

A close-up photograph of a brick wall. The bricks are dark and weathered. There are large, irregular splatters of red, white, and green paint across the wall. The red paint is the most prominent, forming a large, abstract shape in the center. White and green paint are also visible, creating a layered effect. The overall texture is rough and gritty.

# ASSET RECOVERY IN KENYA

CIFAR RESEARCH PAPER



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# INTRODUCTION

**INTERNATIONAL ASSET RECOVERY REFERS TO THE PROCESS BY WHICH THE PROCEEDS OF CORRUPTION TRANSFERRED ABROAD ARE RECOVERED AND REPATRIATED TO THE COUNTRY FROM WHICH THEY WERE STOLEN. DOMESTIC ASSET RECOVERY REFERS TO PROCEEDS RECOVERED INTERNALLY, WITHIN THE SAME COUNTRY FROM WHERE PUBLIC MONEY WAS STOLEN.<sup>1</sup>**

The seizure and recovery of the proceeds of corruption - asset recovery - is a powerful tool to combat corruption.<sup>2</sup> Indeed, Kofi Annan, the former United Nations Secretary-General, has emphasized that:

*the provisions on asset recovery—the first of their kind—which require Member States to return assets obtained through corruption to the country from which they were stolen is a major breakthrough. It will help tackle a pressing problem for many developing countries, where corrupt elites have looted billions of dollars that are now desperately needed by new governments to redress the social and economic damage inflicted on their societies.<sup>3</sup>*

Although asset recovery has to date not been the most prominent part of the anti-corruption agenda, it has received growing public attention in recent years. There is sufficient evidence that funds that could have been used to substantially improve lives now lie in bank accounts, sometimes abroad, or have been used to buy mansions, jewellery, and luxury goods. Only a small portion of the tangible and intangible products of corruption has been identified, seized, and confiscated and a smaller part still has been recovered.<sup>4</sup>

The Organisation for Economic Co-operation and Development (OECD) reports that approximately USD 2.6 billion in global assets were frozen, while only around USD 424 million were returned, between 2006 and June 2012, implying that only 16 percent of the frozen assets were returned.<sup>5</sup> These figures underline the large gap between the volume of stolen assets, assets that have been frozen and funds that are finally repatriated. This calls for concerted effort to repatriate these assets to the countries of origin which are largely the developing nations.<sup>6</sup>

The United Nations Human Rights Council adopted Resolution 46/11 on the negative impact of non-reparation of funds of illicit origin to the country of origin on the enjoyment of human rights.<sup>7</sup> It raised concerns that the billions of dollars lost every year through illicit financial flows are stalled in banks of requested states and contribute to the denial of the urgently needed development and the realisation of human rights. The responsibility for deterring this trend of illicit outflows from developing countries and ensuring the return and effective management of the returned assets requires the concerted efforts and commitments of all States.

The Kenyan government has been engaged in more recent years in cross-border asset freezing, confiscation, and return of corruption the proceeds of corruption, especially from 2010 on. However, to a large extent, international cases have begun due to proactivity on the side of countries holding stolen Kenyan assets. An example of this is the return of USD 349,057 following the successful case against in the UK against the company Smith & Ouzman for bribery, for which no convictions have yet been handed down in Kenya.

Heightened corruption continues to lead to poor provision of services and increased poverty and inequalities. The abuse of public office for personal gain has been prevalent in Kenya, as indicated by the increased number cases of corruption and asset recovery. While the cases are an indicator of the problem, they also imply improved efforts of anti-corruption agencies and political goodwill to address corruption.

As long as the rewards for engaging in corruption far outweighed the risk of detection and punishment, corruption and illicit financial outflows will continue. Therefore, increasingly the mechanisms to prevent, detect, punish and eradicate corruption and related offences in public and private sector need to be improved. Coordination and harmonisation of policies and legislation for the purpose of prevention, detection, punishment and eradication of corruption is also critical.

This research paper seeks to provide an overview of the current state of play in Kenyan context and to provide recommendations to enhance the progress made.

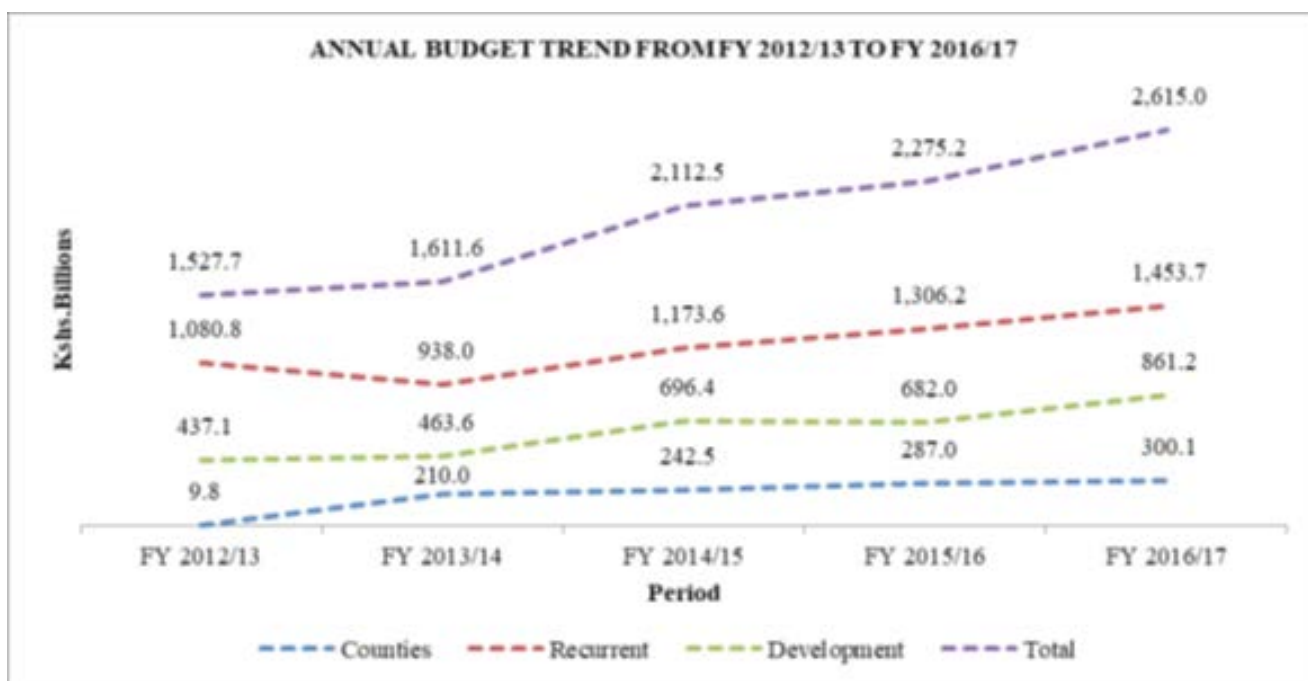
## ASSETS LOST TO CORRUPTION

In 2021, His Excellency the former President of Kenya Uhuru Kenyatta was quoted as saying the Kenya loses Kshs.2 billion per day through corruption.<sup>8</sup> Whereas this was widely perceived as an admission of failure in his administration's efforts to stem the tide of corruption, the ire at such an admission may have been misdirected since acknowledgement of the sheer magnitude of the challenge is the first step in addressing the issue.

While newer figures are not available, beyond that cited by President Kenyatta, in 2016, former Ethics and Anti-Corruption Commission (EACC) Chairman Philip Kinisu announced that about Kshs.600 billion was

lost to corruption every year.<sup>9</sup> According to the Ethics and Anti-Corruption Commission, Kenya is losing an estimated Kshs.608.0 billion (7.8% of Kenya's GDP) to corruption annually. It is not inconceivable that such vast amounts of money are being lost to corruption and this is to the detriment of Kenyan citizens.

At the time, it was also reported that a third of Kenya's approximately Ksh.2.3 trillion budget was routinely being stolen. This translates to Ksh.758.4 billion using figures from the Annual National Government Budget Implementation Review Report (BIRR)<sup>10</sup> for the Financial Year 2016/17 below:



Source: Office of the Controller of Budget (OCOB)

The Ksh.758 billion lost through corruption in 2016/17 is slightly less than the total national development budget of Ksh.861.2, implying that theoretically twice as much development spending would have been available if corruption was curtailed.

This lost amount was also more than twice the total fiscal transfer to the county governments which stood at Ksh.300.1 billion at the time. The lost amount was more than two times larger than the education budget, estimated then at Ksh.345.6 billion; four times larger than budget estimates to the Governance, Justice, Law and Order which was Ksh.210.9 billion and ten times than the ODA grants to the budget, which was Ksh.72.6 billion in the Budget Estimates of 2016/17.

This approximately one third of the national budget lost through corruption greatly and negatively affects the government's efforts toward realising the economic and social rights enshrined under Article 43 of the Constitution of Kenya, 2010.

# ASSET RECOVERY FRAMEWORK

Kenya has experienced an increase in the number of civil cases seeking the recovery of assets believed to have been acquired through corruption.<sup>11</sup> These cases are heard before a specially designated Anti-Corruption Division of the High Court.<sup>12</sup> This section provides the legislative and institutional frameworks under which asset recovery is carried out.

## LEGAL FRAMEWORK FOR ASSET RECOVERY

The legislative framework for asset recovery is firstly based on the international treaties that Kenya has ratified and domesticated through various national laws, such as United Nations Convention Against Corruption (2003). National laws that provide the specific legal framework for combatting corruption include the Constitution of Kenya, 2010 and the Anti-Corruption and Economic Crimes Act (ACECA) of 2003. The section below provides a brief overview of these key laws.

### United Nations Convention Against Corruption (UNCAC), 2003

The current anti-corruption legal and policy framework in Kenya is modelled on several provisions of the convention, including in particular on prevention, criminalization, and international cooperation, as well as on asset recovery under Chapter V.

### African Union Convention on Preventing and Combating Corruption (AUCPCC), 2003

Article 19 of the AUCPCC encourages countries to take legislative measures to prevent corrupt public officials from enjoying the proceeds of crime. This could be through freezing their foreign accounts and facilitating the repatriation of stolen or

illegally acquired monies to the countries of origin.

### The Constitution

Article 2(6) of the Constitution provides that any treaty or convention such as UNCAC or the AUCPCC that is ratified by Kenya shall form part of Kenyan law. In addition, the Constitution dedicates an entire Chapter (VI) on Leadership and Integrity with Article 79 declaring that Parliament shall enact legislation for the establishment of the EACC.

### Ethics and Anti-Corruption Commission (EACC) Act, 2011

The resultant EACC Act of 2011 is an Act of Parliament to establish the EACC pursuant to Article 79 of the Constitution and to provide for its functions and powers. Section 11(1) (j) empowers the EACC to institute and conduct proceedings in court for the purposes of the recovery or protection of public property, or for the freeze or confiscation of the proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

### Anti-Corruption and Economic Crimes (ACECA), Act 2003

Part VI of this law addresses Compensation and Recovery of Improper Benefits, with Section 51 holding persons engaged in corruption or economic crime liable to compensate anyone who suffers a loss as a result. In addition, Section 55 sets the foundation for civil forfeiture of unexplained assets, whilst Section 56 provides for preservation orders. There is also the lesser used Section 54 which gives rise to conviction-based orders for compensation.

## Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), 2009

This law contains a mixture of conviction-based and non-conviction-based means of asset recovery under Part VII and Part VIII of the Act. This legislation is enforced primarily by the Assets Recovery Agency.

### KEY AGENCIES IN ASSET RECOVERY

#### Ethics and Anticorruption Commission<sup>13</sup>

The Ethics and Anti-Corruption Commission (EACC) was established pursuant to Article 79 of the Constitution of Kenya, 2010. The EACC has the mandate to prevent and fight corruption in Kenya and reports to the Parliament. Its mandate is therefore to combat and prevent corruption, economic crime and unethical conduct, including through law enforcement, prevention, public education and promotion of standards and practices of integrity. The EACC has both investigative and asset recovery powers, while prosecutorial powers are left to the Director of Public Prosecutions.

Under Kenyan Law, the EACC is the principal agency responsible for combatting corruption through law enforcement, having been created under the Constitution and subsequently established by legislation through the EACC Act, 2011. In this regard, it is observed that EACC adopts two main strategies:

##### 1) *Proceeds of Crime (Corruption)*

This pertains to public property that is lost as a result of corrupt conduct defined under Section 2 of the Anti-Corruption and Economic Crimes Act (ACECA) of 2003 as follows:

"corruption" means—

- (a) an offence under any of the provisions of sections 39 to 44, 46 and 47;
- (b) bribery;

- (c) fraud;
- (d) embezzlement or misappropriation of public funds;
- (e) abuse of office;
- (f) breach of trust; or
- (g) an offence involving dishonesty—
  - (i) in connection with any tax, rate or impost levied under any Act; or
  - (ii) under any written law relating to the elections of persons to public office.

The process begins with the mandated law enforcement agency – the EACC - instituting proceedings in court to preserve the assets in question pending investigations pursuant to Section 56 Anti-corruption and Economic Crimes Act 2003. These "freezing orders" are the first step. The EACC files civil recovery suits setting out the specific violations of law that resulted in the loss of assets through corruption and seeks orders against the defendant suspects to restore the assets through compensation for improper benefits under Part VI of ACECA, 2003.

##### 2) *Forfeiture of Unexplained Assets*

Similarly, EACC freezes the assets in question at the preliminary stage of investigations pursuant to Section 56 Anti-corruption and Economic Crimes Act 2003. Thereafter, depending on the outcome of investigations, EACC files a civil suit under Section 55 of the Anti-corruption and Economic Crimes Act, 2003 on the basis that investigations have established possession of assets that are disproportionate to known legitimate sources of income and that such assets are believed to have been acquired through corruption. Precedent was set by the Court of Appeal regarding the ingredients necessary to establish a claim for forfeiture of unexplained assets in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR*.<sup>14</sup> In summary, the threshold for existence of unexplained assets was as follows:



1. There must be set time period for the investigation of a person;
2. The person must be reasonably suspected of corruption or economic crime;
3. The person must have assets whose value is disproportionate to his known sources of income at or around the period of investigation and
4. There is no satisfactory explanation for the disproportionate asset.

#### **The Assets Recovery Agency (ARA)<sup>15</sup>**

The Assets Recovery Agency is established under Section 53 of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009, ARA's mandate is to identify, trace, freeze, seize and confiscate the proceeds of crime.

Notably the mandate of ARA extends to crime generally, as opposed to the EACC whose mandate is highly specialized and limited to corruption. Investigations are carried out by officers from the Directorate of Criminal Investigation (DCI) which is established under the National Police Service Act, 2011 and is part of the National Police Service.<sup>16</sup> Some DCI officers are seconded to the ARA for this purpose.

The case of *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR<sup>17</sup> is one such civil suit for forfeiture of unexplained assets carried out by the ARA, which was against a housewife married to a Kenya Revenue Authority (KRA) official. The suit was initiated by the ARA which is a strategic member of the Multi-Agency Taskforce (MAT) alongside EACC.

#### **The Office of the Director of Public Prosecutions (ODPP)**

The ODPP has powers to recover assets that are the proceeds of crime under Section 18 of the ODPP Act 2013. Where a person becomes liable to pay or forfeit property to the Government, the ODPP is mandated to initiate such proceedings as may be necessary to recover the amount. This conviction-based recovery process is also found under Section 54 of ACECA, 2003 which pertains to compensation orders on conviction. Upon conviction, the court may order the guilty party to pay an any amount as liability for improper benefits. These powers are predicated upon securing a conviction and the ODPP to date has not used the recoveries route as opposed to penalties upon conviction.

However, in one recent high-profile case the court observed that "For his role in defrauding the Youth Enterprise Development Fund, the court invokes Section 51 and 54 of the Anti-Corruption and Economic Crimes Act and orders that the accused person pays Sh180,364,789 as compensation to the Youth Fund."<sup>18</sup>

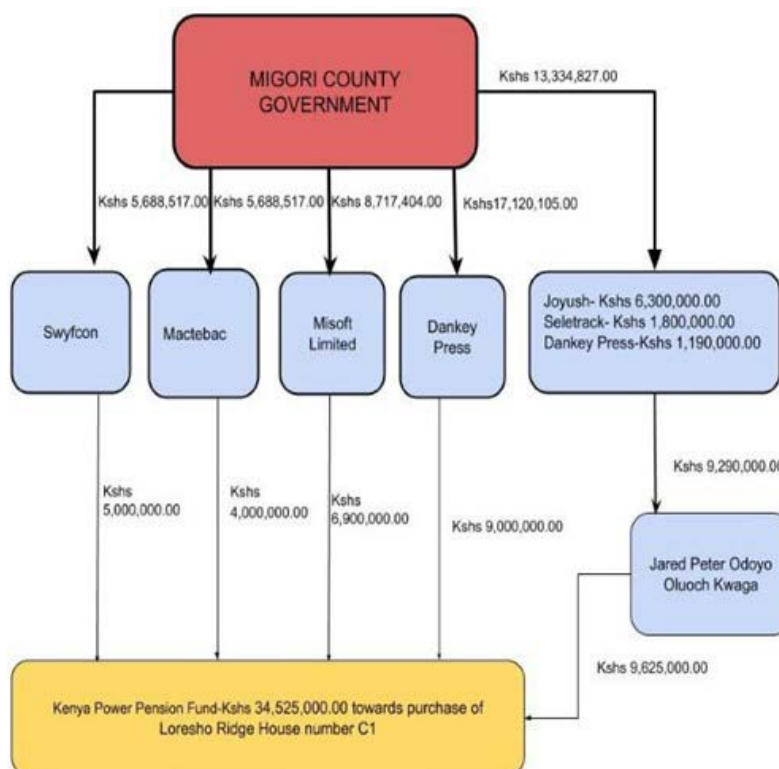
# ASSET RECOVERY EXPLAINERS

Increasingly asset recovery cases have been found in the news headlines of leading media houses. There has been an indication of increased political will to bring to book politically exposed persons who have abused their position to amass wealth through corruption. The section provides few examples that expose the complexities and issues of tracing the stolen assets, as well as challenges and progress achieved in addressing these issues.

## EXPLAINER 1: FREEZING OF MIGORI COUNTY GOVERNOR ASSETS WORTH KSH.73 MILLION

The former Migori Governor Zachary Okoth Obado was suspected to have misappropriated Ksh.2.4billion paid to 23 companies in his first term as governor between 2013-2017.<sup>19</sup> The High Court allowed the EACC to seize assets belonging to the governor worth Ksh.73 million. The case saw sustained media coverage. The infographics below were developed by the EACC to narrate the corruption chain of beneficiaries.

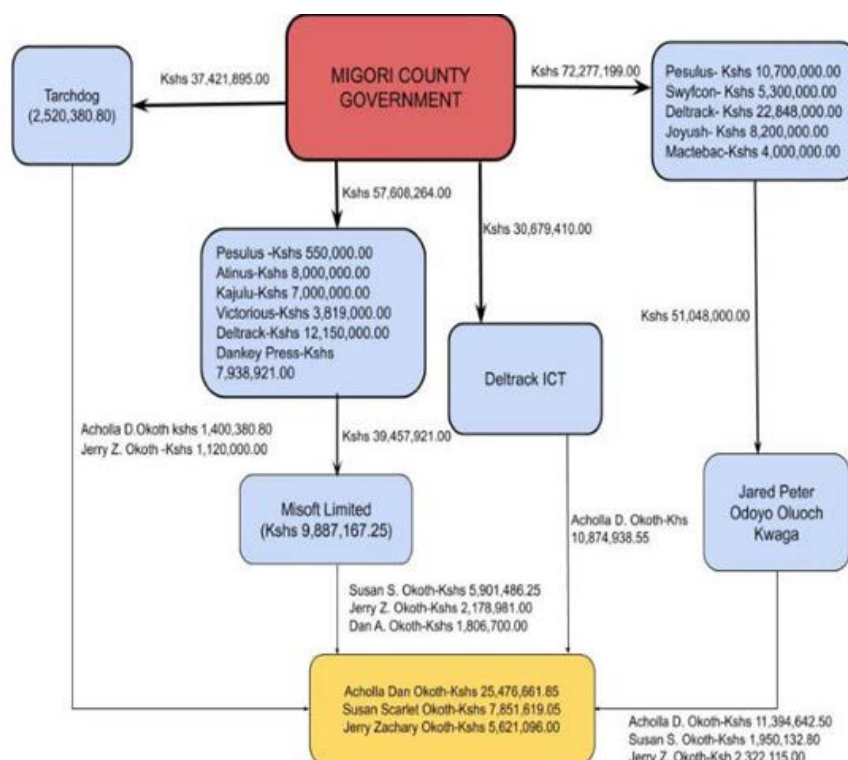
**Figure 1: Flow chart of monies sent to the Trustees of KPLC for the purchase of a luxury home registered in the name of Jared Peter Odoyo Oluoch Kwaga who is believed to be a proxy of Governor Zachary Okoth Obado.**



Source: EACC Reports

According to the EACC, Obado, whilst at the helm of the County Government of Migori, exerted influence to ensure that tenders were awarded to companies owned and/or controlled his proxy Jared Peter Odoyo Oluoch Kwaga and other associates.<sup>20</sup> This scheme resulted in the acquisition of a high value property in an upmarket suburb of Nairobi registered in Jared's name. Interestingly, the property was leased out to a family who paid rent to Governor Obado's daughter and the court was invited to draw an inference from this that the beneficial owner of the property was the Governor himself.

**Figure 2: Flow chart on monies sent to Dan Acholla, Scarlet Susan Okoth and Jerry Zachary Okoth to their personal accounts and to Aberdeen University.**



Source: EACC Reports

In another depiction, the offspring of Governor Obado became conduits for monies extracted from the County Government of Migori. Whereas it could be argued that the Governor's children are adults with capacity to engage in any form of business independent of their father, it was also apparent that the true beneficiary was Governor Obado. This position was informed by the fact that Obado would ordinarily be expected to bear the responsibility of educating his children in universities abroad.<sup>21</sup> Private contractors trading with the County Government of Migori had no business sending money to the Governor's offspring to meet financial obligations such as tuition which belonged to Obado. Least of all when the evidence points to the contractors only having the resources to remit to Obado's children after transacting with the County.

Had the contractors not been irregularly awarded tenders, they would not have had any money to transmit to the Governor's children. The entities awarded contracts by Migori County were controlled by proxies of Governor Obado including brothers Jared Kwaga, Patroba Ochanda, Joram Opala, their mother - Penina Auma Otago - as well as Christine



Akinyi, spouse to Kwaga, and his sister-in-law.

Reports indicate that the companies wired over Kshs. 38 million (approximately USD 380,000) to the Governor's children's accounts, opened in the names of Achola Okoth, Susan Okoth and Jerry Okoth. The cash was used to settle their tuition fees, upkeep, maintenance and medical bills in Australia and the UK.

## EXPLAINER 2: CHALLENGES OF MUTUAL LEGAL ASSISTANCE IN ANGLO LEASING

Mutual legal assistance (MLA) in criminal matters is a process by which States seek for and provide assistance to other States in the servicing of judicial documents and gathering evidence for use in criminal cases.<sup>22</sup> The complexity of cross-border financial investigations requires regional and international cooperation and, when the legal framework or the processes are not harmonized, they create bottlenecks in ongoing investigations and envisaged asset returns. For instance, courts may reject evidence obtained through Mutual Legal Assistance (MLA). This occurred during the long-running Anglo-Leasing trials.<sup>23</sup> In *Republic -v- David Mwiraria & Others* the court was invited to determine whether

- a. The evidence proposed to be admitted was obtained in non-compliance with MLA processes and;
- b. the evidence proposed to be admitted fell short of the admissibility requirements of the Evidence Act.

An important point of argument was the legal framework in existence in Kenya to govern MLA requests at the time (2007-2008). This arose because Kenya's Mutual Legal Assistance Act No. 36 of 2011 ('the MLA Act') only came into force three years later, on 2nd December 2011.

Also under scrutiny were the mechanisms for processing MLA requests guaranteeing the integrity of evidence obtained through a MLA request. The Swiss authorities had nominated a Swiss law firm to receive the materials sought by Kenya's MLA request for onward transmission. An objection to the production of all documents obtained through Mutual Legal Assistance was raised by the defense, citing the fact that there was no witness testimony by the Swiss officers who collected the evidence, among other issues.

The trial magistrate ruled the evidence obtained through the MLA request to Switzerland to be inadmissible "for reasons of anomalies and unbroken but lax chain of custody pertaining to the Kenyan MLA request to the Swiss Confederation." As a result, the entirety of documents and copies of the same which had not already been admitted into evidence in that case were excluded.

Aggrieved by the decision, the Office of the Director of Public Prosecution (ODPP) lodged review proceedings before the High Court in *ACEC Revision E013 of 2021 R -v- David Mwiraria & Others (unreported)*<sup>24</sup> where the trial magistrate's decision was reversed. It was held that the competence of the Kenya Anti-Corruption Commission (KACC) and the validity of the MLA requests themselves could not be contested on the basis of lack of an enabling legal framework at the time. Relying on *Kenya Anti-Corruption Commission v First Mercantile Securities Corporation [2010] eKLR*<sup>25</sup> and *Apex Finance International Limited & Anco. v Kenya Anti-Corruption Commission [2012] eKLR*,<sup>26</sup> which affirmed that such a framework was provided in domestic law under section 12(3) of ACECA. The High Court concluded that

there was nothing wrong with the manner in which the MLA requests to Switzerland were initiated. The judge therefore allowed evidence obtained from the Swiss Confederation to be admitted as evidence, noting that issues of integrity of the documents could be raised during cross-examination. The decision was greeted with approval from various sectors,<sup>27</sup> not least the EACC which had investigated the case.

Challenges to this decision are anticipated and it is not easy to predict the outcome. For instance, a significant portion of the Obado case is supported by evidence obtained from Australia and the U.K. and it remains to be seen whether the materials relied upon in that prosecution will withstand the evidentiary threshold.

### EXPLAINER 3: PUBLIC SECTOR CORRUPTION

The majority of civil suits instituted for the recovery of assets in Kenya involve public or state officers. Although correlation is not evidence of causation, there have nevertheless been several examples of public sector officials investigated for corruption. Indicative examples of this are listed below.

**Figure 2: Indicative table of civil suits instituted by the EACC for the forfeiture of unexplained assets**

	PARTIES	SUBJECT MATTER	STATUS
1	KACC -v- James Mwathethe Mulewa	Civil suit for forfeiture of unexplained assets against the former Managing Director of the Kenya Ports Authority (KPA)	Judgment entered in favour of the EACC (successor to KACC) in the sum of Kshs. 74.3 million (approximately \$USD 740,000)
2	KACC -v- Stanley Mombo Amuti	Civil suit for forfeiture of unexplained assets against the former Finance Manager at the National Water Conservation and Pipeline Corporation (NWCP)	Judgment entered in favour of the EACC (successor to KACC) in the sum of Kshs. 41.2 million (approximately \$USD 410,000)
3	EACC -v- Jimmy Mutuku Kiamba & Others	Civil suit for forfeiture of unexplained assets against the former Chief Officer Finance of Nairobi City County	Judgment entered in favour of the EACC for Kshs. 317 million (approximately \$USD 3,000,000)
4	EACC -v- Gabriel Mbiti Mulei	Civil suit for forfeiture of unexplained assets worth Kshs. 30 million (approximately \$USD 300,000) against Traffic Commandant	Judgment entered in favour of the EACC for Kshs 27,573,959.00 (approximately \$USD 270,000)
5	Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party) [2018] eKLR	Civil suit for forfeiture of unexplained assets against the wife of a Kenya Revenue Authority (KRA) officer.	Judgment entered in favour of the EACC for Kshs 19,688,152.35 (approximately \$USD 190,000)
6	EACC -v- Dr. Salome Munubi	Civil suit for the forfeiture of unexplained assets against a former Valuer at the National Land Commission (NLC)	Judgment entered in favour of the EACC for Kshs. 18 million (approximately \$USD 180,000)
7	EACC -v- Thomas Gitau Njogu	Civil suit for forfeiture of unexplained assets against an accountant in the Ministry of Interior	Judgment entered in favour of the EACC for Kshs. 112 million (approximately \$USD 110,000)
8	KACC -v- Patrick Ochieno Abachi & Others	Civil suit for forfeiture of unexplained assets against an accountant within the Ministry of Finance	Judgment entered in favour of the EACC (successor to KACC) in the sum of Kshs. 80 million (approximately \$USD 800,000)
9	EACC -v- Jamal Barre Mohammed	Civil suit for forfeiture of unexplained assets against a traffic police officer	Kshs. 26 million (approximately \$USD 260,000) forfeited through a consent order.
10	EACC -v- Stephen Ogaga Osiro	Civil suit for forfeiture of unexplained assets worth Kshs. 220 million (approximately \$USD 2,000,000) against the former Head of the Treasury of Nairobi City County	Ongoing.
11	EACC -v- Benson Muteti Masila & Others	Civil suit for forfeiture of unexplained assets worth Kshs. 952 million (approximately \$USD 9,500,000) against the resident Engineer and Kenya Rural Roads Authority (KeRRA) Coast Regional Manager	Assets frozen pending hearing and determination of the forfeiture suit.
12	EACC -v- Jared Peter Odoyo Oluoch Kwaga & Others	Civil suit for forfeiture of unexplained assets worth Kshs. 1,971,179,180.20 (approximately \$USD 19,500,000) against officials of the Migori County Government and affiliate contractors	Injunction granted pending hearing and determination of the forfeiture suit.

#### EXPLAINER 4: FRAMEWORK FOR THE RETURN OF ASSETS FROM CORRUPTION AND CRIME IN KENYA (FRACCK)

The Framework for the Return of Assets from Corruption and Crime in Kenya (FRACCK) is an agreement signed by the Governments of Kenya, Switzerland, the United Kingdom and Jersey. FRACCK came into operation on 11th December 2018 when Jersey, the last of the four parties, signed the agreement.

It facilitated the repatriation of approximately USD 400,000 from the United Kingdom (UK) utilized to purchase 11 ambulances to support the Health Sector. The ambulances were purchased with money recovered by a British court from Smith & Ouzman, a UK security printing firm which, together with its directors, were convicted in the UK for having bribed Kenyan election and examination officials to win printing contracts. The UK firm paid \$545,091 to officials of the Interim Independent Electoral Commission (IIEC) to win the tender for printing electoral materials for the 2010 referendum and two by-elections.

More recently in March 2022, the Framework was employed to return Kshs. 450 million seized from former Kenya Power Managing Director Samuel Gichuru and former Cabinet Member Chris Okemo who once held dockets in the Ministry of Energy and the Ministry of Finance. The monies are in the process of being repatriated to Kenya from Jersey following the signing of an Asset Recovery Agreement (ARA).<sup>28</sup>

Challenges remain in implementing FRACCK with some partner states seeking assurances regarding the application of funds returned to Kenya.<sup>29</sup> This may impede the prompt restoration of Kenyan assets; however, it is a form of mitigation against the risk of future loss. Kenyan law stipulates that forfeited monies are paid back into the treasury where they are once again exposed to the same risk of loss through corruption.<sup>30</sup>

#### EXPLAINER 5: THE FINANCIAL ACTION TASK FORCE (FATF)

The Financial Action Task Force (FATF) was established in 1989 as an inter-governmental body whose mandate is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system. This is guided by a set of 40 recommendations<sup>31</sup> which establish a framework of measures which countries including Kenya should take to combat money mainly laundering. This ties in with asset recovery because of the connected predicate offences such as bribery, embezzlement, fraud and other high-risk acts of corruption and economic crime.

Under the FATF recommendations, member states are obliged to ensure that designated law enforcement agencies such as the EACC and the Assets Recovery Agency (ARA) are lawfully mandated to investigate money laundering. Indeed, the Kenyan judiciary has recently come out strongly in *Tatu City Ltd & another v Ethics and Anti-Corruption Commission & another; Simon Gicharu & 3 others (Interested Parties) [2021] eKLR* to reaffirm that EACC has powers to investigate money laundering as a crime that is related to corruption.<sup>32</sup>



Designated law enforcement authorities are expected to conduct parallel financial investigations in all cases involving money laundering and associated predicate offences such as corruption. According to a yet to be published National Money Laundering and Terrorist Financing (ML/TF) Risk Assessment (NRA)\* report, corruption is a leading proceeds-generating offence in Kenya.

Kenya previously underwent an Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) Mutual Evaluation in 2010, conducted according to the 2004 FATF Methodology. The 2010 evaluation has been published and is available.<sup>33</sup>

## EXPLAINER 6: ASSET RECOVERY AS A CONSTITUTIONAL ISSUE

Successful forfeiture of unexplained assets through civil proceedings has the potential to abrogate property rights enshrined under Article 40 of the Constitution of Kenya. Principally, because it is not dependent on a finding of guilt for the underlying alleged corrupt conduct.

In *Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti [2015] eKLR*<sup>34</sup> it was observed that:

*"The protection of the right to property has socio-political, moral, ethical, economic and legal underpinning. The right protects the sweat of the brow - it does not protect property acquired through larceny, money laundering or proceeds of crime or any illegal enterprise."*

This case has become the foundation for other unexplained wealth cases that have now been successfully prosecuted in Kenya and is the subject of analysis in a recently published book on illicit enrichment.<sup>35</sup>

Of particular concern is the impact of asset recovery, generally, on the protection of economic and social rights under Article 43 of the Constitution.

Article 43 is found in Part IV of the Constitution which relates to the Bill of Rights. The key issues thereunder are Health, Housing, Freedom from Hunger, Clean and Safe Water, Social Security and Education. Juxtaposed against the Sustainable Development Goals, it is evident that there are many points of intersection. For example, at SDG 2 (Zero Hunger), SDG 3 (Good Health and Wellbeing), SDG 4 (Quality Education) and SDG 6 (Clean Water and Sanitation). Asset recovery, in this context, becomes about more than just restoration but also about promotion and protection of human rights.

Taking the Amuti case as an example, we observe an official of the National Water Conservation and Pipeline Corporation amassing wealth through kickbacks from contractors transacting with the institution. It would not be a stretch to imagine that these corrupt contractors would supply sub-standard goods or render poor services to the Corporation thereby placing the rights of Kenyans to clean and safe water at risk. Indeed, barely half of Kenya's urban population has access to water according to the World Bank,<sup>36</sup> with UNICEF reporting in 2020 that only 59% of Kenyans have access to safe drinking water.<sup>37</sup>

The biggest fine ever handed down by the Anti-Corruption Courts in Kenya relates to individuals who defrauded the National Social Security Fund (NSSF) of Kshs. 1.2 billion, presenting a serious threat to the social security of vulnerable citizens.<sup>38</sup> Whereas the fine does not necessarily equate to asset recovery, it indirectly restores a sum six times larger (Kshs. 9.8 billion) than what was lost by the Fund fraudulently. There is a clear connection between corruption and violation of Article 43 rights which can be cured, in part, through asset recovery as long as the returned assets are put to good use.

Furthermore, in civil forfeiture suits the defendant is required to prove that they acquired the assets in question by means other than corruption.<sup>39</sup> This represents a shift in the evidentiary burden and has, predictably, invited challenges regarding constitutionality and the potential violation of a defendant's right to a fair hearing under Article 50 of the Constitution. Civil Procedure Rules anticipate a situation where certain facts are only within the knowledge of the defendant, and it is consequently not unreasonable to seek clarification on those facts from the defendant.

The Court of Appeal in the *Amuti case (supra)* held that under ACECA, the burden of proof remained with the EACC until discharged on a balance of probability. At this stage, the burden would shift to the defendant if the court so ordered. The Court of Appeal went on to observe that this sequence of events was not novel in civil litigation as it was also a feature of defamation cases where a defence of justification was raised. Accordingly, a defendant's right to a fair hearing shall not be deemed to have been violated simply because the defendant was placed under obligation to prove the legitimacy of their assets.

Other constitutional queries arise during the investigative stages with suspects having accused the EACC and other law enforcement agencies of denying them a fair administrative process under Article 47. However, the courts have invalidated investigative processes on very rare occasions and in contested circumstances such as *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others* [2016] eKLR.<sup>40</sup>

Overall, the people of Kenya are entitled to protection under the constitution. While fair trial rights should absolutely be respected, corruption also poses a grave danger to the economic and social rights of Kenyans when public services are unavailable after resources allocated for such purposes are plundered. The constitution therefore provides a balance between these rights.

## EXPLAINER 7: ASSET MANAGEMENT

A persistent conundrum is the management of assets during the following stages:

1. Investigations – when freezing orders are in force
2. Trials – when injunction orders have been granted pending determination of recovery suits
3. Adjudication – upon conclusion of a hearing

An example of this challenge is with regards to motor vehicles, which depreciate in value as it gathers dust for over 2 years in the basement parking at EACC headquarters in Integrity Centre, Nairobi. It was only recently in *Ethics & Anti-Corruption Commission v Charles Muia Mutiso* [2022] eKLR,<sup>41</sup> that the EACC managed to obtain court orders appointing a receiver to collect monthly rental income pending a hearing and determination of the asset recovery suit.

In 2020, EACC received support from the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) in developing an Asset Management and Disposal Policy. The policy will be operationalized by a set of Guidelines which have already been drafted and are pending approval by the Commission before adoption and implementation.

## CONCLUSIONS AND RECOMMENDATIONS

The promotion and protection of economic and social rights under Article 43 of the Constitution of Kenya can receive a huge boost from sustained efforts to curb corruption and pursue asset recovery. Recovered assets could be applied towards improved healthcare and housing, and to reducing hunger, which comprise three out of the four principal priorities of the Government of Kenya.

Part of the challenge in the fight against corruption and the pursuit of asset recovery is the financing of the agencies involved in these functions. Law reform to permit enforcement agencies to retain a percentage of the recovered proceeds of crime could strengthen the EACC, ARA, and judiciary, among others. A proportion of the forfeited funds could be used to finance law enforcement operations and activities. This, however, has to be well regulated to avoid abuse or conflict of interest by the benefiting agencies.

The progress made in disincentivising corruption through asset recovery cannot be denied. However, the asset management regime has remained a weak link. For instance, the depreciation of assets seized in the form of vehicles or houses is a problem that risks the quality and quantity of recovery at the end of the process. A policy framework to avoid the loss or wastage of these assets through depreciation is needed. Vehicles could be sold at an auction and the proceeds deposited in a joint interest-earning account between the law enforcement agency and the subject pending determination of investigations or prosecution. In this regard, there has been success in securing rental income in joint interest earning accounts. However, these

measures for mitigating against loss in value of the assets ought to be established in policy rather than being dealt with on a case-by-case basis and requiring court intervention each time.

Assets retrieved from foreign jurisdictions could benefit from transparent mechanisms such as concurrence on utility upon return. FRACCK has experienced a divergence of opinion so that reaching a common ground between stakeholders became challenging as proposals were rejected by involved parties. Occasions where extradition was included as a condition for repatriation adversely affected judicial independence. The issue of costs is also one that requires resolution so that certain parties do not bear too much.

Further, the National Ethics and Anti-Corruption Policy needs further implementation. It was intended as a comprehensive guideline on anti-corruption matters and informs decision-making in education, prevention, investigation, enforcement and legislation. It contains proposals for a coordinated and integrated approach to the fight against corruption involving all stakeholders. There is need for intervention to spark the policy into life and install asset recovery at the front and centre of the discussion on the fight against corruption in Kenya.

Asset recovery proceedings may prove to be an indirect judicial enforcement of Article 43 rights in that they strive to claw back some of the illicit gains made by corrupt people. Conscientious utility of recovered assets is also needed so that asset recovery ensures that, to some degree, economic and social rights are realised.



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