



# ASSET MANAGEMENT IN KENYA

CIFAR RESEARCH PAPER



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## EXECUTIVE SUMMARY

Over the past decade, Kenya has demonstrated a steadfast commitment to prioritizing asset recovery within its broader anti-corruption and anti-money laundering initiatives. Recognizing these efforts, the 2022 Financial Action Taskforce (FATF) Mutual Evaluation Report by the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) commended the government's strides in enhancing both institutional and legislative frameworks. The successes of the Ethics and Anti-Corruption Commission (EACC) and the Assets Recovery Agency (ARA) in reclaiming assets acquired through crime and corruption were particularly acknowledged. However, the report also pointed to notable challenges, particularly the absence of a dedicated central authority for managing seized and confiscated property assets.

This research paper scrutinizes Kenya's asset management landscape, focusing on the legal and institutional structures in place. Leveraging insights from our previous research, the analysis identifies persistent challenges in asset management across a) the freezing / seizure, and b) the final confiscation/disposal stages of asset recovery.

By drawing parallels with practices established by other jurisdictions in Africa and worldwide, the paper conducts a comparative analysis, shedding light on key differences and deficiencies in Kenya's approach. In the final section, the paper outlines opportunities for transparent and accountable asset management, concluding with recommendations to strengthen Kenya's ability to effectively manage recovered assets and compensate victims of corruption and related crimes.

In doing so, this paper proposes several measures for improving asset management in Kenya:

1. Authorities currently mandated with asset management should **strengthen reporting systems**, including increasing frequency and focusing on accessibility of information on seized and forfeited assets and how these assets have been utilised. They should publish this information openly and where applicable actively engage stakeholders to communicate this data. This includes establishing a central register or database for forfeited funds and properties to streamline and enhance asset management.
2. Government should further **develop the current framework for asset management** both to ensure consistency in policies and procedures across agencies and to ensure that the lack of clarity around the pre-confiscation stage and on the management of physical assets are addressed.
3. Government and Parliament should strengthen existing mechanisms, including by **setting up the Criminal Assets Recovery Fund and conducting ongoing assessments of its efficacy**, with the aim of adjusting its framework as needed to correspond to operational needs.
4. Government should **address and plan for resource and capacity constraints that are likely to be present in asset management authorities**, including through assessing staffing and funding gaps, and prioritizing training and development for effective asset management. They should learn from international examples around making asset management self-funding.

5. Drawing inspiration from successful jurisdictions, government and asset management authorities should **adopt best practice, foster collaborative approaches among agencies, and implement robust monitoring and evaluation mechanisms** to ensure a harmonized, transparent, and accountable effort in asset management. Regular coordination meetings, information sharing, and performance reviews will enhance overall effectiveness and accountability.
6. Government and Parliament could also further **consider how assets are managed at all stages of criminal and civil processes**, in line with international best practice outlined above. This could include expanding the remit of the ARA beyond the CARF or designating or establishing a new body and considering the involvement of external expertise to manage complex or challenging assets.
7. Government and Parliament could also **consider further questions around value-preservation and liquidation of assets**, both pre- and post-confiscation. Particularly important to reflect on here would be questions of value-maximisation in converting physical assets to cash and the rights of persons whose assets have not yet been definitively confiscated.

# INTRODUCTION

Kenya has prioritised asset recovery in its anti-corruption and anti-money laundering efforts over the last decade. The Financial Action Taskforce (FATF) 2022 Mutual Evaluation Report for Kenya published by the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) recognised the efforts made by the government to strengthen its institutional and legislative asset recovery framework.<sup>1</sup> In particular, the report noted the progress made by the Ethics and Anti-Corruption Commission (EACC) and the Assets Recovery Agency (ARA) in successfully recovering assets that are the proceeds of crime and corruption.

An integral part of a successful asset recovery process is also the management of assets that are being recovered or that have already been recovered. Preserving the value of forfeited assets is crucial to ensure they can be effectively used to compensate victims of corruption and other crimes.

This was highlighted in the FATF report, which particularly highlighted the lack of a central authority or agency with the specific mandate to manage seized and confiscated assets to preserve their value pending confiscation.<sup>2</sup> Another concern highlighted in the 2022 Mutual Evaluation Report was that each of the Law Enforcement Agencies (LEAs) that pursues interim measures or final confiscation manages properties individually and according to their own policies. This lack of uniformity also indicates a potential lack of consistency in how assets are being managed, with the possibility of like assets being treated differently depending on the agency involved. It also indicates inefficiencies in approaching asset management, given that each agency needs to establish its own

procedures and policies, and employ its own staff for asset management.

In line with concerns raised by FATF,<sup>3</sup> our previous papers have initially identified recurring challenges in managing assets throughout the two asset management phases of the asset recovery process: a) freezing/seizure pending the conclusion of a case, and b) final confiscation and disbursement of assets.<sup>4</sup> Building on this research, this paper examines asset management in detail.

It begins with an overview of asset management and best practices in managing assets. It then takes a closer look at the existing Kenyan legal and institutional framework, before moving on to an analysis of Kenya's experience in the management of recovered assets, including some of the challenges that have emerged in the practice.

The paper further offers examples of practices in several selected jurisdictions, concluding with a comparative analysis of these jurisdictions and identifying key differences to the Kenyan approach. The final chapter identifies opportunities that exist to strengthen transparent and accountable asset management and concludes by providing recommendations for legal and institutional reform and advocacy.

## DEFINING ASSET MANAGEMENT

Asset management is the process of overseeing and administering assets that have been seized, frozen, or confiscated as part of a prosecution or civil claim, or through restitution orders or voluntary surrenders, and that are linked to economic crimes and corruption.<sup>5</sup> The objective of the management of recovered assets is to ensure that the value of property or money is preserved in an efficient, transparent and accountable manner with the ultimate intention that benefits could be derived from assets ultimately confiscated.

Assets subject to recovery proceedings require management at two stages in the asset recovery process.

- First, during the interim phase when assets are frozen or seized and placed under the control of law enforcement authorities, a specialised asset management office or a court-appointed judicial manager.<sup>6</sup>
- Second, at the conclusion of a case, or after voluntary surrender, when authorities are tasked with managing an asset that has become the property of the state or should be returned to its original owner. In the former case particularly, this may also involve decisions about the (social) reuse of physical assets or the use of assets to compensate victims of crime.

The management of recovered assets is a complex process that requires various factors to be considered, this includes:

- the nature of the asset,
- the amount and value of assets recovered,
- the cost of maintenance and storage,
- the rights of the owner and third-party interests,
- potential outside management arrangements,
- the involvement of stakeholders,
- regulatory requirements, and
- the disposal and cost of disposal of the assets.<sup>7</sup>

In some cases this may include questions of insurance, whether authorities should directly take the assets into their custody or allow them to be managed by a third party, and complex decisions around assets with specialised requirements to maintain their value.

International best practice indicates that the ultimate aim of asset management should be to provide restitution to benefit the victims of crime and corruption, alongside society more broadly. In doing so authorities should adhere to standards of transparency, participation, and accountability.

Due to the complexity of asset management procedures and institutional structures, to date only a few African countries have comprehensive frameworks that offer direction on the management of assets.<sup>8</sup> With momentum on this topic growing, Kenya therefore could be a leader on establishing an effective and accountable asset management framework.



# STANDARDS AND BEST PRACTICES IN ASSET MANAGEMENT

Several global and regional standards exist that identify important considerations when it comes to asset management, this includes the United Nations Convention against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption, the Common African Position on Asset Recovery, G8 and FATF guidelines, the Global Forum on Asset Recovery (GFAR) Principles and the Civil Society Principles for the Accountable, Transparent, and Participatory Management of Frozen and Recovered Assets.

## UNITED NATIONS CONVENTION AGAINST CORRUPTION, 2003

The UNCAC, as a key international agreement dedicated to fighting corruption, recognizes the importance of asset recovery in its Chapter V.<sup>9</sup> The chapter outlines measures countries should take to recover stolen assets, including cooperation and assistance in legal cases between countries. It also establishes guidelines for the disposal of recovered assets and the sharing of recovered assets between countries.<sup>10</sup>

Asset management is found in Article 31(3) of the UNCAC, which requires State Parties to adopt, in line with their national laws, relevant measures to regulate the administration of frozen, seized or confiscated property covered by the Convention.<sup>11</sup>

Kenya is a signatory to the UNCAC and has taken several steps to implement its provisions, including those related to asset recovery.<sup>12</sup>

## AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION, 2003

The African Union Convention on Preventing and Combating Corruption (AUCPCC), aims to promote and strengthen anti-corruption measures in Africa and provides a framework for cooperation between African countries and the international community in preventing and combating corruption.<sup>13</sup>

One of the key provisions of the AUCPCC is the promotion of asset recovery as an essential tool in the fight against corruption. The convention encourages countries to develop and implement effective measures to identify, trace, freeze, seize, and confiscate the proceeds of corruption and other related offences. It also calls for international cooperation in the recovery and return of stolen assets. However, its provisions do not specifically address asset management.

## COMMON AFRICAN POSITION ON ASSET RECOVERY, 2020

The African Union's Common African Position on Asset Recovery (CAPAR) represents the political commitment of African governments to enhance the effectiveness and efficiency of asset recovery processes. The development of CAPAR aims to streamline the framework, policies, and resources dedicated to asset recovery, as well as strengthen investigative and prosecutorial capabilities across African nations. It further aims to facilitate improved cross-border investigations, collaboration, and information-sharing among African countries.<sup>14</sup>

CAPAR is structured into four pillars:<sup>15</sup>

- **Detection and Identification of Assets:** this pillar focuses on enhancing mechanisms to detect and identify illicitly acquired assets within and outside African jurisdictions.
- **Recovery and Return of Assets:** the emphasis here is on developing strategies and frameworks for the successful recovery and repatriation of African assets from foreign jurisdictions.
- **Management of Recovered Assets:** once assets are recovered, this pillar outlines measures to effectively manage and utilize them for the benefit of African development.
- **Cooperation and Partnerships:** recognises that collaboration among member states and international partners is crucial for effective asset recovery. This pillar emphasizes fostering partnerships and cooperation to enhance asset recovery efforts.

Under its third pillar on the management of recovered assets, CAPAR highlights that the:

- » Management of assets must include the power to invest returned assets, dispose of assets and pay proceeds into asset recovery accounts, manage going concerns and generally adopt profitable and economically effective and efficient asset management standards in the interests of the Member States and their peoples (para 20).

It recommends three actions to African Union Member States as part of their commitments to strengthen asset recovery.

- » 4.3.1. The creation and maintenance of an agreed framework for the management of recovered assets in cross-border returns. This includes (a) ensuring that returned funds contribute to the mobilization of domestic resources to meet Africa's development agenda; (b) preserving the value of seized and confiscated assets for the benefit of the source countries; (c) ensuring accountability, transparency and boost public confidence in the asset recovery process; and (d) ultimately contribute to the prevention and control of corruption.
- » 4.3.2. The creation of a policy, legal and institutional framework or the strengthening of existing frameworks for the management of recovered assets. This includes (a) establishing a recovered asset management agency or designation of an existing entity for management of returned assets with clear administrative powers and responsibilities for transparency and accountability; (b) creating or establishing, in accordance with domestic laws, a central returned assets account in local and designated foreign currencies; and (c) codifying or adopting domestic and regional policies on use of returned assets for development, meeting sustainable development goals or implementing any other social investment projects as deemed fit by the Member State.

- » 4.3.3. The implementation of strategies to enhance transparency and accountability in the management of recovered assets.<sup>16</sup> This includes: (a) permitting monitoring the use of recovered assets by interested and relevant stakeholders, at their cost and in accordance with domestic laws; and (b) maintaining a physical African asset register for transparency and accountability at a domestic and/or regional level in accordance with domestic laws.

### GROUP OF EIGHT (G8) BEST PRACTICES

The G8 Best Practices for the Administration of Seized Assets outlines principles for the administration of assets in the pre-confiscation phase. The best practices were developed by the Ministers for Justice and Home Affairs from the G8 states and the European Commission, in collaboration with the Stolen Asset Recovery (StAR) Initiative. The principles highlight the importance of:

- planning for the management of assets,
- efficient and cost-effective mechanisms,
- setting up of strong controls for the administration of assets,
- transparency and accountability in the management of assets,
- designation of a competent authority responsible for the management of assets,
- use of asset managers in complex situations and
- a fund which seized or confiscated assets can be deposited into.<sup>17</sup>

### FINANCIAL ACTION TASK FORCE (FATF) BEST PRACTICES AND FRAMEWORK

Similarly to the G8 Guidelines, the 2012 FATF Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery recommends plausible ways in which seized assets can be best managed, as well as characteristics of an asset management framework.<sup>18</sup>

The Best Practices paper is anchored in Recommendations 4 and 38:

- » FATF Recommendation 4 emphasizes the importance of confiscation and provisional measures in anti-money laundering and counter-terrorist financing regimes. Countries are encouraged to adopt measures similar to those outlined in international conventions (such as the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention). These measures empower competent authorities to freeze, seize, and confiscate criminal property, preventing its laundering or reinvestment. By doing so, organized criminal operations can be disrupted, and illicit proceeds can be hindered from moving around the world. It highlights that this also helps reduce the rewards of crime and may allow victims to be partially or fully compensated.<sup>19</sup>
- » Recommendation 38, on the other hand, focuses on mutual legal assistance related to freezing and confiscation. Countries should ensure that they have the authority to take prompt action in response to foreign requests for identifying, freezing, seizing, and confiscating laundered property, proceeds

from money laundering, predicate offenses, and terrorist financing.<sup>20</sup>

Both recommendations play a crucial role in strengthening legal frameworks, streamlining processes, and enhancing asset recovery efforts within national and international contexts.

According to the FATF Best Practices paper an asset management framework should include:<sup>21</sup>

- Establishment of a framework for managing frozen, seized, and confiscated property, including
  - » Designation of responsible authority(ies) for management
  - » Legal authority for preservation and management
- Allocation of sufficient resources for comprehensive asset management
- Implementation of appropriate planning prior to freezing or seizing actions
- Implementation of measures to:
  - » Properly care for and preserve property
  - » Address individual and third-party rights
  - » Dispose of confiscated property
  - » Maintain accurate records
  - » Take responsibility for damage resulting from legal action
- Ensuring the capacity of property management personnel to be able to offer immediate support and advice to law enforcement during freezing and seizure procedures
- Ensuring property management personnel possess adequate expertise for handling diverse types of property
- Provision of statutory authority to enable courts to order sales, especially for perishable or rapidly depreciating property
- Establishment of mechanisms for property sale with owner consent
- Provision for the destruction of unsuitable property, including items conducive to further criminal activity, constituting criminal offenses, counterfeit, or posing threats to public safety
- Implementation of mechanisms for transferring the title of confiscated property without undue complication and delay
- Implementation of transparency mechanisms to:
  - » Track frozen/seized property
  - » Assess property value at freezing/seizure and thereafter
  - » Maintain records of ultimate disposition
  - » Keep records of realized sale values

## GLOBAL FORUM ON ASSET RECOVERY (GFAR) PRINCIPLES

The Global Forum on Asset Recovery saw the development of 10 principles to address approaches and mechanisms for enhancing coordination and cooperation, and for strengthening transparency and accountability of the asset recovery process.

Principle 4 is particularly relevant and states that information on the transfer and administration of returned assets should be made public and be available to the people in both the transferring and receiving country.<sup>22</sup>

Further, Principle 10 provides for the inclusion of non-governmental stakeholders to participate in the disposition and administration of recovered assets.<sup>23</sup>

## CIVIL SOCIETY PRINCIPLES FOR THE ACCOUNTABLE, TRANSPARENT, AND PARTICIPATORY MANAGEMENT OF FROZEN AND RECOVERED ASSETS

The Civil Society Principles for the Accountable, Transparent, and Participatory Management of Frozen and Recovered Assets<sup>24</sup> were developed through a collaborative process between November 2022 and December 2023 amongst civil society organizations engaged in asset recovery on the global, regional and national levels. These are designed as high-level principles on the accountable, transparent and participatory management of frozen and recovered assets. These principles apply to both the management of assets following the imposition of sanctions or during prosecutorial and judicial processes (frozen or seized assets), and post-confiscation. When part of an international recovery, they should be read alongside other high-level principles, including the GFAR Principles and Civil

Society Principles for Accountable Asset Return.

1. An asset management mechanism should be assigned or established by law to manage and maintain the value of frozen/seized and confiscated assets. This mechanism should have clear administrative powers and transparency and accountability responsibilities.
2. Asset management mechanisms should be adequately equipped with the necessary capacity and resources to undertake their work.
3. Asset management mechanisms should meet the highest standards of transparency and accountability. They should at a minimum provide public and easily accessible information on budgets, structures, staffing and expenditure, with regular audits of their work carried out and published.
4. Proactive and timely public disclosure of accessible information on the receipt, management modalities and disposition of assets should be mandated. This should be digital where possible and available without cost.
5. National, public databases of international and domestic recoveries comprising of frozen/seized and confiscated assets should be established, available online, updated regularly, easily accessible, and in compliance with data protection measures.
6. Asset management mechanisms should have effective oversight to ensure accountability and prevent potential misuse or



misappropriation of assets. This can include through procedures of parliament, by courts and supreme audit institutions, and/or by civil society. Oversight mechanisms should have the power to ensure compliance with other standards set out here.

Any oversight system or process should not replace remedies available under ordinary law, which must remain fully available, particularly for complaints over possible misuse or misappropriation of assets.

7. Broad public participation, including through independent civil society organizations, should be part of the management and disposition of recovered assets from the earliest possible point in the legal process.

This could include formal inclusion of independent civil society organizations in the oversight of asset management mechanisms.

8. Asset management mechanisms should be designed to contribute to the realization of human rights and sustainable development goals, including implementing social investment projects in the countries and communities of origin of the assets.

Civil society actors, identifiable victims and groups representing victims should be involved in decisions around the use of managed assets.

# TYPICAL ASSET MANAGEMENT ARRANGEMENTS

The following section highlights typical arrangements in the management of recovered assets as set out in the 2017 publication *Effective Management and Disposal of Seized and Confiscated Assets*, published by the United Nations Office for Drugs and Crime (UNODC)<sup>25</sup> and *Managing Seized and Confiscated Assets: A guide for practitioners* published in 2023 by the Stolen Asset Recovery (StAR) Initiative and UNODC,<sup>26</sup> which can be drawn on as best practice. These arrangements are useful for both assets at the pre- and post-confiscation stages, including when disposing of confiscated assets.

## SOLID LEGAL FRAMEWORK ESTABLISHING AN ASSET MANAGEMENT OFFICE

*Managing Seized and Confiscated Assets: A guide for practitioners*<sup>27</sup> emphasises the importance of a comprehensive legal framework for asset management, alongside regulations that enable transparency and efficiency, as the foundation of an effective asset management system.

It highlights that the framework should:

- define roles,
- allocate budgets, and
- appoint skilled personnel with decision-making authority.

That does not mean that there is a one-size-fits-all approach to the framework for asset management. In fact, several jurisdictions use one or more of several approaches.<sup>28</sup> This includes:

a) Asset management offices with additional asset recovery-enforcement functions, located **within law enforcement**. Offices such as this exist in Belgium, the Netherlands, the United States and Thailand.

In **Thailand** the Anti-Money Laundering Office includes an Asset Management Division (AMD). The AMD is tasked with maintaining a system for asset accounting, asset appraisal, storing and maintaining assets, turning them over to the Finance Ministry or returning them to the rightful owners. Its system allows for: parties to take assets into custody for their use; assets to be used for the State's benefit; the renting out of assets; the appointing of asset managers; selling assets in an auction under the anti-money laundering law and managing an Anti-Money Laundering Fund.<sup>29</sup>

b) Asset management offices located **within public service entities** with additional property management-related functions. These are non-law enforcement bodies that are responsible for asset management. They exist in Australia, Mexico and New Zealand, amongst other jurisdictions.

In **Mexico** the Asset Administration and Disposal Service is a decentralized public body under the Ministry of Finance. It has its own legal standing and budget. It administers seized and confiscated property, alongside the divestiture of State-owned entities, investment units, the administration of illegal assets from foreign trade and the management of portfolios and non-monetary assets from the federal Treasury.<sup>30</sup>

c) **Self-standing asset management offices.** These exist in Canada, Colombia, France and Honduras, as well as other jurisdictions, and are offices exclusively for the management of seized and confiscated criminal property. The Effective Management and Disposal of Seized and Confiscated Assets publication highlights that this option "is considered desirable, particularly when the scale (number and value) of assets being recovered through the judicial process has increased to a level that justifies the expenditure that setting up such an office inevitably requires."<sup>31</sup>

In **Honduras**, the Office for the Administration of Seized Property is a specialized technical body under the General Prosecutor's Office, "responsible for the safeguarding, custody and administration of seized, confiscated or abandoned property entrusted to it."<sup>32</sup> It has its own legal personality and technical, administrative and financial autonomy.<sup>33</sup>

d) **Court-appointed functionaries.** In some jurisdictions, the court can appoint trustees to manage frozen/seized and confiscated assets. Regulations then govern how appointments are made and how trustees are financed. This system exists in Australia, Canada, France and New Zealand, amongst others, where a designated public sector agency is appointed.<sup>34</sup>

In Australia, Canada and New Zealand, legislation "provides that the court-appointed asset manager is entitled to recover fees and disbursements regarding the management of seized assets. All three entities may subcontract some of the functions to manage an asset, especially when unusual expertise is required."<sup>35</sup>

In other jurisdictions, the court appointed functionary can be an entirely private trustee. In **Namibia, South Africa and the United Kingdom**, the prosecutor can apply to a court to appoint a receiver to either maintain an asset (a management receiver) or dispose of the asset (an enforcement receiver). The receiver is deemed an officer of the court once appointed and has their powers conferred by a court order or the terms of the law. Typically, they report to the court.<sup>36</sup>

The advantage of private trustees / receivers is that "professionals with appropriate skill and expertise can address the requirements of a particular asset or confiscation order. The receiver must be appropriately qualified, be of good standing, have professional insurance to indemnify themselves against civil claims and must be accredited to perform the functions of a receiver by the body that oversees or regulates trustees or receivers in the country."<sup>37</sup>

In addition to the form of the asset management office, important is to consider its role. While enhancing asset value is not typically a main aim, the legal framework should empower asset management offices to preserve and maintain the value of assets. Depending on the type of asset, this may mean interim sales of the asset, even pre-final confiscation, or disposal of unsuitable assets. It could also include holding onto or investing in confiscated assets in order to maximise their value.

## IN-HOUSE TECHNICAL CAPACITY AND OUTSIDE EXPERTISE

Technical expertise and personnel capacity is needed to effectively manage seized and confiscated assets. While expertise in asset inspection, appraisal, valuation and managing comes at a cost, especially for specialized assets, a dedicated asset management office can develop in-house expertise in these elements.<sup>38</sup>

Comprehensive inventory and recordkeeping are also crucial, with centralized databases ensuring efficient management. Safe storage, logistics planning, specialized procurement skills, effective budgeting, and operations management are key components of asset management. These aspects can involve employing safety measures for storage, meticulous planning for transportation, adept procurement skills, strategic resource allocation, and prudent management of seized assets.<sup>39</sup>

However, it is uncommon for a designated asset management office to handle all aspects of asset management and disposal services for every asset requiring storage, maintenance, or disposal. External expertise is often called upon to provide specialized services that the asset management office may lack. This will result in the outsourcing of certain functions, with public or private sector providers being engaged to carry out these tasks.<sup>40</sup>

As highlighted above, private trustees / receivers can be useful in bringing their skills to manage and dispose of complicated property, although can bring challenges in terms of cost. If an asset management office is also established, then private sector expertise can also be brought in through sub-contracting, to, for example, maintain vehicles, provide storage or to arrange sales.<sup>41</sup>

## FINANCIAL PLANNING

Effectively managing seized and confiscated assets involves various financial considerations. Even when assets don't require active maintenance, it can be necessary to cover areas such as storage costs and routine monitoring for compliance with court orders. Higher-value assets such as yachts and businesses may incur substantial maintenance expenses.<sup>42</sup>

Establishing an asset management office also entails budgeting for essential elements related to actual maintenance of an asset's value, such as accommodation, staff remuneration, warehouse facilities, and specialized contractors. Funds are further crucial for basic improvements and potential legal costs. These potentially high costs highlight the need for careful financial planning. It is likely that sustainable funding sources, such as revenue allocations from the national budget, will be required, even where funding can also be achieved from the proceeds of the sale of confiscated property.

The funding of asset management is undertaken in several different ways across the world. This includes through:

- Direct revenue allocations from the national budget
- Proceeds from the sale of confiscated property
- Interest and income earned from investments made with seized cash and the proceeds of pre-confiscation sale
- Fees earned from the management of productive assets
- Fees earned by staff of the asset management office for services rendered in the management and disposal of seized and confiscated assets.<sup>43</sup>

According to the 2017 UNODC report, the aim of most jurisdictions is to achieve a situation where the cost of operating a specialized asset management office is overtaken by the revenue produced through the management and disposal of seized and confiscated funds. France has achieved this in its asset management office, which the law requires to be funded from a) the proceeds of confiscated assets, b) interest earned on a centralized account for all cash seized by law enforcement and part of the domain tax. Indeed, the French asset management office pays millions of euros into the central accounts of the country annual in excess income.<sup>44</sup> Honduras is also close to this goal. It received in 2017 USD 450,000 in central funding annually, with other income coming from an allocation of "10 per cent of all confiscated proceeds and 40 per cent of the fines imposed on financial institutions for failure to comply with anti-money laundering measures."<sup>45</sup>

## DATA COLLECTION

Accurate information concerning the party responsible for any payments according to the court order, and the details of managed assets are essential not only for the effective management of the execution process but also to reinforce accountability within the system.<sup>46</sup>

Recommendations put forth by the Seized and Forfeited Asset Management Project of the Organization of American States<sup>47</sup> underscore the importance of a centralized approach to information collection.

This involves maintaining a structured database that encompasses all phases of the process related to seized and forfeited assets, and collaboration and data provision from various agencies involved in investigation, seizure, custody, administration, and disposal.<sup>48</sup>

Specific details, including asset descriptions, updated total counts, physical locations, owner information (including identification details), serial numbers, condition at the time of seizure, and asset values, should all be captured. The transparent availability of this information contributes to enhanced accountability and effective management of seized and forfeited assets.<sup>49</sup>

Additionally, if authorized for asset tracing, the law should grant necessary powers to access asset information from government databases and financial intelligence units without a court order. It is further recommended to develop coordination mechanisms between asset tracing and management bodies to ensure their seamless operation.<sup>50</sup>

**>>> In South Africa, a central database with basic information on seized assets and their ownership was developed and updated by staff in the Asset Forfeiture Unit (the Enforcement Section) within the prosecuting authority. The misspelling of names of people involved in cases or categories of assets became a major challenge for those capturing the data. To facilitate data entry, drop-down lists from which to choose the respective categories of assets were developed. To easily verify assets during audits and to prevent irregularities in their use and disposal, an electronic system with bar codes attached to all seized assets is now used. <<<<sup>51</sup>**



# EXPERIENCES FROM OTHER JURISDICTIONS IN THE MANAGEMENT OF RECOVERED ASSETS

## SOUTH AFRICA

South Africa established the Criminal Assets Recovery Account (CARA) to be the recipient of funds resulting from confiscation orders. The account was created within the National Revenues Fund (NRF) by the provisions of the Prevention of Organised Crime Act (POCA) 1998.<sup>52</sup> Under section 65, the Act further provides for the establishment of a high-level Criminal Assets Recovery Committee (CARC) consisting of the Ministers of Justice, Safety and Security, and Finance, as well as the National Director of Public Prosecutions. Its role is to advise the Cabinet in connection with all aspects of the forfeiture of property to the State.<sup>53</sup>

Under Section 69 (a) of the Act, recommendations are made by the Committee on:<sup>54</sup>

- i. a policy to be adopted concerning the realization of forfeited property, other than money, and the transfer of such property to the Criminal Assets Recovery Account
- ii. the allocation of property and money from the account to specific law enforcement agencies or to any institution, organization or fund supporting the victims of crime
- iii. the allocation of funds for its own administration.

The CARC makes the decision on allocations of money in the fund and is obligated to indicate the purpose of the money, which is presented to parliament.

Presumably to strengthen transparency and accountability the CARC, it can only allocate money to an institution if an accounting officer is appointed to guarantee that the amount is used for the intended purpose and all aspects of financial management are put in place.<sup>55</sup>

Furthermore, within South Africa, the National Prosecuting Authority (NPA) houses the Criminal Asset Recovery Agency Unit (CARU), which oversees the implementation of provisions related to the agency's work and manages the CARA.<sup>56</sup> Notably, POCA dictates that law enforcement agencies (LEAs) do not participate in decision-making within this setup; instead, the CARC acts as the sole decision-maker regarding the administration and utilization of funds and properties within CARA.<sup>57</sup> Although LEAs receive the largest portion of allocations, with direct victims often benefiting from court-ordered distributions, civic organizations can also receive allocations as per CARC decisions.<sup>58</sup> However, stringent audit requirements outlined in section 69A (ss 4-8) of the Act may pose challenges for non-LEA-affiliated organizations lacking robust structures, potentially explaining the higher allocations to LEAs.

CARA in South Africa has demonstrated several advantages and disadvantages.

Positives attributed to CARA can be identified as:

- significantly increased asset recovery from criminal activities, serving as a deterrent to future crime and depriving criminals

of their illicit gains. Better management of money and property recovered has ensured allocations to LEAs that has provided essential funding for their efforts in combating crime and organized criminal activities.

- the potential for allocating funds to support victims of crime has offered a promising avenue for compensation and assistance.
- the separation in the decision-making between the asset management office and LEAs reduces the risk of conflicts of interest and misuse of funds, contributing to a more transparent and accountable system.
- requiring the CARC to transparently report allocations and purposes in parliament has further promoted accountability and public scrutiny.

However, notable drawbacks can also be identified with the CARA:

- victim organizations tend to receive lower allocations compared to administrative costs and LEAs, raising concerns about the efficacy of victim support initiatives.<sup>59</sup>
- insufficient data and analysis hinders a comprehensive assessment of CARA's overall impact on crime prevention, victim support, and institutional effectiveness.
- implementation challenges, including potential delays and administrative burdens within CARC's operations, have been identified as areas of concern.

- Ensuring the long-term sustainability of the fund beyond recovered assets may require exploring additional funding sources or alternative mechanisms. Setting up the CARA took a long while, with the allocations happening several years after the legislative mechanism was put in place.<sup>60</sup> Further, the fund has to finance the management of assets while interim measures are in place.<sup>61</sup> Therefore given the investment, it could make sense to plan for a long-term operation of the fund.

It is crucial to acknowledge that while CARA is generally considered a positive development, further research and analysis are necessary to fully assess its effectiveness and identify areas for improvement. Balancing fund allocations to adequately support victim organizations alongside law enforcement efforts is essential for comprehensive crime prevention.

### NIGERIA

In Nigeria, the enactment of the Proceeds of Crime (Recovery and Management) Act, 2022, has established a legal and institutional framework dedicated to the recovery and management of assets acquired through criminal activities. The primary objectives of the Act include providing an effective structure for asset recovery, the establishment of the Proceeds of Crime Management Directorate within relevant organizations, and making provisions for the handover, management, and disposal of forfeited properties to the Federal Republic of Nigeria.<sup>62</sup>

The Act empowers the Proceeds of Crime Management Directorate to enforce and administer its provisions, assume

responsibility for managing forfeited properties, set standards for handling such assets, ensure accountability, and recommend training on proceeds of crime management.<sup>63</sup> The Directorate is further tasked with appointing private asset managers, establishing and maintaining asset management and disposal systems, maintaining a central database of seized assets, and collaborating with the Federal Ministry of Justice for the return and management of assets seized from foreign countries.<sup>64</sup>

Furthermore, the legislation introduces the Confiscated and Forfeited Properties Account, a designated account held at the Central Bank of Nigeria, managed by the Crime Management Directorate and reporting to the Minister of Finance.<sup>65</sup> This account has two methods for the disposal of assets:

- a. through the authorisation of the President and approval of the Federal Executive Council (which is the cabinet or executive). Funds authorised in this way can be used for various purposes, including investment in government portfolios, compensation for states or individuals who have suffered pecuniary losses due to criminal activities, payments under international legal assistance agreements, and fulfilment of Nigeria's obligations under relevant laws.<sup>66</sup>
- b. for specific purposes, including judicial and criminal justice reform, law enforcement measures, drug addiction treatment, rehabilitation of victims of human trafficking and terrorist activities, infrastructure development, and humanitarian and social investment programs.

The President, with the approval of the National Assembly, may authorize expenditures from the account for these purposes.

This emphasizes the multifaceted approach taken by the Act to address the complex issues surrounding asset recovery and management in Nigeria. The establishment of the Confiscated and Forfeited Properties Account in Nigeria presents both advantages and challenges.

Identifiable advantages of the account include:

- it incentivizes proactive efforts to recover ill-gotten gains from criminals, potentially weakening their power base and discouraging future criminal activities.
- the centralized management of all seized assets in a dedicated account simplifies administration, and has the potential to enhance transparency and reduce the risk of misappropriation or loss.
- the multifaceted allocation of funds for diverse purposes, including victim compensation, judicial reforms, and social programs, broadens the impact of recovered assets beyond law enforcement alone.
- presidential oversight through approval for expenditures has the potential to ensure strategic decision-making and may prevent the misuse of funds.
- additionally, provisions for managing assets seized from foreign countries and fulfilling international obligations demonstrate Nigeria's commitment to global efforts against crime.

However, there are also notable concerns. This includes:

- the potential for political influence due to presidential control over expenditures could result in the politicisation or misuse of funds, especially without strong accountability mechanisms.<sup>67</sup>
- the Act lacks clear criteria for allocating funds to specific purposes, posing the risk of ad hoc decisions and unequal distribution.
- transparency and accountability concerns need to be addressed to ensure effective oversight mechanisms and prevent corruption. For instance on the power of the president to authorise expenditure from funds as highlighted above.<sup>68</sup>
- challenges in implementation, including the need for robust institutional capacity and expertise, may hinder the efficient management of the account and the effective utilization of funds for intended purposes.

# ASSET MANAGEMENT IN KENYA

## LEGAL AND INSTITUTIONAL FRAMEWORK

Kenya has gradually pursued reforms to strengthen its fight against corruption, money laundering and related crimes with various policies, legal and institutional frameworks that have been developed over the past decade. These developments are consistent with global and regional frameworks and standards, in line with Kenya's obligations from these ratified instruments.

The reforms have seen the development and implementation of laws that have established institutions such as the Assets Recovery Agency (ARA) and expanded the work of existing institutions such as Ethics and Anti-Corruption Commission (EACC) and Office of the Director of Public Prosecution (ODPP). These frameworks provide guidance on the asset recovery process, including on asset management. Important aspects of these frameworks, such as the arrangements for the administration of funds and property pre- and post-confiscation are outlined below.

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

The Anti-Corruption and Economic Crimes Act (ACECA) 2003<sup>69</sup> is one of the key laws that guides the fight against corruption and economic crimes in Kenya. The Act provides for a number of strategies to be employed in the fight against corruption. These include investigation, prosecution, prevention, education, and asset recovery. Under the Act, the EACC is empowered to investigate the extent of liability for the loss of or damage to any public property and; "to institute civil proceedings against any person for the recovery of such property or for compensation; and to recover such property or enforce an order for compensation even if the property is

outside Kenya or the assets that could be used to satisfy the order are outside Kenya"<sup>70</sup>.

Section 55 of the Act empowers the state to forfeit unexplained assets, effectively transferring ownership of assets to the government when a person suspected of corruption fails to provide a satisfactory explanation for their possession despite being given a reasonable opportunity to do so. Section 56A provides for preservation orders which permit relevant agencies to appoint a receiver to manage, control and possess any property suspected to have been acquired through corrupt conduct.<sup>71</sup>

Additionally, the EACC has an Asset Recovery Account that manages the assets during seizure and holds confiscated money before it follows the process highlighted below.<sup>72</sup> According to section 56C of the Act, any funds recovered by the EACC shall be paid into the Consolidated Fund and any asset or property pre- or post-confiscation shall be surrendered to the Permanent Secretary to the Treasury. The Consolidated Fund is established to receive all money collected for the national government, except for specific exclusions outlined by an Act of Parliament. Money can only be withdrawn from the fund through appropriation by an Act of Parliament, in accordance with specified articles, or as authorized by the Constitution or legislation. While withdrawals from any other national public fund require parliamentary approval, withdrawals from the Consolidated Fund must be approved by the Controller of Budget.<sup>73</sup> This however needs to be reconciled with the newly operationalised Criminal Asset Recovery Fund, discussed below.

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

POCAML, which has recently undergone



several revisions, enables asset recovery through criminal and civil processes. The ARA is primarily responsible for enforcing its provisions, including for identifying, tracing, freezing, seizing, and confiscating the proceeds of crime.<sup>74</sup>

Section 109 of the Act establishes the **Criminal Assets Recovery Fund (CARF)** and in Section 111 designates the ARA as its administrator to facilitate the management of confiscated and forfeited property and funds. The long expected CARF is a critical part of Kenya's anti-money laundering and asset recovery regime. It is hoped that by providing a central repository for assets that have been confiscated or forfeited, CARF will be a step towards the transparent and accountable management and disposal of these assets. Section 110 outlines the types of funds that can be deposited into it, which include;

- a. all money derived from the fulfilment of confiscation and forfeiture orders
- b. all property derived from the fulfilment of forfeiture orders
- c. the balance of all money derived from the execution of foreign confiscation orders after payments have been made to requesting countries under the Act
- d. any money appropriated by Parliament, or paid into, or allocated to, the Fund under the provisions of any other Act
- e. domestic and foreign grants
- f. any money or property recovered under the ACECA, or under any other Act other than money or property recovered on behalf of any public body or person
- g. any property or amount of money received or acquired from any other legal sources
- h. all property or money transferred to the Fund pursuant to the provisions of the Act.

Unclear though is how the establishment of the CARF interacts with Section 112 of POCAMLA. This provision outlines that any money shall be paid into the Consolidated Fund, while any properties resulting from confiscation or forfeiture shall be managed by the government and disposed of in accordance with the Public Procurement and Asset Disposal Act detailing the disposal of public property. The Act empowers the Cabinet Secretary to issue regulations in order to authorize administrative operations of the Fund and utilise money and properties deposited into it.<sup>75</sup> While it is presumed that CARF will override this provision, ambiguity exists.

### **The Proceeds of Crime and Anti-money Laundering (Criminal Assets Recovery Fund) Regulations, 2023**

The Proceeds of Crime and Anti-money Laundering Regulations developed in accordance with the Section 113(1) of POCAMLA set out the implementation of the CARF in practice. They provide a framework for the administrative operations of the Fund and the utilisation of properties and money deposited into the CARF.<sup>76</sup> The Section 113 (1) regulations further provide additional sources of assets that shall be deposited into the Fund and provide for payments that can be paid out of the fund, notably five percent of the proceeds realised will be allocated to the agency that recovered the assets and for administrative expenses. The regulations also take into consideration third-party interests by allowing for payments with respect to their claims.<sup>77</sup>

The Regulations set out that ARA will be advised by the Asset Recovery Advisory Board on the administration of the fund. It is required to keep records of the fund and to prepare regular financial statements. The funds should be maintained in accordance with the Public Finance Management Act, 2012 and Audited by the Auditor General in line with Public Audit Act, 2015.<sup>78</sup>

## THE CRIMINAL ASSETS RECOVERY FUND (CARF)

The CARF is expected to be set up soon, following the publication of the Regulations of 2023.<sup>79</sup> The new legislation put forward in the provisions of POCAMLA and the subsequent regulations contain several positive aspects with regards to the management of recovered assets in Kenya.

Firstly, the regulations establish a robust framework for the administrative operations of the Criminal Assets Recovery Fund, emphasizing the need for thorough financial management and reporting. The requirement for annual financial and non-financial reports, prepared in accordance with standards set by the Public Sector Accounting Standards Board, allows for public information on the recovered assets and supports a degree of transparency and accountability in the utilisation of the fund.<sup>80</sup> Furthermore, the inclusion of additional sources of funds beyond the property recovered from crime, such as incidental compensation, restitution orders, and income from investments improves diversification and financial sustainability of the Fund, reducing dependence on a single source and making it more resilient to changes in circumstances.

The involvement of the Asset Recovery Advisory Board in advising on the administration and management of the Fund, as well as in the preparation of financial estimates and reports, adds an additional layer of oversight. This can contribute to better decision-making and governance, promoting responsible use of the recovered assets. Lastly, the regulations explicitly state the purpose of the Fund, is to provide a framework for the administrative operations and utilization of properties and monies as required by the Proceeds of Crime and Anti-Money Laundering Act, which is also a positive development.

Despite the positive aspects, there are certain gaps in the regulations that warrant attention. Firstly, the regulations fall short in providing specifics on managing confiscated properties both at the pre- and post-confiscation stage and focuses solely on what can be paid into the fund which it states should be managed according the Public Finance Managements Act provisions. Additionally, it is not clear how the management of physical property that requires resources to preserve its value is to be done and who is to do it, particularly whether or not external expertise can be enlisted. While POCAMLA outlines that the disposal procedures should be guided by the Public Procurement and Asset Disposal Act, it is unclear how they will be operationalised with respect to the CARF.

Further, the regulations lack specific guidelines on investment strategies. While they mention the ability to invest surplus funds in government securities with Cabinet Secretary approval, clear guidelines would ensure prudent investment practices, preventing misuse or mismanagement of funds. Additionally, there is ambiguity in the definition of administrative expenses. The regulations specify that these expenses shall be three percent of the proceeds recovered, but they do not provide detailed criteria or a breakdown of what constitutes administrative expenses. This lack of clarity could lead to potential misinterpretations or misuse of this provision.

Furthermore, the regulations offer only limited provision for public participation and weak safeguards against potential misuse. Public participation is crucial for ensuring a democratic and inclusive approach to the management of recovered assets.

Finally, while the regulations outline the functions of the administrator and the Advisory Board, there is a lack of explicit safeguards against potential misuse or misappropriation of funds. Robust internal controls and mechanisms for preventing corruption and fraud are essential to maintain the integrity of the Fund.

## EXPERIENCE WITH THE MANAGEMENT OF RECOVERED ASSETS IN KENYA

The recoveries of the proceeds of crime and corruption in Kenya have been largely domestic, with seven international recoveries pursued, including one under the recent Framework for the Return of Assets from Corruption and Crime in Kenya (FRACCK).<sup>81</sup>

Nationally, both the EACC and the ARA have policies for the management of recovered assets. While these are not publicly available, elements of these policies will be discussed below.

Notably, in both international and domestic recoveries, there has been a lack of information on how these monies and properties have been managed and subsequently disposed of.

### International recoveries

One of the most notable international recoveries pursued by Kenya from foreign jurisdictions was the return of the proceeds of corruption conducted in 2017 related to the Smith and Ousman case. This case involved bribery by British nationals in the procurement of contracts for the supply of ballot papers.<sup>82</sup> The British National Crime Agency conducted investigations resulting in two British nationals convicted under the UK's Bribery Act and subsequently issued confiscation orders. The implicated company was also found guilty and fined GBP 2.2 million. The UK Government agreed to share part of the fines with Kenya amounting to KES 49 million (GBP 237,307) which was used to buy seven ambulances distributed to vulnerable counties across Kenya.<sup>83</sup>

The second larger international return to Kenya has been the Windward Limited case in which the repatriation of GBP 3,281,897 has been ongoing since 2022.<sup>84</sup> This is being finalised through an asset-sharing agreement between the Government of

Kenya and the Government of Jersey,<sup>85</sup> under the FRACCK, which sets out the parameters of asset return between Kenya and several jurisdictions. The asset-sharing agreement covers the process of repatriation, disposition and management of recovered assets. The money is to be used for healthcare.<sup>86</sup>

Other recovery cases pursued internationally by Kenya, include;

- a. Daniel Arap Moi / World Duty Free Company Limited: This case revolves around bribery allegations involving the former Kenyan president, Daniel arap Moi, and World Duty Free Company (WDF). WDF allegedly paid bribes to Moi to secure a contract for duty-free complexes at Nairobi and Mombasa international airports. The case involved arbitration proceedings where Kenya argued that WDF's procurement of the agreement through bribes breached contract laws.<sup>87</sup>
- b. Daniel Arap Moi / Anglo-Leasing Case / First Mercantile Securities Corporation: This case involves the Anglo-Leasing scandal, where companies based in Switzerland are suspected of being involved in bribery and money laundering in Kenya. The Kenyan Anti-Corruption Commission sought mutual legal assistance from Switzerland in investigating the scandal. First Mercantile Securities Corporation was involved in financing contracts related to the scandal.<sup>88</sup>
- c. Daniel Arap Moi / Anglo-Leasing Case: This case further explored the Anglo-Leasing scandal, where companies involved voluntarily refunded amounts related to their contracts. The audit report highlighted various payments

made by involved companies, implicating them in money laundering.<sup>89</sup>

- d. Gautam Sengupta: Sengupta, a former World Bank employee, admitted to corrupt practices involving kickbacks and bribery in projects in Ethiopia and Kenya. He pleaded guilty and agreed to pay restitution for the damages caused by his actions.<sup>90</sup>
- e. Stanley Mombo Amuti: Amuti faced allegations of possessing unexplained assets disproportionate to his income, leading to the freezing of his bank accounts and assets by the Kenya Anti-Corruption Commission. Investigations revealed large sums of money deposited and withdrawn by Amuti, raising suspicions of corruption.<sup>91</sup>

### Domestic recoveries

According to the 2022 FATF Mutual Evaluation Review for Kenya, the ARA had applied for a total of 76 preservation orders with a value of KES. 7.6 billion (USD 64.488 million) and 57 forfeiture orders with a total value of KES 5.2 billion (USD 44.123 million). Additionally, the EACC has recovered over KES 25 billion worth of ill-gotten assets in the last five years from corruption-related crimes in the country.<sup>92</sup>

Funds received from these recoveries have been deposited into the Consolidated Fund and subsequently budgeted and reallocated. This is in line with section 56C of ACECA which states that recovered assets shall be paid into the Consolidated Fund and any asset or property pre- or post-confiscation shall be surrendered to the Permanent Secretary to the Treasury. Even though the CARF has already been operationalised through the publication of the regulations by the Cabinet Secretary for Treasury, the necessary infrastructure for its

operations has yet to be put in place. In the meantime, all assets are being deposited or paid into the Consolidated Fund.

Recovered properties, as has been the case for recovered land by the EACC, have been returned to the rightful owners or socially reused,<sup>93</sup> by being returned to the communities impacted by such crimes.<sup>94</sup>

While not published, the EACC asset management policy lays out a comprehensive framework for the management of various assets encountered during its operations, which range from money equivalents to real estate, motor vehicles, and even live assets like crops and livestock. This policy is rooted in Kenya's legal framework, which includes the Constitution, the Ethics and Anti-Corruption Commission Act, and the Anti-Corruption and Economic Crimes Act. These laws empower the EACC to investigate, freeze, seize, and confiscate assets suspected to be the proceeds of corruption or economic crime.

The primary objective of the policy is to provide a structured approach to asset management that ensures efficiency, effectiveness, accountability, and transparency. It covers two main phases: the interim management phase, which involves pre-seizure planning and management of assets prior to determination of ownership rights, and the disposal phase, which focuses on managing assets after ownership has been determined. Key principles guiding this policy include maximizing the recovery of the proceeds of corruption, safeguarding assets against dissipation, protecting third-party rights, and maintaining public confidence. The policy also emphasizes the importance of a multi-agency approach, cost-effective administration, and transparent record-keeping.



## CHALLENGES IN THE MANAGEMENT OF RECOVERED ASSETS

### Inadequacies in the CARF framework for asset management

Despite the significant amount of assets recovered by ARA and EACC, and the regulations operationalising CARF published by the Cabinet Secretary to the Treasury in the past year, the Fund is yet to be set up.

Furthermore, current regulations exhibit several gaps.

Firstly, the regulations lack specifics regarding arrangements in the pre-confiscation stage, focusing solely on what can be paid into the CARF. It is therefore not certain who should manage those assets and under what conditions.

Secondly, for both stages it is unclear on exactly how the management of physical assets that require resources to maintain, from farmland to vehicles and companies should be effectuated and what resources can be used for that, beyond it being stated in POCAMLA that properties resulting from confiscation or forfeiture shall be managed by the government and disposed of in accordance with the Public Procurement and Asset Disposal Act. It is also unclear whether and under what conditions physical assets can be liquidated and, for the pre-confiscation stage, whether compensation could be payable should the person or company not be found liable for the crime in question. Moreover, the procedures for whether external expertise can be enlisted in the management of properties are not clearly outlined.

Further, while it seems implied, it is not clear for all parties involved whether funds seized and confiscated by the EACC should be transferred to the Fund. While the POCALMLA makes it clear that the CARF should be the sole account for the receipt of the confiscated proceeds of crime, there

is ambiguity in the legislation around other accounts transferring their balances into it. Of particular note is the EACC's Asset Recovery Account that holds seized assets and currently deposits confiscated assets into the Consolidated Fund.

Although the Fund is yet to be set up, its existence alone would not guarantee that some of the challenges in the deterioration of the value of the assets whether at the seizure phase or upon final confiscation will be addressed, as this is dependent also on the capacity and resourcing of the administering institution.

### Human resource and capacity constraints

Adequate resourcing and capacity for asset recovery procedures in Kenya are a challenge, and the lack of resources is apparent also when it comes to asset management. While all crime-fighting institutions could benefit from more resources, the ARA's staff capacity and funding in particular has been relatively low, in comparison with the EACC.<sup>95</sup>

The regulation does not indicate whether ARA shall have increased allocation from the treasury to administer the CARF, and it only provides for the three percent of recovered proceeds for administrative costs and additional sources of funds beyond the property recovered from crime, such as incidental compensation, restitution orders, and income from investments. In comparison to the examples considered from Honduras or France, which are or are nearly self-financing, three percent alone seems unrealistic to cover administrative costs.

Moreover, there is little understanding of the existing strengths and weaknesses in terms of institutional capacity and guiding policies since no assessment of the institutions has been undertaken.



## Maintaining data on seized and forfeited assets

Currently, ARA and EACC, as the main agencies responsible for managing assets, do not have a central register for recovered assets, although the institutions do publish annual reports of aggregate figures on the recoveries.<sup>96</sup> To address this, the new POCAMLA (CARF) regulations require that the administrator (in this case the ARA) of the CARF put in place systems for record-keeping on seized and confiscated assets and provides for audits to promote openness and accountability.<sup>97</sup> It remains to be seen whether and how this database will be operationalised in practice and whether it will be public.

## Cost of managing recovered assets

The process of recovering assets is an expensive affair as it requires technical expertise, coordination and funding as the cases can take years which means that interim measures are put in place to preserve the value of the assets. Fewer resources then mean that the administrators or appointed receivers have limited capacity to oversee effective management and therefore the assets deteriorate. This is an even more substantial issue in relation to perishable goods, in cases where they are seized and cannot be disposed of easily, particularly when there are proceedings and interim measures have been instituted.<sup>98</sup> The regulations do not outline the procedure for sale of properties or goods which presents a substantial challenge.

*Comparison of asset management funds in, Kenya, Nigeria and South Africa*

Aspect/Elements	South Africa	Nigeria	Kenya
<b>Name of Fund</b>	Criminal Assets Recovery Account (CARA)	Confiscated and Forfeited Properties Account	Criminal Assets Recovery Fund
<b>Establishment</b>	Established within the National Revenues Fund (NRF) by the Prevention of Organised Crime Act, 1998	Established by the Proceeds of Crime (Recovery and Management) Act, 2022	Established by the Proceeds of Crime and Anti-Money Laundering Act, 2009
<b>Administrator</b>	Criminal Asset Recovery Unit (CARU)	Proceeds of Crime Management Directorate	Asset Recovery Agency (ARA)
<b>Decision-Making Authority</b>	Criminal Assets Recovery Committee (CARC)	Proceeds of Crime Management Directorate	Advisory Board, ARA Director
<b>Allocation of Recovered Funds</b>	CARC makes recommendations on policy, allocation of property and money, and funds for its own administration	The President, with the approval of the National Assembly, authorizes expenditures for various purposes	Funds go into the Criminal Assets Recovery Fund
<b>Transparency Measures</b>	CARC can only allocate money with an appointed accounting officer ensuring proper use	Expenditures from the Confiscated and Forfeited Properties Account are subject to presidential approval	Annual financial and non-financial reports submitted to the Advisory Board
<b>Separation from Law Enforcement</b>	Separate entity for asset management and decision-making (CARU)	Proceeds of Crime Management Directorate	Separate entity (ARA) for administration of the fund
<b>Specific Fund Purpose</b>	Allocation to law enforcement agencies, victim support, and administrative costs	Various purposes including investment, compensation, international legal assistance, and social programs	Allocation to specific purposes as per regulations
<b>Presidential Approval Requirement</b>	Yes	Yes	No

## CONCLUSIONS

While Kenya has successfully concluded a number of domestic, as well as international, asset recovery cases, a lack of transparency in the management of recovered assets presents several challenges. Issues such as unclear accounts, minimal stakeholder participation, and discrepancies in the information provided contribute to this transparency deficit.

Furthermore, inconsistencies in how different agencies pursue and manage recovered assets independently have led to a lack of coherence in asset management policies and procedures. This disjointed approach has raised concerns about the overall effectiveness and alignment of efforts in the recovery process.

The challenges extend to the legal framework for asset management, where inadequacies, coupled with resource and capacity constraints, have posed significant hurdles in the effective management of recovered assets. The existing legal framework requires amendment and strengthening to provide clearer guidance on asset management, fund utilization, and overall accountability.

The introduction of the CARF was meant to address some of these concerns. However, its non-operational status is a critical issue. Despite the issuing of regulations, a substantial portion of forfeited funds are currently being deposited into the Consolidated Fund, undermining the intended transparency and accountability benefits that the CARF would offer.

The ARA, tasked with asset management under the CARF regulations, faces notable resource and capacity constraints. The staffing and funding levels at ARA are considerably lower than the EACC, hindering its effectiveness in managing recovered assets.

Record-keeping challenges add another layer of complexity. The absence of a central register for recovered assets in Kenya means that institutions rely on annual reports for aggregate figures, creating gaps in real-time information availability and hindering efficient asset management.

The high cost associated with managing recovered assets compounds the challenges. The process demands technical expertise, coordination, and funding, and insufficient resources lead to a deterioration in asset value, resulting in a net loss to the government and ultimately the victims of corruption.

International best practices, as observed in South Africa, Nigeria, as well as in Honduras, France, Mexico, Thailand and beyond underscore the importance of dedicated funds, clear allocation policies, and effective asset management structures. Learning from the successes and drawbacks of these models can inform Kenya's approach to enhancing its asset recovery and management processes.

## RECOMMENDATIONS

1. Authorities currently mandated with asset management should **strengthen reporting systems**, including increasing frequency and focusing on accessibility of information on seized and forfeited assets and how these assets have been utilised. They should publish this information openly and where applicable actively engage stakeholders to communicate this data. This includes establishing a central register or database for forfeited funds and properties to streamline and enhance asset management.
2. Government should further **develop the current framework for asset management** both to ensure consistency in policies and procedures across agencies and to ensure that the lack of clarity around the pre-confiscation stage and on the management of physical assets are addressed.
3. Government and Parliament should strengthen existing mechanisms, including by **setting up the Criminal Assets Recovery Fund and conducting ongoing assessments of its efficacy**, with the aim of adjusting its framework as needed to correspond to operational needs.
4. Government should **address and plan for resource and capacity constraints that are likely to be present in asset management authorities**, including through assessing staffing and funding gaps, and prioritizing training and development for effective asset management. They should learn from international examples around making asset management self-funding.
5. Drawing inspiration from successful jurisdictions, government and asset management authorities should **adopt best practice, foster collaborative approaches among agencies, and implement robust monitoring and evaluation mechanisms** to ensure a harmonized, transparent, and accountable effort in asset management. Regular coordination meetings, information sharing, and performance reviews will enhance overall effectiveness and accountability.
6. Government and Parliament could also further **consider how assets are managed at all stages of criminal and civil processes**, in line with international best practice outlined above. This could include expanding the remit of the ARA beyond the CARF or designating or establishing a new body and considering the involvement of external expertise to manage complex or challenging assets.
7. Government and Parliament could also **consider further questions around value-preservation and liquidation of assets**, both pre- and post-confiscation. Particularly important to reflect on here would be questions of value-maximisation in converting physical assets to cash and the rights of persons whose assets have not yet been definitively confiscated.

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