Journal of Conflict Management & Sustainable Development

Volume 9 Issue 2 2022 ISBN 978-9966-046-15-4

Money Laundering and The Role of the Advocate - A Comparative Analysis of Kenyan and South African Law

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Abstract

Advocates in Kenya are not reporting institutions as far as money laundering is concerned. This is despite recommendations by the Eastern and South Africa Anti-Money Laundering Group (EASAAMLG), of which Kenya is a member, for advocates to be designated reporting institutions. This paper explores the basics of money laundering and the role of the advocate in Kenya, in comparison with the role of the South African attorney. The paper refers to the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2010 Laws of Kenya as well as the Financial Intelligence Centre Act No. 38 Laws of South Africa. The paper uses the desktop methodology to explore the findings of various writers on the topic and to draw insight from these. The paper concludes that the Kenyan lawyer is an important part of the fight against money laundering, and should be included as a reporting entity. Contrary to the fears and inhibitions that have hampered the inclusion of the Kenyan advocate as a reporting entity, such inclusion will only formalize existing requirements and will enhance anti-money laundering efforts in Kenya.

1.0 Introduction

1.1 What is money-laundering

Money laundering has been defined as the disguising of proceeds of crime to enable their utilisation without the detection of the illegal activity that

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produced them.[1] It is also "the manipulation of illegally acquired wealth to obscure its true source or nature, which is achieved by performing several transactions that leave the illegally derived proceeds appearing as the product of legitimate investment or transactions".[2] It is also the processing of proceeds of illegal activity to disguise their origin[3] to safeguard them from confiscation.[4]

The crimes from which such proceeds of crime emanate are known as predicate offences, which produce funds or property that is then concealed and disguised, hence laundered. Predicate offences may include fraud (including computer fraud), insider trading, prostitution rings,[5] tax evasion, drug trafficking, corruption, illegal arms trading, extortion, robbery, smuggling, human trafficking,[6] child and drug trafficking, corruption, tax evasion,[7] and also environmental crimes against natural flora and fauna.[8]

[1] US Department of Treasury Financial Crimes Enforcement Network (FInCEN) Advisory March 1 (1996) Vol. 1 Issue 1 available at *http://www.fincen.gov/news_room/rp/advisory/html/advissu1.html* (accessed 18 Feb 2022).

[2] South Africa Law Reform Commission 'Money Laundering and related matters' Report Project NO. 104 August 1996 available at *http://www.justice.gov.za/salrc/reports/r_prj104_1996aug.pdf* (accessed 18 Feb 2022).

[3] Definition accepted by Financial Action Task Force (FATF), Available at *https://www.fatf-gafi.org/faq/moneylaundering/* (Accessed 18 Feb 2022).

[4] Aleksoski, S. & Aleksoski, O. (2015). Money Laundering as a Type of Organised Crime. Journal of Process Management- New Technologies International, Vol. 3, No. 3 44-54

[5] FATF website as in note 3 ibid.

[6] Lilley, P. (2006. Dirty Dealing: The Untold Truth about Global Money Laundering. International Crime and Terrorism. Hereafter Lilley P (2006).

[7] Speech by President Uhuru Kenyatta delivered on 12th December 2018. Available at *https://www.nation.co.ke/kenya/news/president-kenyatta-s-full-speech-on-jamhuri-day-2018-117816* (accessed 18 Feb 2022).

[8] United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25 of 15 November 2000. Available at *https://www.unodc.org/documents/middleeastandnorthafrica/organised-*crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (Accessed 18 Feb 2022)

Following the events of September 11 2001, the AML regime was expanded to include combating the financing of terrorism. [9]

Depending on their scale, these offences produce large amounts of money, which the criminals seek to utilise without raising suspicion. This they do by covering up the illegal sources of the funds, changing their form, and injecting them back into the legitimate financial system so they can utilise them. This is what constitutes the process of money laundering.[10]

1.2 Stages of money-laundering

There are three stages of money laundering, which are placement, layering and integration.[11]

1.2.1 Placement

Placement is where the perpetrators of predicate crimes put illegally obtained money into the legitimate financial system. In this stage, the 'dirty' money is incorporated into the legitimate financial system, hence obscuring its link with the criminal activity that generated it.[12] The criminal may do this by dividing the large sums of money into smaller amounts and giving them to individuals- referred to as '*smurfs'*- who then deposit them into banks or other agents in the financial system. This is done to prevent the said agents, who are mandated to report suspicious transactions, from detecting and reporting the same. The '*smurfs'* can also be shell companies- incorporated for the sole purpose of facilitating the laundering of illegal proceeds.

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[9] See the additional 9 special recommendations of the Financial Action Task Force (FATF adopted in additional to the initial 40 recommendations towards combating money-laundering. Available at *http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf* (Accessed 18 Feb 2022)

[10] FATF website, note 3 ibid.

[11] Schneider F. Money Laundering: Some Preliminary Empirical Findings. Paper Presented at the Conference: Tackling Money Laundering (2007) Available at https://www.uibk.ac.at/economics/bbl/bblpapierews0708/schneider.pdf (Accessed 18 Feb 2022).

[12] Aleksoski S. & Aleksoski O. (2015).

A characteristic feature of shell companies is to have nominee directors; thus their beneficial owners are shielded by the corporate veil and are difficult to trace in case of a money-laundering investigation. Shell companies are also used by terrorist financiers to avoid raising queries as to the purpose of cash sent to a particular jurisdiction. The perpetrators of predicate offences remit money obtained from unlawful activities into the shell company only to 'borrow' it back and use it, hence disguising its initial source of the funds, and making it look legitimate.[13] Such shell companies are often set up in off-shore countries for purposes such as granting loans to the parent company in their own country, which makes no business sense. [14] It is usually an attempt to establish a complex network of transactions to move money [15] or to facilitate trade-based money laundering.[16]

Placement usually occurs close to the criminal activity that generated the funds.[17] This is due to the need to begin processing the said funds to make the money available to the criminal for his/her use. The placement stage is the riskiest for the launderer since it is the most discoverable. The risk arises

[13] See 'What is money Laundering' available at *http://www.slate.com/articles/news_and_politics/explainer/1999/09/what_is_money_laundering.html* accessed 18 Feb 2022).

[14] Shell companies have been identified by the FATF as risk area for legal practitioners. See the FATF RBA 'Guidelines for Legal Professionals' 23 October 2008 29 available at *http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf*. See also the FATF 'Misuse of corporate vehicles including trusts and company service providers 13 October 2006 available at *http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf* (both accessed 18 Feb 2022).

[15] Thus forming a complex mesh of transactions which cannot be traced back to the launderers.

[16] Refers to the laundering of money through the movement of goods. This can be done through overpricing or under-pricing of goods, as well as misrepresenting the quality and/or quantity of goods exported or imported. 'Trade Based Money Laundering' available at *http://www.fatf-gafi.org/topics/methodsandtrends/documents/trade-basedmoneylaundering.html* (accessed 18 Feb 2022).

[17] FATF website ibid.

with the introduction of large sums of money into the financial system, transfer of the same within the said systems, and ultimately outside the borders of the launderer's country/area of operation.

At this stage, the role of banks and other financial institutions is key, in carrying out their obligations to detect, flag and report activities suspected to be linked to money laundering. The said institutions' roles range from scrutiny during account openings, large transactions, small interrelated transactions, lotteries and insurance transactions. [18]

1.2.2 Layering

This is where numerous transactions are performed to obscure the source of 'dirty' money. At this stage, the laundering intends to conceal and cover the tracks created during placement, in terms of documentation. Hence, the funds are moved through numerous banks in different countries and offshore accounts, making them difficult to trace. This may be done through false transactions and invoices, as well as the purchase of stocks/shares, activities that may seem legitimate investments.[19]

The transactions are preferably undertaken in jurisdictions or locations with poor anti-money laundering systems that are referred to as off-shore locations. The destinations of the funds may however be developed economies that provide solid business infrastructure. [20]

1.2.3 Integration

Integration is where the money is injected back into the legitimate economy, thus making it look like 'clean' money.[21] Here, the illegally acquired funds will be intermingled with legitimately acquired funds and returned to the launderer to use legally for their personal needs. The launderers at this stage may purchase items like jewellery, cars, paintings, gold, casino chips and foreign currencies, and obtain valid documentation. [22] Purchases of property

[18] Aleksoski S. & Aleksoski O. (2015).
[19] Aleksoski S. & Aleksoski O. (2015).
[20] FATF website ibid.
[21] South Africa Law Reform Commission 'Money Laundering and related matters' Report, ibid.
[22] Aleksoski S. & Aleksoski O. (2015).

may also be made in other economies, both developed and developing, without raising queries as to the source of the said funds, thanks to the sophisticated methods used at the layering stage.

2.0 The Legal framework of anti-money laundering laws in Kenya

2.1 Historical Background

The term money-laundering was first used in the USA in the 1970s, to refer to bank secrecy laws. The Bank Secrecy Act[23] was enacted to prevent banks from being used by criminals to hide their ill-gotten funds. The said Act required financial institutions to keep records and make reports of suspicious activities involving their customers.[24] Money- laundering was however not criminalised until 1986, following the enactment of the Money Laundering Control Act of 1986 in the USA. This Act imposed both criminal and civil sanctions for failing to detect or prevent money laundering.[25]

These developments in the USA set the stage for the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention), [26] which was the first international instrument to sanction dealing with proceeds of drug offences. The Vienna Convention set out activities and conduct that constitutes money laundering (without using the term) and urged member states to come up with laws to criminalise the said conduct.[27]

Following the Vienna Convention was the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg

[23] Also known as the Currency and Foreign Transactions Reporting Act, 1970 (31 U.S.C. 5311 et seq) USA enacted in 1970.

[24] Federal Insurance Deposit Corporation Manual of Examination Policies. Available at *https://www.fdic.gov/regulations/safety/manual/section8-1.pdf* (Accessed 18 Feb 2022)

[25] Pub. L. 99-570—OCT. 27, 1986; 18 U.S.C. ss.1956 and 1957.

[26] 1988. Entered into force on 11 November 1990 and Kenya ratified it on 19 October 1992
https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6 (accessed 18 Feb 2022).

[27] Article 1(b) and (c) of the Convention, ibid.

Convention).[28] This Convention promoted international collaboration in combating money laundering, thereby advancing jurisdiction to combat money laundering beyond the country of the offence. It urged states to legislate and criminalise activities leading to money laundering as well as promote confiscation of illegally obtained assets. [29]

The United Nations Convention against Transnational Organised Crime and the Protocols Thereto (Palermo Convention) [30] subsequently proscribed money laundering, by urging states in mandatory terms to legislate and criminalise the laundering of proceeds of crime. Key to highlight also was the International Convention for the Suppression of the Financing of Terrorism (Anti-Terrorism Convention),[31] which deals with anti-terrorism measures.

2.2 International Obligations with regards to money-laundering

Of the above-mentioned Conventions, Kenya has ratified the Vienna Convention, the Palermo Convention and the Anti-Terrorism Convention. These Conventions set the stage for domestic legislation in Kenya against money laundering, and are applicable in Kenya as part of Kenyan law. This is under Article 2(5) and (6) of the Constitution of the Republic of Kenya, [32] which provides for the application of international rules, conventions and treaties as part of the laws of Kenya.

[28] Passed by the European Council on 8th November 1990.

[29] Kenya is not a member of FATF but is bound by its recommendations as a member of the international community. Lack of cooperation with FATF may lead to economic sanctions against a country.

[30] Entered into force on 25 December 2005 ratified by Kenya on 5th January 2005. Available https://www.unodc.org/pdf/convention_1988_en.pdf (accessed 18 Feb 2022).

[31] Entered into force on 10 April 2002 and ratified by Kenya on 27 June 2003. Available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en (accessed 18 Feb 2022).

[32] Entered into force on 17th August 2010. Available http://extwprlegs1.fao.org/docs/pdf/ken127322.pdf (accessed 18 Feb 2022).

There are several international and regional bodies which were established to combat money- laundering, one of which is the Financial Action Task Force (FATF). FATF is an inter-governmental body established in 1989 by the G-7 countries and the European Union, to set standards to promote the effective implementation of anti-money laundering measures and countering of financing of terrorism (CFT).[33] FATF comes up with standards in the form of recommendations on AML and CFT measures to be implemented by states.[34]

FATF's goals, include prevention, to deter criminals from utilising individuals and institutions to convert or move proceeds of crime; and enforcement, which involves the criminalisation of money laundering leading to the investigation, prosecution, conviction and punishment of offenders. In addition, it ensures international cooperation which ensures that cross-border crime does not go unpunished. [35] Even though these recommendations constitute non-binding obligations, they are usually enforced against all states, both members and non-members of the FATF.[36] Although Kenya is not a member of FATF, it is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), which is a regional body formed to combat money laundering by implementing the FATF standards. The ESAAMLG conducts periodic mutual evaluations or

[33] A recent addition to the mandate of the FATF is the combating of financing of proliferation of weapons of mass destruction. *See http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-UNSCRS-Prolif-WMD.pdf* (accessed 18 Feb 2022).

[34] FATF 40+9 recommendations on measures to counter money laundering and the financing of terrorism. 2012 revision available at *http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html* (accessed 18 Feb 2022).

[35] Goredema, C. (2007). Confronting money laundering in South Africa: An overview of challenges and milestones in Goredema, C. (2007) Confronting the Proceeds of Crime in Southern Africa: An Introspection. ISS Monograph series No. 132 (2007) 75-76. Hereafter Goredema C (2007).

[36] The United Nations Security Council in Resolution 1617 of 2005 which urged all states to implement the FATF recommendations. The FATF enforces AML and CFT against non-member states by the imposition of economic sanctions by member states against non-compliant states.

reviews of the status of member countries on promoting anti-money laundering and counter-terrorism financing regimes in their jurisdictions. Member countries are required to give yearly reports on steps taken to address deficiencies in combating money laundering and terrorism financing. [37]

2.3 Domestic Laws on Money Laundering in Kenya

In addition to and in compliance with its international obligations, Kenya has enacted laws to deal with money laundering. The major legislation in this respect is the Proceeds of Crime and Anti-Money-laundering Act No. 9 of 2010 (POCAMLA). The POCAMLA does not define the term 'money laundering', but it establishes offences that constitute money laundering under several provisions; which are set out below:-

Section 3, criminalises *transacting* with and *concealing* property which constitutes proceeds of crime among other acts. It provides as follows:

> *A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and—*
> *(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or*
> *(b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to— (i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or (iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.*

[37] See the mutual evaluation reports available on the ESAAMLG via https://www.esaamlg.org/index.php/Countries/readmore_members/Kenya (Accessed 18 Feb 2022).

The term 'proceeds of crime' is defined under Section 2 of POCAMLA as:

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

Section 4 on the other hand criminalises the *use* of proceeds of crime, by providing as follows:

> *A person who— (a) acquires; (b) uses; or (c) has possession of, property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.*

Section 5 then criminalises *wilfully failing* to comply with monitoring and reporting obligations by a reporting institution or officer. Other offences include financial promotion of an offence (Section 7), tipping off (Section 8), false representation (Section 9), malicious reporting (Section 10) Conveyance of monetary instruments (Section 12), misuse of information (Section 13) and hindering a person exercising powers or carrying out duties under the Act (Section 15).

The penalties for the offences above-mentioned are provided for in Section 16 of POCAMLA. The penalties are divided between those for natural persons and corporate bodies. The penalties range from fines up to 5 million shillings in default up to 14 years imprisonment for natural persons; and from 25 million or the value of the property involved, for bodies corporate. Section 16(6) provides for separate prosecution of an officer, director or secretary of a body corporate who connives to commit an offence with the body corporate. Hence both such officer and the body corporate are liable to face

charges for money laundering and related offences. Notably, the highest penalties provided for in the Act relate to the offences directly termed to constitute money laundering, which is proscribed under Sections 3, 4 and 7 of the POCAMLA.

The POCAMLA also establishes two bodies, one being the Financial Reporting Centre (FRC) and the other being the Asset Recovery Agency (ARA). The FRC is established under Section 21 of POCAMLA, and its mandate is to assist in identifying proceeds of crime and overall combating money laundering and financing of terrorism. It does this through sharing of information and promoting international best practices for combating money laundering.[38] The FRC is the body to which suspicious transactions must be reported by reporting institutions, [39] which per the Act are financial institutions and designated non-financial businesses and professions.[40]

The POCAMLA has conferred powers to the FRC, which include the power to issue rules and directives to reporting institutions,[41] to impose both civil penalties and to take administrative action against reporting institutions which do not comply with the act.[42] The Act has also empowered the FRC to supervise and regulate reporting institutions, as well as to obtain search warrants and orders to enforce compliance with the Act.[43] The Act has placed obligations on reporting institutions that include customer identification, maintaining customer records, maintaining internal reporting procedures and registering with the FRC, in addition to reporting suspicious transactions.[44]

The ARA on the other hand is established under Section 53 of the Act, and it is mandated to recover property acquired as a direct or indirect benefit of

[38] Section 23 of the Proceeds of Crime and Anti-Money laundering Act No. 9 of 2009 (POCAMLA)
[39] Section 24 POCAMLA
[40] Section 2 POCAMLA
[41] Section 24A POCAMLA
[42] Section 24B and C POCAMLA
[43] Section 37 and 39 POCAMLA
[44] Sections 44, 45,46, 47 and 47A respectively

a money laundering or predicate offence. This can be done through confiscation and restraint orders, provided for in Section 56 of POCAMLA.[45] Confiscation proceedings can either be after an offender is tried and convicted (referred to as conviction-based forfeiture)[46] or without conviction of an offender (referred to as non-conviction-based forfeiture).[47] In both of these proceedings, the ARA is a major actor, having been empowered by POCAMLA to perform all acts relating to asset recovery.

Domestic laws in Kenya have also legislated against predicate offences which usually produce funds that are laundered. These Acts include the Prevention of Terrorism Act (POTA) No. 30 of 2012,[48] the Anti-Corruption and Economic Crimes Act (ACECA) No. 3 of 2003,[49] and the Narcotics and Psychotropic Substances (Control) Act No. 4 of 1994,[50] the Penal Code Cap 63 Laws of Kenya[51] among others. It is worth noting that in Kenya and the international scene, the offence of money laundering covers not only the perpetrator of the predicate offence but also other persons who participate in the concealing, disguising or hiding of the proceeds of crime; even if they had nothing to do with the predicate crime. [52]

[45] These are Civil Proceedings.
[46] Section 61 POCAMLA
[47] Section 82 POCAMLA
[48] Sections 5-8 provide for offences regarding property used or linked to terrorism acts.
[49] Part V (Sections 38-48) provides for offences under the ACECA as well as the attendant penalties. Section 55 is also note-worthy, providing for forfeiture of unexplained assets.
[50] Section 7 provides for conviction-based forfeiture of land on which prohibited plants have been cultivated, while Section 36 provides for forfeiture of proceeds of crime on application by the Director of Public Prosecutions.
[51] The law that provides for the majority of offences in Kenya, including but not limited to offences with economic benefit such as theft, burglary, extortion, fraud and obtaining by false pretences. Sections 24(f) and 29 of the Penal Code provide for forfeiture as a form of punishment for offences.
[52] Camp, P. (2009). Solicitors and Money Laundering: A Compliance Handbook (3rd ed). Law Society (Great Britain) 4. Hereafter Camp P (2009).

3.0 The gains and opportunities

Kenya has made marked developments in establishing a successful anti-money laundering and Counter-Financing of Terrorism regime. One of the major gains includes a legal framework that supports AML and CFT efforts. Enforcement however remains a challenge.

In the year 2010, Kenya had been listed on the FATF's grey list as a potential money-laundering hub. This was attributed to the lack of counter-terrorism law and a lack of a Financial Intelligence Unit.[53] Subsequently, Kenya took steps to reform its legal and regulatory anti-money laundering framework, leading to its removal from the FATF's monitoring list in the year 2014.[54] Specifically, Kenya enacted the Prevention of Terrorism Act No. 30 of 2012 and established the Financial Reporting Centre by amending the POCAMLA. It has also undertaken periodic reviews of these and other laws as recommended by the annual mutual evaluations by the ESAAMLG.

It has been argued, however, that a lot more needs to be done for Kenya to achieve the ideal anti-money laundering regime. Kenya has been identified as vulnerable to money laundering, as per the 2019 International Narcotics Control Report.[55] The report identified the use of unregulated cash transfers including mobile money and '*hawaladars'*[56] to transfer large amounts of money as rendering it difficult for the government and financial institutions to flag and track suspicious transactions.

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[53] Financial Services Volunteer Corps, 2011-2014 Report on Kenya, available at https://www.fsvc.org/wp-content/uploads/2018/01/FSVC-AML-Success-Story-Kenya-2011-2014.pdf (Accessed 18 Feb 2022)

[54] FATF website, available at *http://www.fatf-gafi.org/countries/a-c/argentina/documents/fatf-compliance-june-2014.html* (Accessed 18 Feb 2022).

[55] US Department of State Report Vol. II available *at https://www.state.gov/wp-content/uploads/2019/03/INCSR-Vol-INCSR-Vol.-2-pdf.pdf* (Accessed 18 Feb 2022)

[56] Persons who provide money transfer services without actually moving money under the hawala system. The hawala system is based on trust and is referred to as 'underground banking'. This system is in wide usage in the Islamic countries. Information obtained from *https://www.investopedia.com/terms/h/hawala.asp* (Accessed 18 Feb 2022).

The report identified good governance and combating corruption as key areas to be addressed if the country is to achieve an effective and efficient Anti-money laundering regime. Another challenge highlighted in the Kenya ESAAMLG report covering 2016-2017 was the failure to include lawyers, notaries, other independent legal professionals as well as Trust and Company Service Providers as reporting institutions. This deficiency was still noted in the subsequent ESAAMLG report covering 2017-2018, where it was noted that the issue had not been sufficiently covered, and the same was carried forward to the next reporting period.

In Kenya, banking secrecy is upheld, and investigators must obtain court orders to obtain bank records. According to the above-mentioned report by the United States Department of State, the confidentiality of this process is often compromised, tipping off the launderers, who then move the funds. In some cases, given the drastic effect of freezing/ restraint orders, the courts usually deny *ex-parte* orders to officers who must then notify the suspects of their application and invite them to make their reply. Such action, even if well-intentioned will ultimately sabotage effects to recover such assets, as once notified, the suspects will move the funds. Provisions such as Section 22 of the Narcotics and Psychotropic Substances Act are progressive in this regard, as it allows the Director of Public Prosecutions to make *ex-parte* restraint orders against a suspect of a Narcotics Offence.[57]

It is notable that despite having a poverty index of 36.1% in the year 2018,[58] it was also reported that Kenya had been ranked fourth in making dollar millionaires, within the same period, between 2016 and 2019.[59] This growth rate has been attributed to the government's policies that made it possible for

[57] Act No. 4 of 1994 ibid.

[58] UNDP Kenya Annual Report 2018, Available at *file:///C:/Users/user/Downloads/UNDP%20Kenya%20AR%202018_INTERACTIVE.pdf* (Accessed 18 Feb 2022).

[59] See the Knight Frank Wealth Report-2019, available at https://content.knightfrank.com/resources/knightfrank.com/wealthreport/2019/the-wealth-report-2019.pdf, the numbers have tapered off as is noted in the 2020 report, but the growth rate of high net worth individuals remains. The 2020 report is available at https://content.knightfrank.com/content/pdfs/global/the-wealth-report-2020.pdf (Accessed 18 Feb 2022).

a few individuals to thrive on bagging tenders, while the drop in numbers between 2018 and 2020 has been attributed partially to the crackdown on corruption.[60]

It has been said that behind every great fortune, there is a crime.[61] This seems to be true in the Kenyan situation, given the relationship between millionaire-minting and anti-corruption measures. The anti-money laundering and counter financing of terrorism measures adopt this view, raising suspicion when there are sudden, unexplained riches. Given their strategic positioning, therefore, all institutions handling cash and other valuable property for clients are by law required to be especially careful 'when confronted with complex, unusual large transactions'.[62]

The reporting institutions have been listed on the Financial Reporting Centre website to include, commercial banks, microfinance institutions, foreign exchange bureaus, stockbrokers, fund managers, casinos, non-governmental organisations, accountants, real estate agents, motor vehicle dealerships, precious metal and precious stones dealers among others.[63] Failure of the said institutions, to detect suspicious transactions has been identified as one of the major challenges to tackling money laundering.[64]

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[60] Omondi D. Article in The Standard Newspaper, available at https://www.standardmedia.co.ke/entertainment/local-news/2001363278/baffling-statistics-on-rise-in-number-of-kenyan-dollar-millionaires (Accessed 18 Feb 2022).

[61] Honoré de Balzac, a French novelist and playwright (1799 – 1850) quoted by Lilley P (2006) ix.

[62] See FATF Recommendation 11 available *at http://www.un.org/en/sc/ctc/docs/bestpractices/fatf/40recs-moneylaundering/fatf-rec11.pdf* (accessed 18 Feb 2022).

[63] Available at http://frc.go.ke/registration/reporting-institutions.html (Accessed 18 Feb 2022)

[64] Niloloska, S. & Simonovski, I. (2012). Role of Banks as an entity in the system for preventing money laundering in Macedonia. Procedia-Social and Behavioural Studies Vol 44 453-459 available at https://reader.elsevier.com/reader/sd/pii/S1877042812011718?token=10D21B682391D84717663CADF2586D1496813908D2DEE63D7E545A3A2C21EE8D3786D223B14295F685CEF0AF37E9FD90&originRegion=eu-west-1&originCreation=20220411125639 (accessed 1 March 2022).

Other challenges have been identified as bribery, tax evasion, weak anti-money laundering regulations, absence of automatic tracking systems, lack of incentive for financial institutions to report suspicious transactions and liberalisation of banks without sufficient checks and balances.[65]

4.0 The role of lawyers in combating money laundering – Lessons from the South African attorney

Lawyers are susceptible to money laundering through designing corporate vehicles, buying and selling of assets, and financial transactions among other services that they offer.[66] The increase in technology especially electronic transactions through Automatic Teller Machines and online banking render customer identification, record-keeping and reporting of suspicious transactions difficult.[67] Rogue customers do many transactions that fall just below the reporting obligations with different financial institutions, thus making it difficult for the financial institutions to detect illegality. Lawyers would detect such conduct better than financial institutions.[68]

Unlike in South Africa where attorneys are listed as reporting institutions, [69] lawyers in Kenya are not listed as such. This is despite that the ESAAMLG has twice recommended ESAAMLG such inclusion, through its mutual evaluation reports of 2016-2017 and 2017-2018. Attempts to include lawyers in Kenya as reporting institutions were undertaken in 2007, 2018 and 2019, without success.[70] The amendment to POCAMLA that sought to introduce the obligation faced opposition from Advocates who lobbied against it in parliament, leading to its failure to pass. The major point raised by

[65] Gilmour, N. (2016). Understanding the Practices Behind Money Laundering- A Rational Choice Interpretation. International Journal of Law, Crime and Justice 1-3.
[66] Pambo, K.O. (2020). Designating Lawyers as Reporting Entities under the Kenyan Anti-Money Laundering Regime. Journal of Money laundering Control, Nairobi 23-3 637-649. Hereafter Pambo KO (2020). Available at https://doi.org/10.1108/JMLC-07-2019-0063 (Accessed 1 March 2022).
[67] Ibid page 640.
[68] Ibid page 640.
[69] See Schedule 1 of Financial Intelligence Centre Act No. 38 of 2001 Laws of South Africa (FICA) that came into effect on 1 July 2003.
[70] Pambo KO (2020) page 637.

parliamentarians was the fear that the said listing would affect advocate/client privilege and would constitute double reporting.[71]

In South Africa, attorneys are considered important professionals as far as anti-money laundering efforts are concerned, being vulnerable to be used-whether knowingly or unknowingly-to facilitate complex money laundering transactions. This led to their being recognised among the accounting institutions, with duties in the fight against money laundering and financing of terrorism. [72] Their duties include the following:

4.1 Duty to report suspicious transactions

Attorneys in South Africa are under a duty to report to the Financial Intelligence Centre (FIC)[73] any unusual or suspicious transactions that could indicate the involvement of their clients in money laundering or terrorist financing.[74] Such a report should be in a prescribed format and should contain details of the client and/or the suspicious transaction.[75] The report must be made within 15 days of knowledge of facts raising the suspicion.[76] Generally, suspicion as envisaged by money laundering legislation does not have to be supported by evidence of money laundering.[77] It is enough that

[71] See Mwere D, (2019). MPs Oppose Proposed Law on Financial Reporting by Lawyers, Daily Nation 18 September 2019 available at https://www.nation.co.ke/kenya/news/mps-oppose-proposed-law-on-financial-reporting-by-lawyers-204954 (Accessed 18 Feb 2021).

[72] See the speech of the director of the FIC Mr Murray Mitchell during the signing of memoranda of understanding between the FIC and the law societies of South Africa on 25 July 2013 available at *https://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/LSSA%20Media%20Statement%20%20-%20final.pdf* (accessed 18 Feb 2021).

[73] The Financial Intelligence Centre is a government public administration body established under s. 195 of the constitution of South Africa and by s. 2 of FICA. Its purpose as per s. 3 FICA is to combat money laundering and terrorist financing activities in South Africa.

[74] S. 29(1) FICA.

[75] R. 22 & 23 Regulations in Terms of the Financial Intelligence Centre Act Gazette No. 7541 of 2002. Hereafter FICA Regulations.

[76] R. 24 FICA Regulations.

[77] Camp P (2009), 163 quoting the UK Law Society's Anti-money Laundering Practice Note of October 2012 available at *http://www.lawsociety.org.uk/advice/practice-notes/aml/* (accessed 18 Feb 2021).

the circumstances in question merely suggest the existence of money laundering or terrorist financing[78], probably due to the involvement of unusual amounts.[79] The involvement of a large sum of money, especially where the same exceeds the normal range of the client's business should trigger suspicion by an attorney.[80]

Suspicion may also be raised by the nature of a client's instruction, for example where a client gives instructions to a lawyer to set up a company in an off-shore centre, whose business sense is not apparent.[81] Mauritius is one such centre, where foreigners can set up companies and investments while incurring low tax obligations.[82] While offshore companies are not illegal per se, they have been for long been used by money launderers,[83] who establish shell companies to conceal laundering activities.

The attorney may only fail to report such a transaction/instructions where he or she is satisfied that its purpose is not to facilitate money laundering.[84]

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[78] S. 29(2) FICA & s. 4(3) Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 Laws of South Africa (POCDATARA).

[79] Suspicion-based and threshold-based reporting. See Van Zyl F 'South Africa money laundering legislation –the way ahead' Journal of Money Laundering Control (1997) Vol. 1 Iss. 1 102.

[80] Schlenther, B (2012). The taxing business of Money Laundering: South Africa. Journal of Money Laundering Control Vol. 16 No. 2 134; quoting British Bankers' Association (2008) Money Laundering and Terrorist Financing Reporting Officer's Reference Guide 2008/9 BBA Enterprises (MHA Group), London.

[81] S. 29(1) (*a*) (*ii*) of FICA lists transactions with no apparent business purpose as suspicious transactions.

[82] See 'Mauritius as an offshore business centre' available at http://www.maurinet.com/busoff1.html (accessed 18 Feb 2021). Information on how to set up an offshore company in Mauritius is readily available on the internet. See *http://www.offshorecompanyexperts.com/en/offshorecompany/mauritius-offshorecompany.html* (accessed 18 Feb 2021).

[83] Reuter, P. & Truman, E. M (2009). Chasing Dirty Money: The Fight against Money Laundering (2004) 30-31. Hereafter Reuter and Truman (2004). See also Camp P (2009) 169.

[84] Camp P (2009) 5 & 164-5 discusses the formation of (overseas) subsidiaries where there seems to be no commercial purpose as well as purchase of companies using suspect funds as examples of instances where particular caution should be taken by attorneys.

Under the Financial Intelligence Centre Act, No. 38 of 2001 Laws of South Africa (FICA), failure to report such suspicion constitutes an offence and attracts a fine or a prison sentence.[85]

Although reporting institutions are not explicitly required to establish their clients' sources of funds or net worth[86] they should take steps to ascertain the legitimacy of funds, especially in transactions involving large amounts of cash.[87]

4.2 Customer due diligence

Attorneys in South Africa are also under a duty to obtain and verify the identity of clients with whom they deal.[88] They must obtain sufficient identification of all clients at the beginning of business transactions as well as obtain all relevant information where a transaction poses a high risk of facilitating money laundering.[89]

4.3 Duty to keep records

South African attorneys are required by law to keep records of all transactions carried out on behalf of their clients,[90] which include the identity of the client and details of all transactions carried out on behalf of the said client. Such records must be kept for at least 5 years[91] and should be availed to officials of the FIC if so requested.[92] Failure to keep the said records constitutes a crime which attracts a prison sentence of up to 15 years or a fine of up to R10 million(over Kshs 71 million).[93]

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[85] S. 52 FICA. S. 68 provides the penalty as a prison sentence of 15 years or a fine of R 10 million.
[86] De Koker, L. (2002). Money Laundering Trends in South Africa. Journal of Money Laundering control Vol. 6 No. 1. See also Camp P (2009) 19.
[87] R. 2193 FICA Regulations provides a requirement to obtain information on the source of funds involved in a transaction suspected to involve money laundering. See also Camp P (2009) 5.
[88] S. 21 FICA.
[89] R. 21(2) FICA Regulations.
[90] S. 22 FICA. The failure to keep such records is an offence according to s. 46(2) of FICA and it attracts a penalty of imprisonment or a fine as per s. 68 FICA.
[91] S. 23 FICA.
[92] Ss. 26 & 27 FICA.
[93] Ss. 47 & 68 FICA.

Where an attorney fails to provide such records, the FIC is enabled to obtain the same pursuant to an order of the court against the particular law firm.[94] Such records are then admissible in court, both in proceedings against the money-launderer and against the lawyer who aids such laundering.[95]

5.0 Attorney-Client Privilege in light of the reporting duties of attorneys

The lawyer-client privilege is a component of the right to a fair trial as entrenched in the bill of rights in the constitution of Kenya. The right to a fair trial as provided in Article 50(2) includes the right of an accused person to choose his counsel or to have counsel appointed for him by the state at the state's own expense where substantial injustice would otherwise result.[96] This principle is protected by common law as well and is an indispensable tool in upholding the rights of accused persons. Where a client contacts the attorney to obtain legal advice, such communication is subject to legal professional privilege.[97]

Section 134(1) of the Evidence Act Cap 80 Laws of Kenya prohibits advocates from disclosing advocates-client communication, both in terms of documentation as well as advice rendered. It is also a requirement of the Law Society of Kenya Advocates Code of Conduct that communication between an advocate and his/her client should not be disclosed.[98] Legal professional privilege has also been upheld by the ACECA,[99] in its Section 28(10). Section 18 of the POCAMLA of Kenya protects privileged communication between an advocate and his/her client. Such communication can only be disclosed pursuant to a court order and in furtherance of an investigation. Section 137 of the Evidence Act provides for confidentiality of communications between an advocate and his client.

[94] S. 35 (4) FICA provides that such an order may be made ex-parte.
[95] S. 39 FICA.
[96] Art 50(2)(h).
[97] S v Kearney 1964 (2) SA 495 (A) at 499–500.
[98] Rule 7 of the Law Society of Kenya Advocates Code of Conduct 2016 (Available at http://kenyalaw.org/caselaw/cases/view/118365/ accessed on 19/2/2021)
[99] See note 49 ibid.

The doctrine of confidentiality is an equitable one that gives rise to an obligation not to disclose the information or use it for unauthorised purposes.[100] It has been argued that requiring lawyers to report requirements is cumbersome, costly and unworkable, constitutes double reporting and equates to transferring law enforcement obligations to advocates.[101] In addition, the benefit of confidentiality outweighs any negative effects on society and ensures high-quality legal advice.[102]

Legal professional privilege and confidentiality do not however protect communications made in furtherance of illegality. An advocate may disclose such communication to prevent the commission of a crime.[103] This position was upheld in the case of *Mohamed Salim Balala & Anor Vs Tor Allan Safaris Ltd,*[104] where the Court of Appeal held that advocate-client privilege can only be breached where the communication between an advocate and the client furthers an illegal purpose or where the advocate observes that the client used the privilege to commit a crime. It is also not protected where it goes against the public interest.[105]

Similarly, in South Africa, lawyer-client privilege is a component of the right to a fair trial as entrenched in the bill of rights in the constitution of South Africa. It includes the right of an accused person to choose his counsel or to have counsel appointed for him by the state at the state's own expense.[106] In the case of *S v Safatsa & others*[107] it was noted that privilege is a fundamental right to which inroads should not be liberally made. This has also been

[100] Njaramba, E.G. (2020). The Conflict Between Anti-Money Laundering Reporting Obligation And The Doctrine of Confidentiality in Kenya. Journal of Money Laundering Control Vol. 24 No. 3, pp. 607-620. https://doi.org/10.1108/JMLC-05-2020-0055.
[101] Ibid page 614.
[102] Ibid page 616.
[103] Section 134(1(a) &(b) Evidence Act Cap 80 Laws of Kenya
[104] (2015) eKLR.
[105] Njaramba EG (2020) 609.
[106] S. 35 (2) (*b*) & (*c*) Constitution of South Africa Act No. 108 of 1996 (Available at https://www.gov.za/sites/default/files/images/a108-96.pdf accessed on 19/2/2021). See also s. 35(3) (*f*) & (*g*) FICA.
[107] 1988 (1) SA 868 (A) 643-4.

provided in FICA, which excludes the duty of advocates to report where communications are protected by legal professional privilege. This is in the case of ongoing litigation, or for advice concerning contemplated litigation.[108]

South African law places an obligation to attorneys to be careful when advising clients as such advice could facilitate the smuggling of cash. Due to increased scrutiny of large cash amounts by financial institutions, money launderers [and terrorist financiers] result to smuggling of cash across borders to avoid detection,[109] and this can be facilitated by advice from attorneys to carry amounts falling just below the reporting threshold, which is illegal under South African law.[110] It is also illegal for an attorney to give legal advice while knowing or suspecting that this advice could facilitate the acquisition and dealing in proceeds of crime or facilitating terrorism.[111]

Both in the Kenyan and South African situations, professional privilege is sacred; but does not entirely waive an attorney's duties with respect to the combating of money laundering and terrorist financing. South African law is however specific as to the duty of the lawyer when a money laundering crime has been, is being or is likely to be committed, and the consequences of failing to uphold the said duty. A lawyer who fails to report a suspicious transaction and who gives the advice to facilitate money laundering is likely to incur personal criminal liability.

In Kenya, the POCAMLA provides for reporting any conveyance to or from Kenya of money or a monetary instrument of $10,000 or more. It doesn't however place an obligation on advocates to avoid giving advice that allows avoidance of reporting obligations. It also does not impose reporting obligations on them. Advocates in Kenya have not however been left to their own devices, as there are obligations imposed on the Kenyan lawyer to combat money-laundering imposed on them both by the Law Society of

[108] Section 37(2) FICA
[109] Reuter & Truman (2004) 28.
[110] Transactions carried out with an intention to avoid reporting obligations are sanctioned by s. 29(1) (*a*) (*iii*) FICA.
[111] S. 29(2) FICA. S. 4(3) POCDATARA. Also Camp P (2009) 8.

Kenya Advocates Professional Code of Ethics, as well as the Law Society Anti-Money Laundering Guidelines for legal practitioners. [112] These guidelines impose similar obligations as on other reporting institutions to combat money laundering.

It is therefore this paper's view that no harm would be done by a legal provision formalising the obligations of advocates, by making them reporting institutions. The objections raised to the POCAMLA Amendment Bill to make advocates reporting institutions should be weighed against the possible gains. As has been discussed above, such inclusion would not affect legal professional privilege, which cannot be used to conceal or facilitate any crime, including money laundering. The limits of such reporting would be stipulated, to only apply to transactions that exceed a certain limit, and those that raise suspicion to the advocate, given previous dealings with the particular client.[113] If anything, it would still be upon the advocate to exercise his judgment to determine what he/she should report.

On the second concern advocates' inclusion would constitute double reporting, this paper posits that the move would assist anti-money laundering and counter financing of terrorism efforts. It would make it impossible for offenders to escape detection, and close the gap where other institutions fail in their duty to report. Advocates should not rely on the reporting obligations of other players, including financial institutions, accountants and real estate agents, but should themselves join the efforts to combat money laundering.

6.0 Conclusion

Even if Kenya has made marked and considerable progress in anti-money laundering efforts, there remains a duty to enforce the raft of its laws and regulations against money laundering and counter financing of terrorism. In

[112] Available at *https://lsk.or.ke/Downloads/LSK%20AML-CFT%20Guidelines%20-%20Draft%20MWB%20FINAL%20Rev%20Clean.pdf* (Accessed 19/2/2021)

[113] Ole Maika S-Director General the Financial Reporting Centre, Role of Lawyers in Curbing Money Laundering, Daily Nation 24 August 2019 Available at *https://www.nation.co.ke/kenya/blogs-opinion/opinion/role-of-lawyers-in-curbing-money-laundering-197598* (Accessed 18 Feb 2021).

combating those challenges, and considering the vulnerabilities presented by the role of advocates, it is ideal that they are included as reporting institutions if the war against money laundering is to be won.

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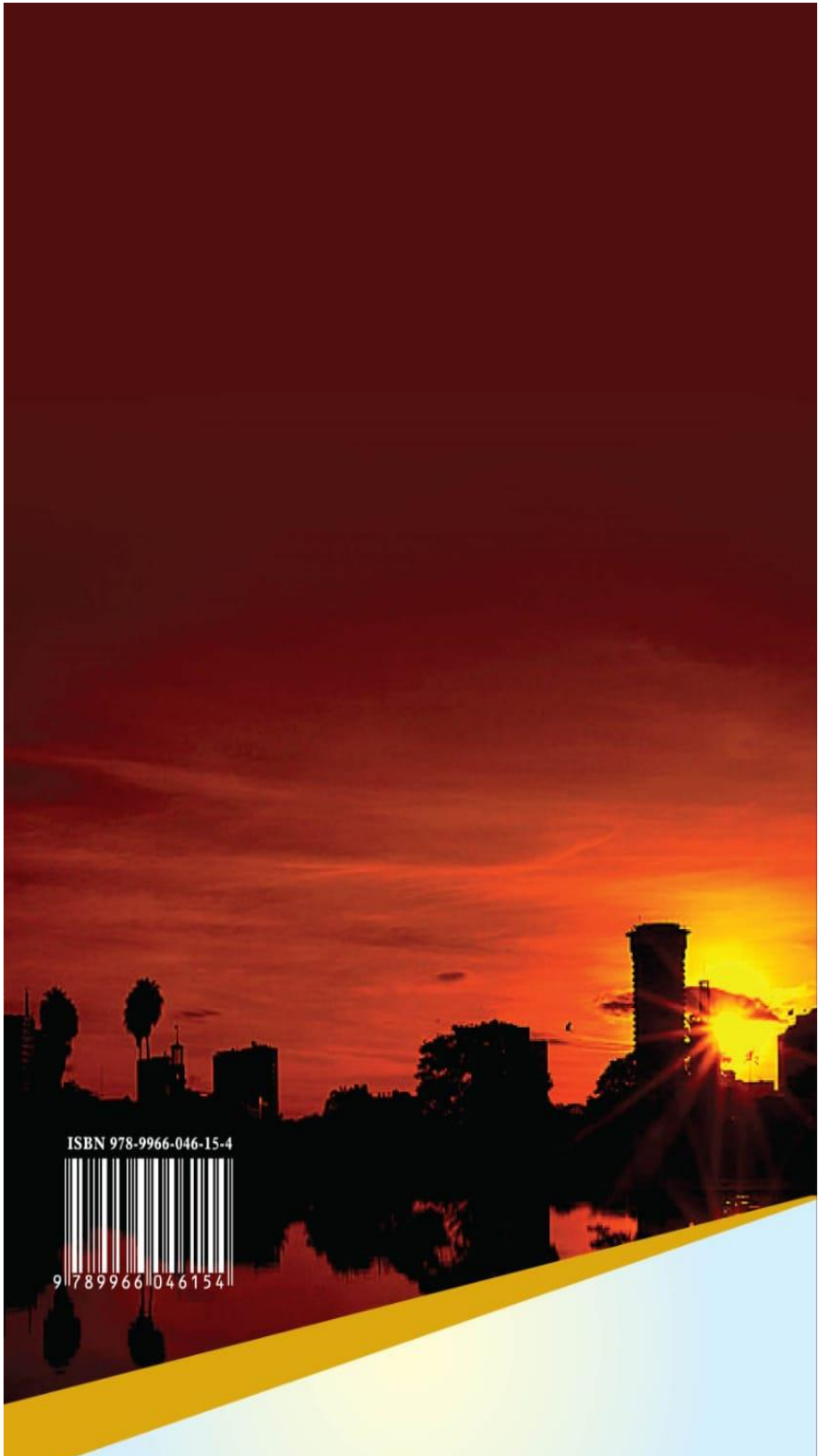
ISBN 978-9966-046-15-4