Journal of African Law, 64, 1 (2020), 27–51 © SOAS, University of London, 2020.
doi:10.1017/S0021855320000017 First published online 21 January 2020

The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions

Constance Gikonyo*
University of Nairobi
cwgikonyo@gmail.com

Abstract

Civil forfeiture is an asset forfeiture mechanism available to seize proceeds of crime. Kenya has embraced its use and provides statutory mechanisms for its implementation. The Proceeds of Crime and Anti-Money Laundering Act is the main statute in this regard. This article examines the substantive law and procedure for civil forfeiture provided in this statute. The analysis indicates that the provisions are technical in nature and that the process is systematic. This ensures a procedurally and substantively fair process before an individual's property is seized. This approach aims to safeguard against the arbitrary deprivation of property. Nonetheless, challenges are identified that interfere with the effective implementation of the civil forfeiture regime. These problems lead to the current underutilization of the regime. Accordingly, the article identifies viable ways of addressing these shortcomings. Implementation of these suggestions could enhance the use and success of civil forfeiture in dealing with the proceeds of crime.

Keywords
Forfeiture, proportionality, civil, money laundering, proceeds

INTRODUCTION

Civil forfeiture is also referred to as non-conviction based (NCB) forfeiture. This is because the proceedings are not criminal in nature and do not depend on a criminal conviction. Hence they constitute an action *in rem*, that is, against the "thing" itself. It must be shown that the property is "tainted", that is, was obtained in whole or part from unlawful activity.[1] Even if the proceeds of crime have been broken up and dispersed, any part can be pursued if proved to be "tainted".[2]

Civil forfeiture can be used to target both the proceeds of crime and its instrumentalities. The latter is property used or intended for use to commit

---

* Lecturer, University of Nairobi, School of Law.

1 A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2nd ed, 2013, Lexis Nexis) at 8–9 and 114; E Rees, R Fisher and R Thomas *Blackstone's Guide to the Proceeds of Crime Act 2002* (4th ed, 2011, Oxford University Press) at 160; N Boister *An Introduction to Transnational Criminal Law* (2012, Oxford University Press) at 240.

2 Boister, ibid.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

crime and it is this association that causes the property to be "tainted". NCB forfeiture can target property held by third parties who may have known or not known of the property's connection to the proceeds or instrumentalities of crime.[3] This is based on the fact that the property itself or other property that it represents is tainted, as it constitutes the proceeds of crime, or has been used or intended to be used to commit crime.

Kenya's asset forfeiture regime is contained in a number of statutes. These include the Prevention of Organized Crime Act,[4] Office of the Director of Public Prosecution Act,[5] Prevention of Terrorism Act,[6] Narcotic Drugs and Psychotropic Substances (Control) Act,[7] Bribery Act,[8] Anti-Corruption and Economic Crimes Act (ACECA),[9] and Proceeds of Crime and Anti-Money Laundering Act (POCAMLA).[10] NCB forfeiture is captured by ACECA and POCAMLA; of the two statutes, POCAMLA contains the most detailed and comprehensive provisions on NCB forfeiture. Accordingly, this article focuses on the civil forfeiture regime under POCAMLA.

The enactment of POCAMLA was greatly influenced by a rationale similar to the considerations of the international community in enacting international conventions on asset forfeiture. This is primarily the need to ensure that criminals do not enjoy the proceeds of their illicit activities.[11] Likewise the Kenyan Parliament was convinced of the need to enact POCAMLA; having ratified the relevant conventions, it enacted POCAMLA to fulfil its obligations to domesticate those conventions.[12] Interestingly, several attempts to introduce anti-money laundering and asset forfeiture legislation were made before POCAMLA was enacted. The first bill was published in October 2006 and tabled in Parliament in November 2006, but it lapsed. The second bill was published in April 2007, but it also lapsed when the ninth Parliament was prorogued in October 2007. The third bill, subsequently published in 2008, was eventually passed into law: the current POCAMLA.

Under POCAMLA, civil forfeiture is undertaken in two stages: preservation[13] and forfeiture.[14] The preservation phase aims to prevent the wasting or

3 Proceeds of Crime and Anti-Money Laundering Act, sec 92(1).
4 Cap 59, Act No 6 of 2010.
5 Act No 2 of 2013, sec 18.
6 Act No 30 of 2012, sec 40.
7 Act No 4 of 1994.
8 Act No 47 of 2016, sec 18(7).
9 Cap 65, Act No 3 of 2003.
10 Cap 59B, Act No 9 of 2009.
11 *National Director of Public Prosecutions v Meir Elran* (2013) (1) SACR 429 (CC), para 66. J Hendry and C King "'How far is too far? Theorising non-conviction-based asset forfeiture" (2015) 11/4 *International Journal of Law in Context* 398 at 398–99.
12 See parliamentary debates on the POCAMLA bill in Kenya National Assembly Official Report (*Hansard*) of 8 May 2008 per Dr Shaban and Mr Wamalwa at 946 and 951 respectively.
13 POCAMLA, secs 81–89.
14 Id, secs 90–99.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

disappearance of property that may become the subject of a forfeiture order. The forfeiture stage seeks to establish if the targeted property does indeed constitute the proceeds or instrumentality of criminal activity. If proved in the affirmative, a forfeiture order is issued. These stages are effected through court proceedings where the relevant orders are given. During these procedural steps, parties with an interest in the targeted property are given an opportunity to be heard and oppose the applications through filing a petition for the exclusion of their interests. Civil forfeiture proceedings are civil in nature, so civil rules of evidence and procedure apply in court, and the civil standard of proof applies: on a balance of probabilities.[15]

This article seeks to evaluate the legal clauses and procedure in relation to civil forfeiture under POCAMLA, in order to identify the gaps in the provisions and possible challenges that can be encountered when undertaking the process and then to suggest possible means of addressing the identified issues. To achieve this, the next section expounds on the scope of application of civil forfeiture, regarding the criminal proceeds that can be targeted, the procedural aspects of *locus standi* [capacity to bring a legal action], court jurisdiction and limitations of actions. The article then evaluates the fragmented investigatory approach. The next section appraises the issues of safeguarding targeted property by seeking preservation orders, as well as the exceptions that the court can consider and grant when making the order. The article also evaluates the making of the substantive forfeiture order as well as the exclusion of certain interests from the operation of the final order when it is granted. The application of a proportionality analysis is central to avoiding the arbitrary deprivation of property when making a forfeiture order, and this is covered in the next section. The article then elaborates on the issuing and execution of a forfeiture order, before reviewing other general challenges that arise in the utilization of civil forfeiture.

Before proceeding with this examination, it is essential to point out two key issues. First, despite POCAMLA having been operational since 2010, there is still very limited jurisprudence dealing with its application.[16] The available jurisprudence mainly deals with preliminary issues, such as seeking preservation orders, and most is dated 2016 or later. Consequently, one can only speculate as to some possible challenges or problems that may arise as a result of its application. This position informs the decision to enrich the discussion by referring to South African and English court decisions throughout the article.

15 Id, secs 56(2) and 81(2).

16 There have been very few prosecutions under the statute. Moreover, as at November 2019, fewer than five forfeiture orders had been given under the act. In the case of *Asset Recovery Agency v Charity Wangui Gethi* ACEC misc appln no 16 of 2016, judgment 20 November 2018, the forfeiture order was denied. A forfeiture order was granted in *The Assets Recovery Agency v Quorandum Limited and Two Others* misc appln no 4 of 2017, judgment 21 September 2018.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

By looking at the jurisprudence in these jurisdictions, valuable lessons can be drawn for the Kenyan position, where very limited jurisprudence is available on the application of asset forfeiture laws.[17]Accordingly, this assists in the examination of the Kenyan provisions and benchmarking. Case law from England and South Africa provides persuasive authority and guidance on how the Kenyan courts can address similar issues, consequent to the application of POCAMLA.

This is primarily because the jurisdictions have similar legislation, having based their forfeiture regimes on international conventions and Financial Action Task Force recommendations.[18] Moreover, both jurisdictions have advanced greatly in terms of the investigative and functional capabilities of the relevant authorities and courts in dealing with forfeiture matters. These aspects are evidenced by the vast number of judicial decisions that are available from the two jurisdictions. Further, Kenya can learn from England due to the historical links between the two jurisdictions. Having been a British colony, Kenya adopted the English common law system, which remains applicable. In keeping with this tradition, Kenyan courts still refer to English decisions as persuasive jurisprudence in dealing with matters before them. With regard to human rights issues, Kenya and South Africa have similar bills of rights and, since the application of legislation dealing with the proceeds of crime will affect human rights, it is justifiable to seek guidance from South African jurisprudence.

Secondly, this article adopts a constitutional and human rights approach in analysing the provisions on civil forfeiture. This approach is justified on the basis of the centrality of human rights in Kenya's legal system. Kenya's Constitution of 2010 (the Constitution) clearly provides that it is the fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and freedoms granted.[19] As such, the courts are required to facilitate realization of the guaranteed rights. Kenya's asset forfeiture regime therefore has to be developed and applied in a manner that promotes such realization.

---

17 The Kenyan courts endorsed this position in *Kenya Anti-Corruption Commission v LZ Engineering Construction Ltd and Five Others* civil misc appln no 599 of 2004 [2004] eKLR (10 December 2004). Although speaking in reference to ANECA, P Kariuki J stated (at 8) that, when dealing with new and untested legislation in order to develop jurisprudence "collaboration and exchange of ideas on the lessons learnt from the experiences of others in the implementation of similar legislation in other jurisdictions" was vital.

18 These are the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 28 *International Legal Materials* 493 (1989), UN Convention against Transnational Organized Crime 2000, 2225 *UN Treaty Series* 209, as well as the Financial Action Task Force (FATF) recommendations. Kenya and South Africa are members of the Eastern and Southern Africa Anti-Money Laundering Group, a body tasked with assisting in implementing the FATF recommendations in the region; see: <http://www.esaamlg.org> (last accessed 16 December 2019).

19 The Constitution, art 21(1).

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

SCOPE OF CIVIL FORFEITURE PROCEEDINGS

POCAMLA seeks to combat the offence of money laundering and "to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes".[20] This permits its broader application in locating and confiscating the proceeds of various crimes.[21] The key concept is thus "offence", since it is this "predicate" activity that leads to the generation of the proceeds of crime that fall within the ambit of the legislation. The statute defines "offence" as any deed that is an unlawful act under Kenyan law.[22] This ensures that Kenya has adopted the "all crimes" approach in defining the predicate offences for money laundering. Further, this means that the proceeds generated by any criminal activity, that is proscribed under Kenyan law, fall within the ambit of POCAMLA. Consequently, such criminal proceeds can be targeted through civil forfeiture.

There is no requirement that the predicate offence be committed in Kenya. However, for Kenya to have the requisite jurisdiction, the criminal proceeds should be within the country or have been laundered through it. This is based on the principle of territoriality, as the money laundering or the predicate offence must have been committed within Kenya's territory.[23] However, section 127 of POCAMLA includes a dual criminality requirement. This provision provides that receipts of foreign crimes in Kenya will be considered criminal proceeds, as long as the unlawful conduct occurring in the foreign state constitutes an offence under Kenyan law. Essentially, if committed in another jurisdiction, the predicate offence should be a crime in both countries to trigger the application of POCAMLA.

However, there is no need to prove the predicate offence.[24] What is required is to identify and show a direct cause and effect connection between a particular crime and the property: that is, to provide information showing that the crime(s) led to the targeted criminal proceeds.[25] Moreover, the courts have stated that the use of the words "irrespective of the identity of the offender" in defining "proceeds of crime" negates the need to prove a predicate offence. These specific words provide for where a conviction for the predicate offence cannot be obtained because there is no offender to prosecute,[26] for example because the principal offender who committed the predicate offence is deceased or a fugitive.

20 POCAMLA, preamble.

21 Id, sec 54(1A). See also id, sec 92(1).

22 Id, sec 2.

23 R Durrieu *Rethinking Money Laundering and Financing of Terrorism in International Law Towards a New Global Legal Order* (2013, Martinus Nijhoff Publishers) at 395–415.

24 *Republic v Director of Public Prosecutions and Another Ex Parte Patrick Ogola Onyango and Eight Others* JR civil appln no 102 of 2016 (29 June 2016), para 150.

25 Id, para 143.

26 Id, paras 151–53.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

Additionally, the definition of the proceeds of crime encompasses different types of property, not only the original illegal benefits. It also includes later benefits or property derived from or into which the initial criminal earnings are subsequently converted, transformed or intermingled with legitimate property. Hence the definition captures the proceeds of crime or economic advantage originally obtained and later laundered, as well as the profits or property acquired from the investment of the illicit gains.

However, it is not explicitly clear if the act only applies to criminal proceeds gained or retained after its commencement on 28 June 2010. Section 52(3) of POCAMLA states generally, "for the purposes of Parts VI to XII, a person will have benefited from an offence if that person has at any time, whether before or after the commencement of this act, received or retained any proceeds of crime." The provisions in parts VI to XII relate to criminal and civil forfeiture. Accordingly, the law on proceeds that can be targeted under civil forfeiture is open to two interpretations. The first is that the POCAMLA provisions on civil forfeiture apply retrospectively to proceeds of crime acquired before 28 June 2010, as per section 52(3). However, the key principle of criminal law of *nullum crimen sine iure* [only the law can define a crime and prescribe a penalty] is also instructive,[27] leading to the deduction that POCAMLA's provisions on civil forfeiture should not apply retrospectively.

The preferred application is in accordance with section 52(3). Retrospective implementation permits fulfilment of Parliament's rationale in enacting POCAMLA: taking away any criminal benefit already gained.[28] Therefore, section 52(3) promotes the legislators' paramount intention, by facilitating a backdated application in taking away the proceeds of crime gained before the statute's enactment. Nonetheless, the law requires certainty, hence a provision should be included specifically stating that the act applies even where "the offence concerned occurred or the proceeds of crime were derived, received or retained, before or after the commencement of this act".

The act also governs instrumentalities. The interpretations section of POCAMLA does not offer an explicit definition of the term. Likewise, the courts have provided no clarification. A possible meaning is found in section 82(2)(a) of POCAMLA, which provides that preservation orders can be sought against property that "has been used or is intended for use in the commission of an offence". This section implies a definition of instrumentalities. Nonetheless, in *National Director of Public Prosecutions v Cook Properties*, the South African court dealt with a similar provision and this case is instructive on what constitutes an instrumentality. The court held that the term "instrumentalities" covers not only the means by which an offence is committed but also the property concerned in the offence.[29] This definition is similar to the

27 A Ashworth *Principles of Criminal Law* (6th ed, 2009, Oxford University Press) at 64.

28 See *Hansard* of 8 May 2008, above at note 12 at 946 and 951.

29 *NDPP v (1) Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd and Another; (3) Seevnarayan* [2004] 2 ALL SA 491 (SCA), paras 13–14 (*Cook Properties*). Interestingly,

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

characterization in section 82(2)(a). Thus, it is necessary to provide evidence showing a sufficiently close link between the property and its use in facilitating the commission of an identifiable offence.

A reading of POCAMLA provisions indicates that civil forfeiture is applicable over property in a foreign jurisdiction. This is because proceeds of crime are defined broadly to cover "any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence".[30] Likewise, the definition of property is wide and covers real or personal property of every description, "whether situated in Kenya or elsewhere".[31] Consequently, property in a foreign jurisdiction can be subject to civil forfeiture under the act. This leads to various questions concerning: the monetary value of criminal property to which civil forfeiture is applicable; whether the doctrine of limitation of actions applies in civil forfeiture; and the issue of *locus standi* and court jurisdiction. This article now considers these matters in turn.

Value of targeted property

POCAMLA does not set the lower limit of the value of property that may be targeted for forfeiture. This suggests that civil forfeiture proceedings can be initiated against criminal property of any value. However, it is advisable that a lower limit threshold is provided. This would assist the relevant authorities in deciding whether or not to pursue civil forfeiture. It would also ensure that the resources employed are proportional to the expected value of the property to be recovered, thereby justifying the utilization of civil forfeiture.

Under POCAMLA, the decision whether or not to prosecute is made at the discretion of the Assets Recovery Agency (ARA) director, who is required to consider carefully the civil forfeiture suitability of each case. Yet, England, a more experienced jurisdiction in handling civil forfeiture, has found it necessary to impose threshold requirements.[32] Remedying the situation can be done by setting guidelines that direct the ARA in the decision-making process. Guidelines setting a lower value for targeted property in civil forfeiture can help achieve legal certainty, for instance in providing the court with appropriate jurisdiction, as discussed below.

Limitation of actions

POCAMLA came into effect on 28 June 2010 and, as examined above, the act has two possible conflicting applications. The first is that it applies to crimes

---

contd
Kenya's Mutual Legal Assistance Act, No 36 of 2011, sec 2 gives a similar definition of instrumentalities.

30 POCAMLA, sec 2.

31 Ibid.

32 For example, the English Proceeds of Crime Act 2002, sec 287 provides that the secretary of state should set a lower limit for the recoverable amount. The Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003, SI 2003/175 has set the current limit at GBP 10,000.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

committed after this date in accordance with the *nullum crimen sine iure* principle. The second is that it applies to the proceeds of crime received before or after commencement of the act, since retrospective application is permitted. Nonetheless, in both situations it is necessary and may sometimes be difficult to determine the "accrual" date on which the criminal proceeds were acquired.

Establishing the accrual date is very important as it is linked to the limitation of actions: the period beyond which proceedings cannot be instituted. This is relevant where forfeiture proceedings are contemplated.[33] POCAMLA does not specify the limitation period applicable to civil forfeiture. Thus, since the proceedings are civil in nature, recourse is to be found in the Limitations of Actions Act (LAA).[34] Section 4(5) of the LAA provides: "[a]n action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years on which the cause of action accrued". A possible interpretation of this provision is that NCB should be instituted within two years of the cause of action accruing. The question then is: when is a cause of action deemed to have accrued? There are two possible answers: when the violation complained of occurred or when it was discovered or ought reasonably to have been discovered.[35]

The favoured application in this instance would be when the violation is discovered. This is because criminals endeavour to hide illegal earnings, so it may not be easy to uncover the existence of criminal proceeds or instrumentalities immediately after the violation has occurred. However, this interpretation does not eliminate the problem created by applying section 4(5) of the LAA to civil forfeiture, since the application of this provision means that the ARA director must institute civil forfeiture proceedings within two years of finding proceeds or instrumentalities of crime. Two years is a very short period of time, considering the complexity and long duration that it may take to conduct and conclude investigations.[36] In addition, utilization of this provision as it is may render POCAMLA's aims redundant. This is because all an individual would have to do is hide the proceeds or instrumentalities for two years. Thereafter, once the limitation period sets in, they would be free to enjoy the property. Ultimately this defeats the purpose of depriving individuals of criminal proceeds.

33 KM Stephenson, L Gray, R Power, JP Brun, G Dunker and M Panjer "Barriers to asset recovery: An analysis of the key barriers and recommendations for action" (2011) at 74–75, available at: <https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Barriers_to_Asset_Recovery.pdf> (last accessed 16 December 2019).

34 Cap 22 Laws of Kenya.

35 This is inferred from the reading of the LAA, secs 4, 26 and 27.

36 See generally, H McDermott (ed) *Investigation and Prosecution of Financial Crime International Readings* (2014, Thomson Reuters). A reading of the various chapters clearly points to the complexity and lengthy process of conducting financial crime investigations. See also, GA Pasco *Criminal Financial Investigations: The Use of Forensic Accounting Techniques and Indirect Methods of Proof* (2nd ed, 2013, CRC Press) at 57–62.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

The contrary and extreme possibility is also not good. Lack of a limitation period is tantamount to indefinitely entertaining the possibility of a claim being instituted against the property, consequently limiting its enjoyment. This is unfair and unjust, especially considering that NCB forfeiture actions are civil in nature and subject to a limitation period. Therefore, a plausible solution is to amend the POCAMLA and LAA provisions and provide for a reasonable limitation period, the suggested period being 20 years. Justification for this duration is that, under Kenyan law, the longest limitation period in relation to claims involving real property is 12 years.[37] In pursuing property that constitutes the proceeds and instrumentalities of crime, POCAMLA gives the widest definition of the term "property".[38] It encompasses real property and other forms of property such as intangible property, which can be effectively disguised and hidden. Due to the hidden nature of dealing in criminal property, detection of such property may not be easy. Accordingly, the duration of 12 years may also not be sufficient for investigations to gather evidence, identify the property and the ultimate beneficiary for the purposes of prosecution.

Consequently, consideration of the position in England supports the claim for 20 years. This is primarily because England has extensive experience in undertaking civil forfeiture investigations and prosecutions and applies an identical limitation period.[39] Additionally, taking into account the hidden nature of offences relating to criminal proceeds, the longest possible duration that can be granted is reasonable. This provides ample time for the investigation and institution of civil forfeiture proceedings.

Locus standi and court jurisdiction

Locus standi refers to a person having the right or capacity to bring legal proceedings. If someone has no *locus standi*, they lack the legal standing to be heard in court. Under Kenyan law, the general powers of prosecution are granted to the Director of Public Prosecutions (DPP).[40] However, the mandate for civil forfeiture sits squarely with the ARA. This is because sections 82(1) and 90(1) of POCAMLA provide that application for a preservation or forfeiture order respectively can only be done by the ARA director.

Regarding court jurisdiction, certain factors have to be considered. Under Kenyan law, jurisdiction emanates from statute or the Constitution or both. Having the relevant authority permits a court to deal with a matter brought

37 LAA, sec 7.

38 POCAMLA, sec 2.

39 N Ryder "To confiscate or not to confiscate? A comparative analysis of the confiscation of the proceeds of crime legislation in the United States and the United Kingdom" (2013) 8 *Journal of Business Law* 767 at 784–87 and 791–93. See Proceeds of Crime Act 2002, sec 288, read together with Limitation Act 1980, secs 27A and 32.

40 The Constitution, art 157(6) and Office of the Director of Public Prosecutions Act No 2 of 2013, sec 5.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

before it. Without the requisite right, a court has no basis or power to proceed with a matter and ultimately give its judgment. In civil forfeiture, various courts can exercise jurisdiction. Jurisdiction in dealing with the granting of preservation orders is not explicitly stated. This is because section 82 only refers to an application of a preservation order being made ex parte "to the court".[41] Section 2 defines "court" as "a court of competent jurisdiction". The deduction is therefore that any court can deal with a preservation order so long as it possesses the relevant authority. Hence, magistrates' courts as well as the High Court can exercise power in granting preservation orders, because jurisdiction is determined in relation to the value of the targeted property,[42] whereas, in granting a forfeiture order, section 90 clearly states that jurisdiction lies with the High Court. Overall, the interpretation and application of sections 82 and 90 of POCAMLA mean that two different courts can have jurisdiction in a particular civil forfeiture case.

However, to ensure uniformity in the handling of civil forfeiture proceedings, the High Court should be granted exclusive jurisdiction. As indicated above, if a minimum threshold amount is enacted as a requirement to institute civil forfeiture lawsuits, then it can be stipulated that all cases meeting this limit are handled by a particular court. The jurisdiction could possibly be given to the courts in the Anti-Corruption and Economic Crimes division of the High Court of Kenya. This would help in centralizing the handling of civil forfeiture actions, which would in turn assist in developing judicial expertise and coherent jurisprudence on such matters, as well as ensuring predictability and certainty in applying the law. These challenges on *locus standi* and court jurisdiction are amplified by the fragmented approach in relation to initiating investigations linked to civil forfeiture.

CIVIL FORFEITURE INVESTIGATIONS

The investigatory approach provided under POCAMLA is a fragmented one. It involves three different authorities that can initiate investigations in relation to criminal proceeds: the Attorney General (AG), the DPP and the ARA. However, all three lack the capacity to perform investigations independently, since the National Police Service, specifically the Kenya Police service (KPS), is the institution permitted, and having the requisite manpower, to carry out investigations.[43]

The DPP has no authority to conduct any investigation and thus, strictly speaking, cannot be considered to be an investigatory authority under

41 It refers to legal proceedings by one party without the other party being present or participating.

42 See Magistrates' Court Act 2015, sec 7.

43 The National Police Service comprises two entities: the KPS and the Administration Police Service. See the Constitution, art 243(2).

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

POCAMLA. However, the Office of the Director of Public Prosecutions Act[44] gives the DPP powers to direct the inspector general of the National Police Service to investigate any information or allegation regarding criminal conduct.[45] Further, the DPP has powers under the Constitution to direct an investigation to be carried out.[46] Hence, by implication, the DPP has the power to instigate investigation into criminal proceeds.

Section 122 of POCAMLA permits the AG to direct a specific investigation where there is reason to believe an individual has information relevant to the commission of an offence under the act.[47] Consequently, both the AG and the DPP can call for an investigation to be undertaken under POCAMLA. However, it is ultimately the KPS that executes investigations as per the DPP's or AG's request. This is because the KPS is the authority that has been granted investigatory powers over crimes under Kenyan laws.[48] Specifically, it is the Directorate of Criminal Investigations (DCI), a department of the KPS, that has the mandate to undertake investigations regarding serious offences involving proceeds of crime.[49]

Another important authority involved in the investigation of criminal proceeds is the ARA, which is an autonomous body corporate.[50] The ARA's mandate is to implement POCAMLA provisions on civil and criminal forfeiture,[51] as well as undertaking "all cases of recovery of the proceeds of crime or benefits accruing from any predicate offence in money laundering".[52] Accordingly, the ARA has been granted all powers necessary and expedient for the performance of this mandate.[53] To this end, it can be deduced that the ARA has both investigative and prosecutorial powers. However, with regard to its investigatory capacity, the agency is to co-operate with other authorities that also have investigative and prosecutorial powers.[54] The implication of this provision is that the ARA must collaborate with the DCI and the DPP in investigations and prosecutions. Moreover, despite being an independent body corporate it cannot undertake investigations alone, since it does not have the requisite manpower, hence it has to rely on the DCI.

This fragmented investigatory approach may lead to buck-passing and lack of co-ordination in investigations. This would eventually cause time to be

44 Office of the Director of Public Prosecutions Act, sec 5(a).
45 Id, sec 5(1). The authority with the primary power to investigate all types of crimes in the country is the Kenya Police Service as per the National Police Service Act, cap 84, sec 24(e).
46 The Constitution, art 157(4).
47 Id, art 156(4)–(5).
48 Id, art 243(1) and (2); National Police Service Act, sec 24(e).
49 The DCI has the power to investigate serious crimes by virtue of the National Police Service Act, sec 35(b) and (h).
50 POCAMLA, sec 53(1).
51 Id, sec 54(1).
52 Id, sec 54(1A).
53 Id, sec 54(2).
54 Id, secs 55 and 123. These include the DPP's Office and the National Police Service.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

wasted and lead to the potential for delay in handling investigations. Bearing in mind the DPP's functions and powers, the ARA and the DCI point to the need for a more collaborative working relationship. This is in relation to undertaking the identification, tracing, freezing, seizure and confiscation of the proceeds or instrumentalities of crime. Co-operation between the three institutions is necessary from the time investigations are pursued, to deciding whether to commence forfeiture proceedings and during trial. An integrated modus operandi would promote the effective utilization of available resources and cohesion throughout the process, and avoid duplication. This could potentially increase the chances of success in prosecutions and hence promote the attainment of POCAMLA's aim. In addition to the co-operation strategy between the agencies, it would be appropriate, in the long term, for the ARA to have its own team of investigatory staff.

PRESERVING TARGETED PROPERTY BEFORE TRIAL

During the investigation and decision-making process, it is necessary to prevent dissipation of property that is likely to be the subject of a forfeiture order. Failure to do so may render any granted orders nugatory. Therefore, a preservation order seeks to safeguard the property, hence making it available for fulfilment if the final order is eventually granted. This safeguarding is effected by making ex parte applications that may lead to granting a preservation order. If given, the order will prohibit any person from dealing with the targeted property.

The ARA director is permitted to make ex parte applications when seeking a preservation order. The preservation order is usually sought at the beginning of the civil forfeiture proceedings. The order will be granted if there are "reasonable grounds to believe" the property concerned constitutes the proceeds or instrumentalities of crime.[55] Interestingly, the wording of section 82(2) indicates that the court cannot exercise discretion in granting a preservation order: it is bound to grant the order if the considerations stated above are fulfilled.[56] The order is made against particular property only and should be accompanied by a seizure order, authorizing sequestration of the specific property.[57]

Kenyan legislation requires the court to establish that there are "reasonable grounds for believing" the property constitutes the proceeds or instrumentalities of a particular offence. The implication is that the ARA has to show that the justifications giving rise to the belief must be reasonable and objectively rational.[58] That is, the facts must have a logical basis and bear some relation

55 Id, sec 82(2).

56 This sub-section provides: "The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned …".

57 Id, sec 82(3).

58 Kruger *Organised Crime*, above at note 1 at 119.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

to the relief sought. However, the court does not have to be satisfied of this on a balance of probabilities. This is the interpretation the South African court has given in considering similar provisions.[59] This suggests that a lower standard than on a balance of probabilities is applicable. Thus, the prosecution should not be required to prove factually that a forfeiture order will ultimately be made. The rationale for this approach is founded on the basis that a preservation order is appealable even though it is an interlocutory order[60] and that it is possible for the court to grant a provisional preservation order.

POCAMLA does not explicitly provide for a rule nisi and granting of a provisional preservation order.[61] However, it is pertinent for the courts to provide for such an interpretation. Justification for doing so rests on ensuring that the interpretation of section 82 of POCAMLA upholds the right to a fair hearing. This is because it would permit an affected party to have the opportunity to be heard by the court in opposing the preservation order application as stipulated in the right. Additionally, since forfeiture proceedings are civil in nature, this would accord with the civil procedure rules that guide such matters.

The civil procedure rules stipulate that an ex parte injunction can only be granted once, for not more than 14 days, and can only be extended once, with the consent of parties in the matter,[62] which means that the order is given for a temporary duration and is subject to an interparty hearing. Nonetheless, under POCAMLA, a preservation order expires automatically 90 days after gazetting, unless there is an application for a forfeiture order over the property subject to the preservation order.[63] In such instances, the preservation order remains in force until the proceedings against the property have been concluded.

Accordingly, granting a provisional order and implying a rule nisi protects the right to a fair hearing, as it ensures that the rights of a person having an interest in targeted property are protected, since the individual is given a reasonable opportunity to state their case in court. For example, persons affected by the order are the only ones who can give information on certain matters, such as their reasonable living and legal expenses, and investigations into such matters should take place concurrently with the making of the preservation order. Thus, issuing a provisional preservation order gives the defendant an opportunity to be heard by the court in opposing the preservation order application. Nevertheless, in addressing this issue, South African courts have also held that the ex parte application of preservation orders does not of itself violate the *audi altarem partem* [let the other side be heard] rule.[64]

59 Ibid. *NDPP v Madatt and Another* (6488/2007) [2008] ZAWCHC 5, para 9.

60 POCAMLA, sec 89.

61 In criminal forfeiture proceedings, the granting of a temporary restraint order is explicitly permitted under id, secs 68(3) and (4).

62 Civil Procedure Rules 2010, Legal Notice 151 of 2010, order 40(4)(2).

63 POCAMLA, sec 84.

64 The *audi altarem partem* rule embodies the principle that no person should be condemned unheard in legal proceedings. See *NDPP and Another v Mohamed NO and Others*

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

Kenyan law also provides that preservation orders may be accompanied by a seizure order, authorizing confiscation of the targeted property. The implication is that an interested party is only likely to become aware of the existence of such orders when the property is seized. This provision seems unfair to an interested party. Its justification is however based on the fact that it protects the property from dissipation, which would defeat the aims of forfeiture. Further, the court has the discretion to include such conditions and exceptions in granting the order.[65] Moreover, application of a rule nisi would suggest that a court can grant a temporary order pending an interparty hearing; this would safeguard the interests of a person affected by the order.[66] POCAMLA also permits affected individuals to file an application requesting certain exemptions from the operation of the preservation order.

Exceptions when granting a preservation order

Although asset forfeiture proceedings are supposed to be an effective tool for fighting crime by taking away its benefit, the converse is that they may occasion an erosion of fundamental rights. This is primarily because a preservation order is initially sought on the basis of reasonable belief, not conclusive proof that the targeted property constitutes the proceeds or instrumentalities of crime.[67] Therefore, the granting of exceptions when making a preservation order helps to mitigate the draconian intrusion into the rights of persons affected by the orders.[68] In a nutshell, these provisions are an attempt to blunt the impact of asset forfeiture on fundamental rights.[69] This is in line with article 20(1) of the Constitution, which stipulates that the bill of rights applies to all laws, hence it being mandatory for a court to develop any law so as to give effect to the bill of rights. Accordingly, POCAMLA permits the making of certain exceptions when granting a preservation order.

Consideration of these exceptions is not a separate and independent process. Generally, it is undertaken as part of the examination to be made by the court in determining whether to grant a preservation order. However, it can be done as a separate process in certain instances where amendment of an already granted preservation order is sought. Specifically, exclusion can only be made for reasonable living expenses. These living expenses can

contd
2003 (4) SA 1 (CC) (*Mohammed 2*), para 51. NC Ndzengu and JC Bonde "The duty of utmost good faith in asset forfeiture jurisprudence: Some lessons to learn" (2013) 34/3 *Obiter* 377. JM Burchell *Principles of Criminal Law* (4th ed, 2013, Juta Publishers) at 904–05; Kruger *Organised Crime*, above at note 1 at 116.

65 POCAMLA, sec 82(3).

66 See *Mohamed 2*, above at note 64, paras 29–32 for a discussion on the court giving a temporary order.

67 *Meir Elran*, above at note 11, para 24.

68 Id, para 23.

69 Id, para 25. A Eissa and R Barber *Confiscation Law Handbook* (2011, Bloomsbury Professional) at 123.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

cover the affected individual and his family or household.[70] To be eligible, the affected individual should hold an interest in the property. The individual should disclose under oath all his interest in the property and submit an affidavit testifying the same, further to establishing his inability to meet the sought expenses out of property that is not subject to the preservation order.

The wording of section 88(2) limits the court's discretion when granting exceptions. These strictures are evident in the use of the words "shall not" and "unless satisfied that", in the legal provision. The deduction is that the court is obliged not to make such provision(s) unless both conditions, being cumulative and interlinked, are proved.[71] In summary, as stated in *Mohamed 2*,[72] when considering similar provisions, section 88(2) permits that, at the time of making a preservation order, a court may carry out an inquiry into all these matters on its own volition and may then proceed to make such provisions. Essentially, the court does not have to wait for an affected party to make a separate application for exclusion of interests.

Interestingly, although section 88(1) specifically only provides for exceptions in relation to living expenses, this may be extended to the provision of legal services. This is inferred from the reading of section 134(i)(c) of POCAMLA, which provides that the cabinet secretary in charge of finance matters, in consultation with the chief justice, shall prescribe the maximum allowable cost for legal services. These costs pertain to an application for a preservation or forfeiture order or for proceedings in defence of a criminal charge related to property that is subject to a preservation order. The implication is that courts may be permitted to make exceptions for the provision of legal services in civil forfeiture proceedings. Currently, no such regulations have been issued. This provision creates a state of confusion in the determination of the specific exceptions that a court is permitted to grant in relation to civil forfeiture. It also leads to the inference that legal expenses were intended to be included as part of the permissible exceptions when a preservation order is granted. An unambiguous provision needs to be enacted to clarify the extant position.

FORFEITURE ORDER

POCAMLA provisions explicitly require two main elements to be proved before a forfeiture order can be granted. First, it must be ascertained that the property was acquired through criminal conduct. Secondly, certain interests such as of an innocent / ignorant / responsible property owner must be determined and excluded. Although not expressly stated in the statute, it is also necessary to undertake a proportionality analysis.

To prove that property constitutes the proceeds of unlawful activities, the ARA must demonstrate that the respondent committed an unlawful act and

70 POCAMLA, sec 88(1).

71 Id, sec 88(2).

72 Above at note 64.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

consequently the property has been derived, received or retained, directly or indirectly, as a result of or in connection with the said criminal activity. Put simply, it has to be shown that the proceeds are in some way the corollary of an identifiable unlawful undertaking. Instrumentality of an offence is defined as any property that is concerned with the commission or suspected commission of an offence, hence the need to illustrate a connection between the alleged offence and the implicated property.

Kenyan courts have stated that, in determining proceeds of crime, the applicant does not have to prove the commission of any specific criminal offence, that is, there is no need to prove that a specific offence was committed on a particular date by a specific individual. What is required is to specify the kind or kinds of unlawful conduct involved and in return for which the property was obtained. Nonetheless, the applicant should adduce "cogent evidence" to show that it is more probable than not that the property represents the proceeds of unlawful conduct.[73] Essentially, the evidence presented should be sufficient to enable the court to decide whether the conduct described was unlawful under Kenyan criminal law, in addition to showing that the property is also unlawful since it can be traced back to the commission of that conduct.[74]

The criminal nature of the property can be proved in various ways. The applicant may seek to show a link between the property and the principal offender, referred to as association evidence.[75] This will assist in substantiating that the property was derived from a specific crime. If this is not possible, the applicant may seek to show that an "irresistible inference" can be drawn from the prevailing circumstances that the property was derived from a particular offence.[76] This can be done by utilizing circumstantial evidence.

Generally, proving the criminal nature of property requires the applicant to adduce different types of evidence. Direct evidence is stronger, as it does not require an inference to be drawn to arrive at a conclusion.[77] However, considering the hidden nature of criminal proceeds, the available evidence is most likely to be circumstantial.[78] Accordingly, it is permitted to use circumstantial

73 See *R (on application of the Director of the ARA) v Jia Jin He and Dan Dan Chen* [2004] EWHC 3021 (admin), para 66.

74 See *Director of Assets Recovery Agency v Green* [2005] EWHC 3168 (admin), paras 16–20. See also *R v Anwar* [2013] EWCA Crim 1865.

75 College of Policing "Money laundering (criminal property offences)" (2017) available at: <https://www.app.college.police.uk/app-content/investigations/investigative-strategies/financial-investigation-2/money-laundering/> (last accessed 16 December 2019).

76 K Murray "In the shadow of the dark twin: Proving criminality in money laundering offences" (2016) 19/4 *Journal of Money Laundering Control* 447 at 449. See also K Murray "The uses of irresistible inference: Protecting the system from criminal penetration through more effective prosecution of money laundering offences" (2011) 14/1 *Journal of Money Laundering Control* 7.

77 R Ratliff "Third-party money laundering: Problems of proof and prosecutorial discretion" (1996) 7/2 *Stanford Law & Policy Review* 173 at 174.

78 Durrieu *Rethinking Money Laundering*, above at note 23 at 327 defines indirect / circumstantial evidence as "the facts or circumstances from which the existence of other

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

evidence from which inferences are drawn to prove the criminal origin of property.[79]

Circumstantial evidence includes accomplice evidence, admissions, expert evidence, audit trails, financial evidence, unlikelihood of legitimate origin, absence of commercial or domestic logic, evidence of bad character, packaging of proceeds, lies by the defendant, intrusive surveillance and interceptions of communications, and false identities, addresses and documentation.[80] Ultimately, although different pieces of evidence are gathered, they should cumulatively provide a link pointing to the criminal origin of the property.

To determine if property has been concerned in the commission of an offence there are two requirements for instrumentalities. First, there must be a sufficiently close link between the property and its criminal use. Secondly, the property must have a close enough relationship to the actual commission of the offence to render it an instrumentality. The implication is that the inquiry must satisfy both a factual connection and a legal causal connection,[81] that is, a relationship of direct functionality between what is used and what is achieved.[82]

South African courts have cautioned that, in determining the instrumentality of an offence, focus should not be on the owner's state of mind, but rather on the role the property plays in the commission of the offence.[83] The state of the owner's mind is only relevant when considering the exclusion of interests.[84] This stage can only begin after it has been established that the property is an instrumentality. Therefore, if it is proved on a balance of probabilities that the property is criminal, a forfeiture order will be granted, regardless of the property right holder's involvement or otherwise in the predicate offence. Nevertheless, to mitigate the draconian intrusion into the rights of persons affected by such orders, the exclusion of certain interests from the operation of the order is permitted.

Exclusion of interests

Similar justifications are applicable in relation to the exclusion analysis conducted when making a forfeiture order as when granting a preservation

contd

facts or circumstances can be deduced through a process of logical interpretation" and proceeds to consider it relevant in criminal proceeds prosecutions. See also *Dos Santos and Another v The State* [2010] 4 ALL SA 132 (SCA), para 33.

79 *Patrick Ogola Onyango*, above at note 24, para 151.

80 RE Bell "Proving the criminal origin of property in money laundering prosecutions" (2000) 4/1 *Journal of Money Laundering Control* 12 at 13–22. Pasco *Criminal Financial Investigations*, above at note 36 at 107–11.

81 Burchell *Principles of Criminal Law*, above at note 64 at 907.

82 Ibid.

83 *Cook Properties*, above at note 29, para 21. See also *NDPP v Van der Merwe and Another* [2011] 3 All SA 635 (WCC).

84 *Cook Properties*, id, para 22.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

order. Put simply, in providing for exclusions, the aim is to protect the interest (s) in terms of property rights or other personal claim(s) a third party may have in relation to the targeted property. This ensures they are recognized and safeguarded by the court, thereby promoting an individual's rights by avoiding the arbitrary deprivation of property. This constitutional protection is defended by enabling individuals having rights in targeted property to have an opportunity to present a claim for the exclusion of interests, with the court making a determination.

POCAMLA has a two-step process for determining whether certain interests may be excluded: making an order declaring the nature, extent and value of the person's interest under section 93; and then making an order excluding the declared interests from the operation of the forfeiture order under section 94. Under a section 93 application, proof is required, in respect of both proceeds and instrumentalities of crime, that the person: was in no way involved in the commission of the offence; paid sufficient consideration; and did not know or should not have reasonably suspected at the time of acquiring the property that it was tainted.

Under section 94, regarding proceeds of crime, the interested party has to prove that: they acquired the interest legally; for a consideration the value of which is not significantly less than the value of the interest; and, if the interest was acquired after the commencement of POCAMLA, they neither knew nor had reasonable grounds to suspect that the property constituted criminal proceeds. For instrumentalities, proof is required that: the interest was acquired legally; and, if it was acquired after the commencement of POCAMLA, the owner neither knew nor had reasonable grounds to suspect the property had been used or was intended for use in the commission of an offence; and, if the property was utilized before the commencement of the act in the commission of an offence, they have taken all reasonable steps to prevent the continued use.

If an interested party is able to establish their valid interest under section 93, the court shall then make an order declaring the nature, extent and value of the person's interest. Seeking a declaration of one's interest is important for two reasons. Such interest will be taken into consideration when the final forfeiture order is made and may be excluded; and the interested party is also permitted to make a claim for a portion or remainder of the property after completion of the forfeiture process. For example, in the case of joint ownership, a declaration is granted regarding the extent and value the interested party has in the property, allowing them to claim their portion after the forfeiture order.

The second step under section 94 is undertaken during the making of a forfeiture order. It can only be carried out after the extent and value an interested person has over property has been established. In this step, the court makes an order excluding the interests already declared from the operation of the forfeiture order. The implication is that the court cannot exclude interests that have not already been considered and a declaration made.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

Additionally, section 94 is more burdensome than section 93, since it requires the court to establish payment of sufficient consideration. Section 93 calls for the court to establish that some value that is real and can be expressed in terms of economic value was exchanged. The court need not investigate its adequacy, that is, whether the parties received equal value or if the price was fair,[85] whereas section 94 obliges the interested party to prove that they acquired the property legally and the court has to interrogate the value of the consideration paid. The value paid should not be significantly less than the value of the interest when acquired. Thus, unlike in a declaration of interest, where the court reviews the sufficiency of consideration, here it appraises the adequacy of consideration.

Consequently, examination of section 94 indicates that, even if a court initially made a declaration of interest, it is not bound to uphold these interests and exclude them from the operation of the forfeiture order. The rationale is that the requirements that a party has to satisfy in the two instances differ. This imputes that, if at any point the interested party is unable to convince the court on these requirements, the court will not proceed to declare an interest or thereafter exclude the interest from operation of the forfeiture order.

Furthermore, section 94 is onerous as it requires interested parties to establish that they were innocent, ignorant, responsible property owners. In respect of both proceeds and instrumentalities of crime, the burden of proving innocence or ignorance is placed on the owner, albeit on a balance of probabilities.[86] This is because they are required to demonstrate that they neither knew nor had reasonable grounds to suspect that the property was criminal property or that the property had been used or intended for use as an instrumentality. Besides, an interested party is expected to show all the reasonable steps they undertook to prevent the continued misuse of the property. Thus, section 94 burdens the owners of property pleading to be an innocent or ignorant owner with a reverse burden of proof and, if they are unable to discharge it, their interests will not be excluded.

In summary, under sections 93 and 94 of POCAMLA, the court has the discretion to exclude certain interests from the operation of a forfeiture order. This requires the court first to give an order determining the interest a person has in the property. Thereafter the order is operationalized by excluding these interest(s), vesting the property in the state or depositing the proceeds in the Criminal Assets Recovery Fund. Thus, the exclusion provisions grant persons having an interest in targeted property an opportunity to be heard. Subsequently, their legal interests are recognized and exempted from operation of the forfeiture order. This promotes the right to property and avoids arbitrary deprivation. Undertaking a proportionality analysis also contributes towards upholding these principles.

85 See *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 for a discussion of the difference between sufficiency and adequacy of consideration.

86 *Cook Properties*, above at note 29, para 23.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

PROPORTIONALITY ANALYSIS IN FORFEITURE PROCEEDINGS

Strictly speaking, proportionality requires the intensity of interference in a right to be measured against the importance of the aim sought.[87] To achieve proportionality, consideration should be given to the nature of the right, the importance of the purpose of the limitation (suitability), the nature and extent of the limitation (necessity), and the relation between the limitation and its purpose.[88] Ultimately, the application of proportionality seeks to ensure a fair balance between the interests of individuals and the community vis à vis the government's legitimate objectives pursued by limiting a right.[89]

In relation to asset forfeiture, the principle is applicable through the right to property. The right to property entitles an interested party to claim immunity against the state compulsorily taking over private property.[90] Proportionality seeks to protect against arbitrary interference with private property by the state, unless it is authorized by law and meets a basic standard of justification.[91] To ensure that deprivation of property is not arbitrary, it has to follow fair procedures and substantive fairness.[92] Principally, this ensures that the harm to the right is proportional to the benefit gained by the deprivation. That means balancing Parliament's aim of depriving individuals of criminal proceeds, with safeguarding against the infringement of property rights and ensuring that the property serves the public interest.

POCAMLA provisions ensure that the deprivation, limitation or restriction of one's property rights is not done arbitrarily but after the conclusion of a trial where affected person(s) are given an opportunity to be heard, ensuring procedural fairness.[93] Substantive fairness is maintained, in that, upon conducting the civil forfeiture proceedings, the courts are able to establish if the property was acquired unlawfully and, if so, justify forfeiture. This is in accordance with article 40(6) of the Constitution, which stipulates that the right to property does not extend to property that is found to have been unlawfully acquired. This creates a valid exception to the protection of the right to property and safeguards that the deprivation of property is not done arbitrarily.

Moreover, addressing the threats posed by the proceeds and instrumentalities of crime helps advance the public good of limiting crime, by removing

87 YA Takahashi "Proportionality" in D Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013, Oxford University Press) 446 at 452.

88 Id at 450–51. E Reid and R Visser "Introduction" in E Reid and R Visser (eds) *Private Law and Human Rights Bringing Rights Home in Scotland and South Africa* (2014, Edinburgh University Press) 1 at 9; MC Eliya and I Porat *Proportionality and Constitutional Culture* (2013, Cambridge University Press) at 2.

89 Reid and Visser, ibid. Kruger *Organised Crime*, above at note 1 at 144.

90 I Currie and J De Waal *The Bill of Rights Handbook* (6th ed, 2013, Juta Publishers) at 533.

91 Id at 534.

92 Id at 540–47.

93 *Multiple Hauliers East Africa Ltd v Attorney General and Ten Others* [2013] CHR petition 88 of 2010 [2013] eKLR (19 December 2013), para 34.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

the means by which crimes are committed. The protection of the public good is greater than the individual's right to illegally acquired property. Appropriately, the utilization of forfeiture proceedings in limiting an individual's rights to unlawfully acquired property is justified. To guarantee this balancing, a proportionality analysis has to be part of the civil forfeiture process.

POCAMLA does not explicitly require a proportionality analysis in forfeiture proceedings. However, it is necessary to conduct one by virtue of article 24(1) of the Constitution. The importance of guaranteeing proportionality cannot be understated, since Kenyan courts have affirmed the need to prevent the arbitrary deprivation of property.[94] Hence, despite seeking to remove the proceeds and instrumentalities of crime, the application of proportionality promotes constitutional principles by safeguarding the right to property.

The provisions of article 24(1) provide the elements of the proportionality test. These provisions require courts in limiting a right to: consider the nature of the right, the importance of the purpose of the limitation, and the nature and extent of the limitation; ensure that an individual's enjoyment of their rights does not prejudice the rights of others and; consider the relation between the limitation, its purpose and whether there are less restrictive means to achieve the purpose.

When applying these elements in civil forfeiture proceedings, the court should ensure that the forfeiture order given is fair overall, in that the deprivation is the result of a procedurally and substantively fair process. In addition, constitutional principles would be promoted by a balance being secured between safeguarding the individual's right to property, while simultaneously preserving the intentions of Parliament and promoting the greater public good. Therefore, despite recognizing an individual's right to property, it is necessary to give life to Parliament's intention, in enacting POCAMLA, of removing the proceeds and instrumentalities of crime and thus advancing the public interest.

Ultimately, applying procedural and substantive fairness in civil forfeiture proceedings, as well as using the proportionality principle, ensures that the different interests are balanced. This makes certain that any resulting deprivation of property is not arbitrary. Once it has ascertained that property was acquired through criminal conduct, established any interests to be excluded and undertaken a proportionality analysis, the court can proceed to declare a forfeiture order.

JUDGMENT AND EXECUTION

In civil forfeiture, use of the word "shall" in section 92(1) of POCAMLA leads to the inference that it is mandatory for the High Court to make a forfeiture

94 In dealing with the lawful deprivation of property, *Crywan Enterprises Ltd v Kenya Revenue Authorities* petition 322 of 2011 [2013] eKLR (15 April 2013) cited with approval *FNB and Others v Minister of Finance* (CCT19/01) [2002] ZACC 5, a case that enunciated what amounts to arbitrary deprivation of property.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

order if it finds, on a balance of probabilities, that the property concerned constitutes the proceeds or instrumentality of crime. The court's discretion is eliminated by the wording of the provision.[95] The court may only exclude predetermined interests and make an order to this effect.

The absence of a person whose interest in property may be affected by the making of a forfeiture order does not prevent the court from making such an order.[96] Section 92 grants the court jurisdiction to hear and make forfeiture orders where the wrongdoer is unknown or a fugitive, an interested party has died and in uncontested cases. Accordingly, forfeiture orders made in such instances cannot be later invalidated.

Further, the validity of a forfeiture order is not affected by the outcome of criminal proceedings or investigations that are associated with property that is the subject of the order.[97] This applies to money laundering proceedings under POCAMLA or other criminal proceedings. The implication of this is that a forfeiture order cannot be overturned or rendered invalid based on the finding in a trial relating to the same property. Essentially, an acquittal in other criminal proceedings in relation to property that is the target in civil forfeiture proceedings, does not affect or invalidate a forfeiture order over the same property. Therefore, if a defendant is acquitted after a separate criminal trial, the findings in the trial cannot void a forfeiture order over property associated with both cases.

In dealing with a similar issue, the court in *Gale and Another v Serious Organized Crime Agency*[98] justified this position as follows: although the evidence adduced in the criminal trial was insufficient to discharge the burden of proof, this did not demonstrate that the accused had not committed the criminal act or that the associated property was not tainted.[99] Thus, by instituting civil forfeiture proceedings, it may be possible to use the lesser standard of proof to target the associated property.

Once a forfeiture order has been granted, it should be published in the *Kenya Gazette* within 30 days.[100] The order takes effect after the period allowed for appeal has expired or an appeal has been conducted and concluded.[101] During the pendency of such an appeal, any preservation or seizure order granted earlier remains in force, pending the outcome of the appeal.[102]

95 POCAMLA, sec 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" (emphasis added).

96 Id, sec 92(3).

97 Id, sec 92(4).

98 [2011] UKSC 49.

99 Id, para 19.

100 POCAMLA, sec 92(5). The *Kenya Gazette* is an official publication of the Government of Kenya.

101 Id, sec 92(6).

102 Id, sec 97.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

After the completion of all appeals or applications, the forfeiture order vests the property in the manager who takes possession on behalf of the government.[103] Upon the vesting of the property, the manager must dispose of it and deposit the proceeds into the Criminal Assets Recovery Fund.[104] If the property is located outside the jurisdiction, mutual legal assistance provisions can be relied upon to facilitate enforcement.

CHALLENGES IN THE APPLICATION OF CIVIL FORFEITURE

This discussion has highlighted the substantive law and procedure in undertaking civil forfeiture in Kenya. Notwithstanding the applicability of these provisions, the analysis also indicates some of the existing and potential challenges. Apart from the highlighted issues there are others. These will also interfere in utilizing civil forfeiture proceedings to target criminal proceeds and instrumentalities, and are considered below.

Significant delays are likely to be experienced when undertaking civil forfeiture proceedings. For instance, the provisions providing for the exclusion of interests of the defendant or a third party have the noble aim of seeking to ensure proportionality in removing property and protecting their rights. However, the same provisions could prove a hindrance. The affected parties are given ample opportunities to bring applications to court.[105] Hearing and determining these applications could take a prolonged period, not to mention the cost implications: even if the property is eventually forfeited, a cost benefit analysis reveals that the resources used and time expended are not commensurate to the value of property recovered.[106] This is especially so in instances where frivolous and vexatious applications are filed with the intention of delaying the process.

Further, utilization of the court process in seeking such protection orders would be straightforward for parties situated in Kenya. However, it would be difficult for third parties outside the Kenyan jurisdiction to enforce their rights, primarily because of dissimilarities in legal traditions and systems.[107] Variations in legal traditions and systems lead to differences in terminologies used, evidentiary and admissibility requirements for enforcement and mutual legal assistance. This is likely to lead to lengthy civil forfeiture proceedings.

In instances where forfeiture is finally granted, obtaining the property may prove a daunting task. For example, the defendant or third party may not be co-operative in facilitating liquidation of the assets. This is regardless of whether they are within or outside the jurisdiction. Further, even where the

103 Id, sec 98.

104 Id, sec 99(1).

105 Id, secs 67(5), 68(9), 75(3), 83(3), 89(1), 91 and 96. All these provisions permit affected parties to file applications seeking to protect their interests in targeted property.

106 DK Brown "Cost-benefit analysis in criminal law" (2004) 92/2 *California Law Review* 323.

107 Stephenson et al "Barriers to asset recovery", above at note 33 at 47–49.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

parties co-operate, carrying out mutual legal assistance procedures and enforcing extra-territorial forfeiture orders are likely to be protracted and tedious. Especially since the ARA cannot directly seek mutual legal assistance, such applications should be channelled through the office of the AG.[108]

Moreover, enforcement in foreign jurisdictions may prove difficult, if not impossible, if the concept of civil forfeiture is not recognized or allowed.[109] Generally, the justification for this position is that civil forfeiture does not offer the full protections accorded under criminal forfeiture, such as ensuring that the accused's guilt has been established and it has been shown that the benefit gained is as a result of the offence for which he was convicted.[110] Admittedly, enforcement will be difficult in such a situation, if not impossible.

Reflection over the forfeiture provisions in their totality indicates that they are technical in nature. Therefore, it is important and necessary that the staff of the agencies tasked with investigating, prosecuting and enforcing forfeiture cases are fit for the task. The DCI, DPP, ARA and judges should all have the relevant skills and resources to handle civil forfeiture investigations and trials. Lack of these translates into difficulties in enforcing asset forfeiture. To ensure effectiveness, it is necessary to undertake further staff training. Centralizing the handling of civil forfeiture cases within the economic and financial crimes division of the High Court would therefore be helpful in this regard, since it would facilitate faster development of expertise on these matters. Moreover, since POCAMLA came into force, there has been few prosecutions and no convictions under the statute. This could indicate a number of possibilities: the lack of political will to prosecute or the lack of skills thus making it impossible to implement the statute. Hence, capacity development is a key issue if POCAMLA is to be utilized successfully in tackling criminal proceeds.

CONCLUSION

This article has focused on the civil forfeiture regime under POCAMLA in Kenya. It has highlighted the applicable law and procedure for taking away criminal proceeds and instrumentalities. POCAMLA is evidently capable of facilitating attainment of this objective by providing an asset forfeiture mechanism. Furthermore the act specifies a wide scope of proceeds that can be targeted, primarily because the original proceeds can be pursued, as well as any other property into which they have been converted.

108 POCAMLA, sec 115.

109 Boister *An Introduction*, above at note 1 at 240–41. See also SNM Young "Introduction" in SNM Young (ed) *Civil Forfeiture of Criminal Proceeds: Legal Measures for Targeting the Proceeds of Crime* (2009, Edward Elgar) 1 at 1.

110 Boister, id at 241–42; A Gray "The compatibility of unexplained wealth provisions and 'civil' forfeiture regimes with Kable" (2012) 12/2 *Queensland University of Technology Law & Justice Journal* 18.

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press

There are a number of advantages in using civil forfeiture. Foremost, no conviction for a predicate offence is required, since the focus is on the tainted property. Further, property held by third parties who did or did not commit the predicate offence, or who may or may not be aware of the property's link to proceeds or instrumentalities of crime, can be targeted.

Nonetheless, there are challenges in utilizing civil forfeiture. These include the short limitation period imposed for the institution of a suit. This requires investigations to be done quickly to ensure timeliness, because, once the limitation period has lapsed, the property can no longer be targeted for forfeiture. The enforcement of local and extra-territorial forfeiture orders is likely to encounter challenges. This is especially so in instances where a foreign jurisdiction does not recognize civil forfeiture. For foreign jurisdictions where this is not a problem, the utilization of mutual legal assistance may be helpful, but still protracted. Lack of a central investigatory agency, compounded by the scarcity of sufficient capacity among institutions expected to implement POCAMLA, is also a problem. This definitely interferes with the effective execution of civil forfeiture.

Besides these, there are the ramifications of the potential intrusion of civil forfeiture into the rights of individuals. This can be a challenge to constitutional principles, especially as regards enforcing the bill of rights. Importantly, constitutional principles need to be upheld. This is achieved by ensuring procedural and substantive fairness in the process as well as carrying out a proportionality analysis before granting a forfeiture order. This will ensure a balance between taking away the criminal property or benefit gained, and avoiding the arbitrary deprivation of property. The courts should strive to give life to Parliament's aims when it enacted POCAMLA: depriving criminals of the proceeds of crime, while balancing the rights of individuals and public interest granted under the Constitution.

Regrettably, the extant situation is that civil forfeiture proceedings are underutilized. This is evident from the lack of legal decisions dealing with these proceedings. The likely cause is the lack of political will to prosecute or the lack of expertise in conducting investigations linked to criminal proceeds. This calls for increased efforts towards developing the relevant skills needed to facilitate utilization of the statute.

This analysis of the Kenyan NCB regime has helped in identifying the strengths and weakness inherent in it. Further, it has offered solutions or alternatives to deal with the weaknesses. This is beneficial for the monitoring agencies, government or governmental bodies involved in the fight against illicit proceeds. Besides, the issues discussed may be replicated in other jurisdictions, so this examination may be influential in assisting countries in the sub-regional or regional context in assessing their NCB regimes. Moreover, the research may encourage jurisdictions to review and utilize civil forfeiture more.

CONFLICTS OF INTEREST

None

https://doi.org/10.1017/S0021855320000017 Published online by Cambridge University Press