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PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT

NO. 9 OF 2009

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PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT

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NO. 9 OF 2009

PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT

[Date of assent: 31st December, 2009.]

[Date of commencement: 28th June, 2010.]

An Act of Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes

[Act No. 9 of 2009, L.N. 89/2010, Act No. 51 of 2012, Act No. 14 of 2015, Act No. 3 of 2017]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Proceeds of Crime and Anti-Money Laundering Act, 2009.

2. Interpretation

In this Act, unless the context otherwise requires—

“**account**” includes any facility or arrangement by which a reporting institution does any one or more of the following—

- (a) accepts deposits of monetary instruments;
- (b) allows withdrawals of monetary instruments or transfers into or out of the account;
- (c) pays cheques or payment orders drawn on a financial institution or collects cheques or payment orders on behalf of any person;
- (d) supplies a facility or arrangement for a safety or fixed term deposit box;

“**accounting officer**” means an accounting officer appointed under section 17 of the Government Financial Management Act, 2004 (No. 5 of 2004);

“**affected gift**” means any gift made by the defendant at any time, if it was a gift of property—

- (a) received by that defendant in connection with an offence committed by him or any other person; or
- (b) any part thereof, which, directly or indirectly represents, in that defendant’s hands, the property which that person received in that connection with an offence:

Provided that any such gift was made on or after the commencement of this Act;

“Agency” means the Assets Recovery Agency established under section 53(1);

“Agency Director” means the Director of the Agency appointed under section 53(2);

“authorised officer” means—

- (a) a police officer;
- (b) an officer of the department of the Kenya Revenue Authority for the time being responsible for matters relating to customs;
- (c) Agency Director; or
- (d) any person or class of persons designated by the Minister as an authorised officer to perform any function under this Act;

“Board” means the Anti-Money Laundering Advisory Board established under section 49;

“Centre” means the Financial Reporting Centre established under section 21;

“confiscation order” means an order referred to in section 61;

“court” means a court of competent jurisdiction;

“customs” or **“the customs”** means the customs department of the Kenya Revenue Authority;

“data” means representations, in any form, of information or concepts;

“defendant” means a person against whom a prosecution for an offence has been instituted, irrespective of whether that person has been convicted or not;

“designated non-financial businesses or professions” means—

- (a) casinos (including internet casinos);
- (b) real estate agencies;
- (c) dealing in precious metals;
- (d) dealing in precious stones;
- (e) accountants, who are sole practitioners or are partners in their professional firms;
- (f) non-governmental organisations;
- (g) such other business or profession in which the risk of money laundering exists as the Minister may, on the advice of the Centre, declare;

“Deputy Director” means the Deputy Director appointed under section 25;

“Director-General” means the Director-General appointed under section 25;

“document” means any record of information, and includes—

- (a) anything on which there is writing;

- (b) anything on which there are marks, figures, symbols, or perforations having meaning for persons qualified to interpret them;
- (c) anything from which sounds, images, writings or data can be retrieved, with or without the aid of anything else; or
- (d) a map, plan, drawing, photograph, video tape or similar thing;

“estate agency” in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, means doing any of the following acts—

- (a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or
- (b) negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;

“financial institution” means any person or entity, which conducts as a business, one or more of the following activities or operations—

- (a) accepting deposits and other repayable funds from the public;
- (b) lending, including consumer credit, mortgage credit, factoring, with or without recourse, and financing of commercial transactions;
- (c) financial leasing;
- (d) transferring of funds or value, by any means, including both formal and informal channels;
- (e) issuing and managing means of payment (such as credit and debit cards, cheques, travellers’ cheques, money orders and bankers’ drafts, and electronic money);
- (f) financial guarantees and commitments;
- (g) trading in—
 - (i) money market instruments, including cheques, bills, certificates of deposit and derivatives;
 - (ii) foreign exchange;
 - (iii) exchange, interest rate and index funds;
 - (iv) transferable securities; and
 - (v) commodity futures trading;
- (h) participation in securities issues and the provision of financial services related to such issues;
- (i) individual and collective portfolio management;
- (j) safekeeping and administration of cash or liquid securities on behalf of other persons;
- (k) otherwise investing, administering or managing funds or money on behalf of other persons;
- (l) underwriting and placement of life insurance and other investment related insurance; and
- (m) money and currency changing;

“fixed date”, in relation to a defendant against whom—

- (a) a prosecution for an offence has been instituted, means the date on which such prosecution has been instituted; or
- (b) a restraint order has been made against the defendant, means the date of such restraint order,

whichever is the earlier date;

“Fund” means the Criminal Assets Recovery Fund established under section 109;

“inspector” means a person designated as such under this Act;

“Kenya Revenue Authority” means the Kenya Revenue Authority established by section 3 of the Kenya Revenue Authority Act; (Cap. 469)

“Minister” means the Cabinet Secretary for the time being responsible for matters relating to finance, and all references in this Act to **“the Minister”** shall be construed accordingly;

“monetary instruments” means—

- (a) coins and paper currency designated as legal tender of Kenya or of a foreign country and which is customarily used and accepted as a medium of exchange in Kenya or the country of issue;
- (b) travellers' cheques, personal cheques, bank cheques, money orders or securities;
- (c) any other negotiable instrument which is in bearer form, or other form through which title passes upon delivery;

“money laundering” means an offence under any of the provisions of sections 3, 4 and 7;

“offence” in this Act, means an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya;

“person” means any natural or legal person;

“proceeds of crime” means 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;

“property” means all monetary instruments and all other real or personal property of every description, including things in action or other incorporeal or heritable property, whether situated in Kenya or elsewhere, whether tangible or intangible, and includes an interest in any such property and any such legal documents or instruments evidencing title to or interest in such property;

“realizable property” means—

- (a) property laundered;

- (b) proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences;
- (c) property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and
- (d) property of corresponding value;

“regulations” means regulations made under this Act;

“reporting institution” means a financial institution and designated non-financial business and profession;

“restraint order” means an order made under section 68;

“supervisory body” means a functionary or institution specified in the First Schedule, or such other functionary or institution as may be prescribed by the Minister;

“tainted property” in relation to an offence means—

- (a) any property used in, or in connection with, the commission of the offence;
- (b) any proceeds of the offence; or
- (c) any property in Kenya which is the proceeds of a foreign offence in respect of which an order may be registered, and when used without reference to a particular offence means tainted property in relation to an arrestable offence.

[Act No. 51 of 2012, s. 2, Act No. 14 of 2015, s. 48, Act No. 3 of 2017, s. 2.]

PART II – MONEY LAUNDERING AND RELATED OFFENCES

3. Money laundering

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.

4. Acquisition, possession or use of proceeds of crime

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.

[Act No. 51 of 2012, s. 3.]

5. Failure to report suspicion regarding proceeds of crime

A person who wilfully fails to comply with an obligation contemplated in section 44(2) commits an offence.

6. Defence

If a person is charged with committing an offence under section 3, 4 or 5, that person may raise as a defence the fact that he had reported a suspicion under the terms and conditions set forth in section 44 or, if the person is an employee of a reporting institution, that he has reported information pursuant to section 47(a).

7. Financial promotion of an offence

A person who, knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.

8. Tipping off

(1) A person who—

- (i) knows or ought reasonably to have known that a report under section 44 is being prepared or has been or is about to be sent to the Centre; and
- (ii) discloses to another person information or other matters relating to a report made under paragraph (i).

(2) In proceedings for an offence under this section, it is a defence to prove that the person did not know or have reasonable grounds to suspect that the disclosure was likely to prejudice a report made under subsection (1).

[Act No. 51 of 2012, s. 4.]

9. Misrepresentation

A person who knowingly makes a false, fictitious or fraudulent statement or representation, or makes, or provides, any false document, knowing the same to contain any false, fictitious or fraudulent statement or entry, to a reporting institution, or to a supervisory body or to the Centre, commits an offence.

10. Malicious reporting

Any person who wilfully gives any information to the Centre or an authorised officer knowing such information to be false commits an offence.

11. Failure to comply with the provisions of this Act

(1) A reporting institution that fails to comply with any of the requirements of sections 44, 45 and 46, or of any regulations, commits an offence.

(2) In determining whether a person has complied with any requirement of the provisions referred to in subsection (1), the court shall have regard to all the circumstances of the case, including such custom and practice as may, from time to time, be current in the relevant trade, business, profession or employment, and may take account of any relevant guidance adopted or approved by a public authority exercising supervisory functions in relation to that person, or any other body that regulates or is representative of the trade, business, profession or employment carried on by that person.

12. Conveyance of monetary instruments to or from Kenya

(1) A person intending to convey monetary instruments in excess of the amount prescribed in the Second Schedule to or from Kenya shall, before so doing, report the particulars concerning that conveyance to a person authorised by the regulations for that purpose.

(2) A person authorised to receive a report made in subsection (1) shall, without delay, send a copy of the report to the Centre.

(3) A person who wilfully fails to report the conveyance of monetary instruments into or out of Kenya, or materially misrepresents the amount of monetary instruments reported in accordance with the requirements of subsection (1) commits an offence.

(4) Any monetary instrument used in a suspected violation of subsection (3), or which an authorised officer has reasonable grounds to suspect is tainted property, may be temporarily seized by an authorised officer for as long as is necessary to obtain a court order pursuant to section 68 or 82, but not later than five days.

(5) An authorised officer making a temporary seizure under subsection (4) shall give the person from whom the monetary instruments are seized—

(a) a receipt specifying—

- (i) the name, agency, rank of the seizing officer;
- (ii) contact information for that officer and agency;
- (iii) time, date and location of seizure;
- (iv) description (including serial numbers) of the value of and types of instruments seized; and

(b) a formal notice of the authorised officer's intent to initiate forfeiture proceedings under this Act against the seized monetary instruments.

(5A) An authorised officer shall, upon discovery of a false declaration or disclosure of monetary instruments or a failure to declare or disclose them, enquire from the person in whose possession the monetary instruments are found the origin thereof and their intended use, and shall record the same in writing signed by the person in possession of the monetary instruments and countersigned by himself.

(5B) The authorized officer shall indicate in the prescribed form—

- (a) the amount comprised in the monetary instruments declared or disclosed; and
- (b) the identity of the bearer of the monetary instruments,

and such information shall be retained for not less than seven years.

(5C) The information provided under subsection (5B) shall be used by the appropriate authorities when—

- (a) the subsequent declaration by the same person exceeds the prescribed threshold specified in the Fourth Schedule; or
- (b) there is false declaration; or
- (c) there is suspicion of the commission of any other offence.

(6) An authorised officer, other than Agency Director, shall immediately but not later than five days surrender monetary instruments seized under subsection (4) to the Agency Director in such manner as the Agency Director may direct.

(7) If the authorised officer fails to obtain an order under section 68 or 82 against the temporarily seized monetary instruments within five days from the date of seizure pursuant to subsection (4), then, unless that period is otherwise extended by the Court, the monetary instruments shall be returned forthwith to the person from whom it was taken.

[Act No. 51 of 2012, s. 5.]

13. Misuse of information

(1) A person who knows or ought reasonably to have known—

- (a) that information has been disclosed under the provisions of Part II; or
- (b) that an investigation is being, or may be, conducted as a result of such a disclosure,

and directly or indirectly alerts, or brings information to the attention of another person who will or is likely to prejudice such an investigation, commits an offence.

14. Failure to comply with order of court

A person who intentionally refuses or fails to comply with an order of a court made under this Act, commits an offence.

15. Hindering a person in performance of functions under this Act

A person who hinders a receiver, a police officer or any other person in the exercise, performance or carrying out of their powers, functions or duties under this Act, commits an offence.

16. Penalties

(1) A person who contravenes any of the provisions of sections 3, 4 or 7 is on conviction liable—

- (a) in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; and

(b) in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher.

(2) A person who contravenes any of the provisions of sections 5, 8, 11(1) or 13 is on conviction liable—

(a) in the case of a natural person, to imprisonment for a term not exceeding seven years, or a fine not exceeding two million, five hundred thousand shillings, or to both and

(b) in the case of a body corporate, to a fine not exceeding ten million shillings or the amount of the value of the property involved in the offence, whichever is the higher.

(3) A person who contravenes any of the provisions of section 12(3) is on conviction, liable to a fine not exceeding ten per cent of the amount of the monetary instruments involved in the offence.

(4) A person who contravenes the provisions of section 9, 10 or 14 is on conviction liable—

(a) in the case of a natural person, to imprisonment for a term not exceeding two years, or a fine not exceeding one million shillings, or to both and

(b) in the case of a body corporate, to a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher.

(5) *Deleted by Act No. 51 of 2012, s. 6.*

(6) Where any offence under this Part is committed by a body corporate with the consent or connivance of any director, manager, secretary or any other officer of the body corporate, or any person purporting to act in such capacity, that person, as well as the body corporate, shall be prosecuted in accordance with the provisions of this Act.

[Act No. 51 of 2012, s. 6.]

17. Secrecy obligations overridden

(1) The provisions of this Act shall override any obligation as to secrecy or other restriction on disclosure of information imposed by any other law or otherwise.

(2) No liability based on a breach of an obligation as to secrecy or any restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, shall arise from a disclosure of any information in compliance with any obligation imposed by this Act.

[Act No. 51 of 2012, s. 7.]

18. Client advocate relationship

(1) Notwithstanding the provisions of section 17, nothing in this Act shall affect or be deemed to affect the relationship between an advocate and his client with regard to communication of privileged information between the advocate and the client.

(2) The provisions of subsection (1) shall only apply in connection with the giving of advice to the client in the course and for purposes of the professional employment of the advocate or in connection and for the purpose of any legal proceedings on behalf of the client.

(3) Notwithstanding any other law, a Judge of the High Court may, on application being made to him in relation to an investigation under this Act, order an advocate to disclose information available to him in respect of any transaction or dealing relating to the matter under investigation.

(4) Nothing in subsection (3) shall require an advocate to comply with an order under that subsection to the extent that such compliance would be in breach of subsection (2).

19. Immunity where actions are exercised in good faith

A suit, prosecution or other legal proceedings shall not lie against any reporting institution or Government entity, or any officer, partner or employee thereof, or any other person in respect of anything done by or on behalf of that person with due diligence and in good faith, in the exercise of any power or the performance of any function or the exercise of any obligation under this Act.

20. Protection of information and informers

(1) Where any information relating to an offence under this Act is received by the Centre or an authorised officer, the information and the identity of the person giving the information shall be kept confidential.

(2) Subsection (1) shall not apply to information and identity of a person giving the information—

- (a) where it is for the purposes of assisting the Centre or the authorised officer to carry out their functions as stated under this Act; or
- (b) with regard to a witness in any civil or criminal proceedings—
 - (i) for the purposes of this Act; or
 - (ii) where the court is of the opinion that justice cannot fully be done between the parties without revealing the disclosure or the identity of any person as the person making the disclosure.

PART III – FINANCIAL REPORTING CENTRE

21. Establishment of a Financial Reporting Centre

There is established a centre to be known as the Financial Reporting Centre, (hereinafter referred to as the “Centre”) which shall be a body corporate, with perpetual succession and a common seal and shall be capable, in its corporate name, of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding or disposing of movable and immovable property;
- (c) entering into contracts;
- (d) doing or performing such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done by a body corporate.

22. Headquarters

The headquarters of the Centre shall be in Nairobi.

23. Objectives of the Centre

(1) The principal objective of the Centre is to assist in the identification of the proceeds of crime and the combating of money laundering and the financing of terrorism.

(2) Without prejudice to subsection (1), the Centre shall—

- (a) make information collected by it available to investigating authorities, supervisory bodies and any other bodies relevant to facilitate the administration and enforcement of the laws of Kenya;
- (b) exchange information with similar bodies in other countries regarding money laundering activities and related offences; and
- (c) ensure compliance with international standards and best practice in anti-money laundering measures.

[Act No. 14 of 2015, s. 49.]

24. Functions and powers of the Centre

The Centre—

- (a) shall receive, analyse and interpret—
 - (i) reports of usual or suspicious transactions made by reporting institutions pursuant to section 12;
 - (ii) all reports made pursuant to section 44;
 - (iii) information disclosed to it pursuant to section 42 of the Prevention of Terrorism Act, 2012; and
 - (iv) any additional or other information disclosed to it and obtained by it in terms of this Act;
- (b) shall send information received under this Act to the appropriate law enforcement authorities, any intelligence agency, or any other appropriate supervisory body for further handling if, having considered the reports, the Director-General has reasonable grounds to suspect that a transaction or activity involves proceeds of crime, money laundering or financing of terrorism;
- (c) may, at any time, cause an inspection to be made by an inspector authorised by the Director-General in writing and the inspector may enter the premises of any reporting institution during ordinary business hours to inspect any documents kept pursuant to the requirements of this Act, and ask any question relating to such documents, make notes and take copies of the whole or any part of such documents;
- (d) shall send to the appropriate law enforcement authorities, intelligence agency, or supervisory body any information derived from an inspection carried out pursuant to paragraph (c) if such inspection gives the Director-General reasonable grounds to suspect that a transaction or activity involves proceeds of crime, money laundering or the financing of terrorism;
- (e) may instruct any reporting institution to—

- (i) provide it with such other or additional information or documents to enable the centre to properly Undertake functions under this Act; or
- (ii) take such steps as may be appropriate to facilitate any investigation undertaken or to be undertaken by the Centre including providing documents and other relevant information.
- (f) may compile statistics and records, disseminate information within Kenya or elsewhere, and make recommendations arising out of any information received, issue guidelines to reporting institution and advise the Minister;
- (g) shall design training requirements and may provide such training for any reporting institution in respect of transactions, record-keeping and reporting obligations in accordance with the provisions of this Act;
- (h) may consult with any relevant person, institution or organization for the purpose of exercising the powers or duties under this Act;
- (i) may, from time to time, publish in the *Gazette* such information as may be prescribed by the Minister;
- (j) shall create and maintain a database of all reports of suspicious transactions, related Government information and such other materials as the Director-General may from time to determine to be relevant to the work of the Centre;
- (k) may provide information relating to the commission of an offence to any foreign financial intelligence unit or appropriate foreign law enforcement authority, subject to any conditions as may be considered appropriate by the Director-General;
- (l) may, on the basis of mutual agreement and reciprocity, enter into any agreement or arrangement, in writing, with a foreign financial intelligence unit which the Director-General considers necessary or desirable for the discharge or performance of the functions of the Centre:

Provided that the Director-General is satisfied, on a case by case basis, that the foreign financial intelligence unit has given appropriate undertakings—

- (i) for protecting the confidentiality of anything communicated to it; and
- (ii) for controlling the use that will be made of such information.
- (m) shall draft the regulations required by this Act, in consultation with the Board, for submission to the Minister for his approval, prior to publication in the *Gazette*;
- (n) shall set anti-money laundering policies in consultation with the Board;
- (o) shall maintain proper books of accounts;
- (oo) shall have power to compel the production of, or to obtain access to all records, documents or information relevant to monitoring compliance outside the scope of onsite inspection;

- (p) shall engage in any lawful activity, whether alone or together with any other organization in Kenya or elsewhere, aimed at promoting its objectives;
- (q) shall perform such other functions in relation to money laundering as the Minister may direct;
- (r) The Centre may request any supervisory body, monetary authority, financial regulatory authority, fiscal or tax agency, or fraud investigations agency to provide it with information where such information is reasonably required for the proper discharge of the functions of the Centre under this Act or for purposes of achieving the objectives of the Act; and
- (s) shall have all the powers necessary or expedient for the proper performance of its functions.

[Act No. 51 of 2012, s. 8, Act No. 14 of 2015, s. 50, Act No. 3 of 2017, s. 3.]

24A. Instructions or directions

(1) The Center may issue such instructions, directions, guidelines or rules to reporting institutions as it may consider necessary for the better carrying out of its functions under this Act or regarding the application of this Act.

(2) Any instructions, directions, guidelines or rules issued under this section may—

- (a) be either general or special;
- (b) be revoked or varied by subsequent instructions, directions, guidelines or rules;
- (c) be given to such persons and in such manner as may be considered appropriate by the Centre.

(3) The Center may, where it deems appropriate, delegate powers to a supervisory body to issue instructions, directions, guidelines or rules regarding the application of this Act to reporting institutions regulated or supervised by the supervisory body:

Provided that a supervisory body shall consult the Centre prior to issuing any instructions, directions, guidelines or rules under this section.

(4) Notwithstanding subsections (1), (2) and (3), the Centre or a supervisory body may in writing, direct any reporting institution to which the provisions of this Act applies, to—

- (a) provide the Center or that supervisory body, as the case may be—
 - (i) with the information reports or statistical returns specified in the notice, at the time or at the intervals specified in the notice; and
 - (ii) within the period specified in the notice, with any document in its possession or custody or under its control;
- (b) cease or refrain from engaging in any act, omission or conduct in contravention of this Act;
- (c) perform such act as may be necessary to remedy alleged non-compliance with this Act; or
- (d) perform such act as may be necessary to meet any obligation imposed by this Act.

(5) The Centre or a supervisory body may examine a document submitted to it in terms of subsection (4)(a) and may make a copy thereof or of part thereof.

[Act No. 51 of 2012, s. 9.]

24B. Powers of the Centre to impose civil penalties for non-compliance

(1) Without derogating from any criminal penalty or other sanction that may be imposed by this Act, where a person or a reporting institution is in breach of, or fails to comply with any instruction, direction or rules issued by the Centre under section 24A—

- (a) in the case of a natural person, a person shall be liable to a monetary penalty not exceeding five million shillings;
- (b) in the case of a corporate body, the corporate body shall be liable to a monetary penalty not exceeding twenty five million shillings;
- (c) in the case of continued failure, the person or reporting institution shall be liable to an additional monetary penalty of ten thousand shillings per day on which such failure continues for a maximum period of one hundred and eighty days.

(2) Before imposing a monetary penalty on any person or reporting institution under this section, the Centre shall give not less than fourteen days notice in writing, requiring the person or reporting institution to show cause as to why the prescribed monetary penalty should not be imposed.

(3) Where a monetary penalty is prescribed under this section, such penalty shall—

- (a) be paid to the Centre and form part of the funds of the Centre;
- (b) be paid within fourteen days, unless otherwise stated; and
- (c) where a person or reporting institution fails to pay the monetary penalty within the prescribed time, the Centre may take such other action as the Centre may deem necessary in accordance with this Act.

(4) A monetary penalty imposed on a person under this section shall be a debt due to the Centre and shall, after it becomes due be recoverable at any time through proceedings in a court of competent jurisdiction.

[Act No. 3 of 2017, s. 4.]

24C. Powers of the Center to take administrative action for non-compliance

(1) The Centre may for reasons disclosed in writing—

- (a) issue a warning to a specified person or reporting institution; or
- (b) issue an order requiring a specified person or reporting institution to comply with any specific instruction or direction issued by the Centre;
- (c) issue an order barring an individual or individuals from employment within the specified reporting institution whether entirely or in a specified capacity;
- (d) issue an order to a competent supervisory authority requesting the suspension or revocation of a license, registration, permit or authorization of a specified reporting institution whether entirely or in a specified capacity or of any director, principal, officer, agent or employee of the reporting institution.

(2) Before taking administrative action imposed against any person or reporting institution under this section, the Centre shall give the person or reporting institution a written notice of not less than fourteen days requiring the person or institution to show cause as to why the prescribed administrative action should not be taken.

[Act No. 3 of 2017, s. 4.]

25. Appointment of Director and Deputy Director

(1) There shall be a Director-General and a Deputy Director of the Centre.

(2) The Director-General and the Deputy Director shall be fit, competent and proper persons, recommended by the Board and approved by the National Assembly for appointment to their respective positions.

(3) On approval of a person by the National Assembly under subsection (2), the Minister shall appoint that person to the office in respect of which the approval was given.

(4) A person shall not be appointed as a Director-General or Deputy Director unless that person—

- (a) holds a degree in law, public administration, management, international relations, economics or finance from a recognised institution;
- (b) has at least ten years work experience in the relevant field, of which at least three shall be in senior management; and
- (c) meets such other requirements that may be prescribed by the Board.

(5) The persons appointed as the Director-General and the Deputy shall hold office—

- (a) for a term of four years and three years, respectively, subject to renewal for one further term of four years and three years, respectively; and
- (b) on such terms and conditions as may be determined by the Cabinet Secretary in consultation with the Board and set out in the instrument of appointment which shall include specific and measurable performance targets.

(6) The provisions of subsection (3) shall apply to the renewal of an appointment under subsection (5)(a).

[Act No. 3 of 2017, s. 5.]

26. Resignation of Director-General or Deputy Director

(1) The Director-General or the Deputy Director may resign by a written resignation addressed to the Minister.

(2) A resignation is effective upon being received by the Minister or by a person authorized by the Minister to receive it.

[Act No. 3 of 2017, s. 6.]

27. Removal from office

(1) The Minister may, in consultation with the Board, remove the Director-General or Deputy Director from office on the grounds of gross misconduct, mental or physical incapacity or failure to satisfy the terms and conditions of service set forth in section 25(5)(b), or—

- (a) where there is proof of a financial conflict of interest with any reporting institution;
- (b) if he is adjudged bankrupt or enters into a composition or scheme of arrangement with his creditors; or
- (c) if he has been convicted of an offence for which one may be sentenced to imprisonment for a term exceeding six months.

(2) The Minister may, in consultation with the Board, suspend the Director-General or Deputy Director from office pending determination of any inquiry as to whether grounds of misconduct, incapacity or incompetence exist.

[Act No. 3 of 2017, s. 7.]

28. Responsibilities of the Director

(1) The Director-General shall be the Chief Executive Officer of the Centre and shall be responsible for its direction and management.

(2) Without prejudice to the generality of subsection (1), the Director-General as the Chief Executive Officer shall be responsible for—

- (a) the formation and development of an efficient and performance driven administration;
- (b) control and maintenance of discipline of staff; and
- (c) taking all decisions of the Centre in the exercise, discharge and performance of the Centre's objectives, powers, functions and duties.

(3) The Director-General shall perform the functions of the office subject to the policy framework which may be prescribed by the Minister on the advice of the Board.

[Act No. 3 of 2017, s. 8.]

29. Delegation by the Director-General

(1) Subject to this Act, the Director-General may in writing, delegate any of his powers and duties under this Act to such other officer or officers of the Centre as the Director-General may determine.

(2) A delegation made under subsection (1) may, at any time, be varied or cancelled by the Director-General.

[Act No. 3 of 2017, s. 9.]

30. When Deputy Director may act

The Deputy Director may act for the Director-General and shall exercise all the powers and perform all the functions conferred on the Director-General under this Act whenever the Director-General is temporarily absent, and shall perform such other functions as the Director-General may, from time to time, assign to him.

[Act No. 3 of 2017, s. 10.]

31. Appointment of staff

(1) The Cabinet Secretary may approve the general terms and conditions of service of the Centre.

(2) The Centre shall determine its own staff establishment and may appoint other officers as are necessary for the proper discharge of its functions under this Act in accordance with the approved general terms and conditions of service.

(3) The Centre may engage the services of any person by agreement including any state department to perform any specific act or function.

[Act No. 3 of 2017, s. 11.]

32. Oath of confidentiality

The Director-General, the Deputy Director and staff of the Centre shall—

- (a) before they begin to perform any duties under this Act, take and subscribe before a Magistrate or Commissioner for Oaths the oath of confidentiality prescribed in the Third Schedule;
- (b) maintain, during and after their employment, the confidentiality of any matter which they came across during their tenure of office.

[Act No. 3 of 2017, s. 12.]

33. Inspection

(1) Where an inspection is made under section 24(c), the reporting institution concerned and every officer and employee thereof shall produce and make available to the inspector all the books, accounts and other documents of the reporting institution and such correspondence, statements and information relating to the reporting institution, its business and the conduct thereof which the inspector may require within seven days or such longer time as the inspector may direct in writing.

(2) Failure to produce books, accounts, records, documents, correspondence, statements, returns or other information within the period specified in the direction under subsection (1) shall constitute an offence under this Act.

(3) The books of accounts and other documents required to be produced shall not, in the course of inspection, be removed from the premises of the reporting institution or other premises at which they are produced.

(4) The inspector shall make copies of any books, accounts and other documents required for the purpose of the inspector's report.

(5) All information obtained in the course of the inspection shall be treated as confidential and used solely for the purposes of this Act.

(6) An inspector shall submit a report to the Director-General, in which attention shall be made to any breach or non-observance of the requirement of this Act or any regulations made thereunder and any other matter revealed or discovered in the course of the inspection, warranting in the opinion of the inspector, remedial action or further action by the Director-General or the appropriate supervisory body.

[Act No. 3 of 2017, s. 13.]

34. Obligation to respond to the inspection reports

The Director-General may by notice in writing and after giving the reporting institution a reasonable opportunity of being heard, require the reporting institution to comply by the date or within the period as may be specified therein, with such directions as are necessary in connection with any matter arising out of a report made under section 33.

[Act No. 3 of 2017, s. 14.]

35. Obligation of persons to provide information to the inspectors

(1) The Director-General may, by notice in writing, require any person who is or has at any time been an employee or agent of the reporting institution being inspected, to—

- (a) give to the inspector all reasonable assistance in connection with the inspection; or
- (b) appear before the inspector for examination concerning matters relevant to the inspection; or
- (c) produce any books or documents that relate to the affairs of the reporting institution.

(2) A person who—

- (a) refuses or fails to comply with a requirement of an inspector which is applicable to that person, to the extent to which the person is able to comply with it; or
- (b) obstructs or hinders an inspector in the exercise of the powers under this Act; or
- (c) furnishes information which the person knows to be false or misleading in any material way; or
- (d) appears before an inspector for examination pursuant to such requirement, makes a statement which the person knows to be false or misleading in any material particular,

commits an offence.

(3) A person who contravenes the provisions of this section shall be liable, on conviction, to—

- (a) in case of a natural person, imprisonment for a term not exceeding three years or a fine not exceeding one million shillings, or to both; and
- (b) in the case of a body corporate a fine not exceeding five million shillings.

[Act No. 3 of 2017, s. 15.]

36. Obligation of a supervisory body and its staff

(1) A supervisory body and its staff shall report to the Centre any suspicious transaction that the supervisory body or its staff may encounter during the normal course of their duties.

(2) A person who as an employee of a supervisory body deliberately or with intention to deceive does not make a report in accordance with this section commits an offence.

(3) A person who contravenes the provisions of this provision is liable on conviction to—

- (a) in the case of a natural person, imprisonment for a term not exceeding three years or a fine not exceeding one million shillings, or to both; and
- (b) in the case of a body corporate, a fine not exceeding five million shillings.

36A. Responsibility for supervision of Reporting Institutions

(1) The Centre shall have the powers to regulate and supervise all reporting institutions, regarding the application of this Act.

(2) Subject to subsection (1), each supervisory body shall be responsible for supervising and enforcing compliance with this Act or any instruction, direction, guideline or rule made pursuant to or in terms of this Act by all reporting institutions regulated or supervised by it and to whom the provision of this Act apply.

(3) The obligation referred to in subsection (2) shall form part of the legislative mandate of any supervisory body and shall constitute a core function of that supervisory body.

(4) Any law which regulates a supervisory body or authorises that supervisory body to supervise or regulate any reporting institution to whom the provisions of this Act apply, shall take account of subsection (2), and a supervisory body may utilise any fees or charges it is authorised to impose or collect to defray expenditure incurred in performing its obligations under this Act or any order, determination or directive made in terms of this Act.

(5) A supervisory body, in meeting its obligation referred to in subsection (2), may—

- (a) in addition to any powers it has under any other Act, exercise any power afforded to it in this Act;
- (b) take any measures it considers necessary or expedient to meet its obligations as imposed by this Act or any order, determination, instruction, directive or rule made in terms of this Act, or achieve the objectives of the Centre of this Act;
- (c) require a reporting institution supervised or regulated by it and to whom, the provisions of this Act apply, to report on that institution's compliance with this Act or any order, determination, instruction, directive or rule made under this Act in the form manner and within the period determined by the supervisory body;
- (d) issue or amend any licence, registration, approval or authorisation that the supervisory body may issue or grant in accordance with any Act, to include the following conditions—
 - (i) compliance with this Act;
 - (ii) the continued availability of human financial, technological and other resources to ensure compliance with this Act or any order, determination or directive made under this Act; and
- (e) in making a determination in accordance with any Act applicable to it as to whether a person is fit and proper to hold office in a reporting institution, take into account any involvement, whether directly or indirectly, by that person in any non-compliance with this Act or any order, determination, instruction, directive or rule made in terms of this Act, or any involvement in any money laundering activity.

(6) A supervisory body shall submit to the Centre, within such period and in such manner, as the Centre may prescribe, a written report on any action taken against any reporting institution in terms of this Act or any order, determination, directive, instruction, or rule made under this Act.

(7) The Centre and each supervisory body shall co-ordinate the exercising of their powers and performance of their functions under this Act to ensure consistent application of the Act, and may for such purpose; enter into a written memorandum of understanding in respect thereof.

(8) Notwithstanding the provisions of subsection (1) or any other provision of this Act, the Centre may require a reporting institution to report on that institution's compliance with this Act or any order, determination, instruction, or direction in the manner and within such period as may be determined by the Centre

[Act No. 51 of 2012, s. 10, Act No. 14 of 2015, 51.]

37. The Centre's power to obtain a search warrant

(1) The Centre or the appropriate law enforcement agency, may apply to the High Court for a warrant to enter any premises belonging to or in the possession or control of a reporting institution or any officer or employee thereof, and to search the premises and remove any document, material or other thing therein for the purposes of the Centre, as ordered by the High Court and specified in the warrant.

(2) The High Court may grant the application if it is satisfied that there are reasonable grounds to believe that—

- (a) the reporting institution has failed to keep or produce documents, records, or report on a suspicious transaction, as required by this Act; or
- (b) an officer, employee or partner of a reporting institution is committing, has committed or is about to commit any offence under this Act.

38. Property tracking and monitoring orders

For the purpose of determining whether any property belongs to or is in the possession or under the control of any person, the Centre, may upon application to the High Court, obtain an order—

- (a) that any document relevant to—
 - (i) identifying, locating or quantifying that property; or
 - (ii) identifying or locating any document necessary for the transfer of that property, belonging to, or in the possession or control of that person,be delivered forthwith to the Centre;
- (b) that the reporting institution forthwith produce to the Centre or the appropriate law enforcement agency all information obtained about any transaction conducted by or for that person during such period before or after the order as the High Court may direct.

39. Orders to enforce compliance with obligations under this Act

(1) A person who fails to comply with any obligation provided for under this Act, commits an offence.

(2) The Centre may, upon application to the High Court, after satisfying the Court that a reporting institution has refused to comply with any obligation, request or requirements under this Act, obtain an order against all or any officers,

employees or partners of the reporting institution in such terms as the High Court may deem necessary, in order to enforce compliance with such obligation.

(3) In granting the order pursuant to subsection (2), the High Court may order that should the reporting institution fail, without reasonable excuse, to comply with all or any provisions of the order, may order such institution, its officers, employees or partners to pay a fine not exceeding one million shillings for an individual and a fine not exceeding five million shillings for a body corporate.

40. Constitution of funds

The funds of the Centre shall consist of—

- (a) money appropriated by Parliament for the purposes of the Centre;
- (b) any Government grants made to it;
- (c) any other money legally acquired by it, provided that the Centre may accept donations only with the prior written approval of the Minister.

41. Financial year

The financial year of the Centre shall be a period of twelve months ending on the thirtieth June of each year.

42. Annual estimates

(1) At least three months before the commencement of each financial year, the Centre shall cause to be prepared estimates of the revenue and expenditure of the Centre for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Centre for the financial year and in particular, the estimates shall provide for—

- (a) the payment of salaries, allowances and other charges in respect of the staff of the Centre;
- (b) the payment of pensions, gratuities and other charges in respect of the staff of the Centre;
- (c) the proper maintenance of the buildings and grounds of the Centre;
- (d) the maintenance, repair and replacement of the equipment and other property of the Centre.

(3) The annual estimates shall be approved by the Board before the commencement of the financial year to which they relate and shall be submitted to the Minister for approval and after the Minister's approval, the Centre shall not increase the annual estimates without the consent of the Minister.

43. Books of accounts, records, audit and reports

(1) The Centre shall cause to be kept proper books of accounts and records of accounts of the income, expenditure, assets and liabilities of the Centre.

(2) The Centre shall within three months of the closure of the financial year submit to the Controller and Auditor-General—

- (a) a statement of income and expenditure during that period;
- (b) a statement of the assets and liabilities of the Centre on the last day of that year.

(3) The accounts of the Centre shall be audited and reported upon in accordance with the Public Audit Act (Cap. 412B).

PART IV — ANTI-MONEY LAUNDERING
OBLIGATIONS OF A REPORTING INSTITUTION

44. Monitoring and Report by institutions

(1) A reporting institution shall monitor on an ongoing basis all complex, unusual, suspicious, large or such other transactions as may be specified in the regulations, whether completed or not, and shall pay attention to all unusual patterns of transactions, and to insignificant but periodic patterns of transactions which have no apparent economic or lawful purpose as stipulated in the regulations.

(2) Upon suspicion that any of the transactions or activities described in subsection (1) or any other transaction or activity could constitute or be related to money laundering or to the proceeds of crime, a reporting institution shall report the suspicious or unusual transaction or activity to the Centre in the prescribed form immediately and, in any event, within seven days of the date the transaction or activity that is considered to be suspicious occurred.

(3) Notwithstanding subsections (1) and (2), a reporting institution shall report all suspicious transactions, including attempted transactions to the Centre.

(4) A financial institution shall as far as possible examine the background and purpose of the transactions referred in subsections (1) and (2) and shall set out its findings in writing.

(5) A reporting institution shall retain its findings under subsection (4) for at least seven years from the date of the making thereof, and shall make them available to the Centre, and to its supervisory body or auditors.

(6) Despite the provisions of this section, a reporting institution shall file reports on all cash transactions equivalent to or exceeding the amount prescribed in the Fourth Schedule, whether they appear to be suspicious or not.

(7) A report under subsections (2) and (3) shall be accompanied by copies of all documentation directly relevant to the suspicion and the grounds on which it is based.

(8) The Centre may, in writing, require the person making the report under subsection (2) or (3) to provide the Centre with—

- (a) particulars or further particulars of any matter concerning the suspicion to which the report relates and the grounds upon which it is based; and
- (b) copies of all available documents concerning such particulars or further particulars

(9) When a person receives a request under subsection (8), that person shall furnish the Centre with the required particulars or further particulars and copies of documents to the extent that such particulars or documents are available to that person within a reasonable time, but in any case not later than thirty days from the date of the receipt of the request:

Provided that the Centre may, upon written application by the person responding to a request and with the approval of the Director-General, grant the person an extension of the time within which to respond.

(10) A person who is a party to, or is acting on behalf of, a person who is engaged in a transaction in respect of which he forms a suspicion which, in his opinion, should be reported under subsections (2) or (3), may continue with and complete that transaction and shall ensure that all records relating to that transaction are kept, and that all reasonable steps are taken to discharge the obligation under this section.

[Act No. 51 of 2012, s. 11, Act No. 3 of 2017, s. 16.]

45. Obligation to verify customer identity

(1) A reporting institution shall take reasonable measures to satisfy itself as to the true identity of any applicant seeking to enter into a business relationship with it or to carry out a transaction or series of transactions with it, by requiring the applicant to produce an official record reasonably capable of establishing the true identity of the applicant, such as—

- (a) in the case of an individual—
 - (i) a birth certificate;
 - (ii) a national identity card;
 - (iii) a driver's licence;
 - (iv) a passport; or
 - (v) any other official means of identification as may be prescribed; and
- (b) in the case of a body corporate—
 - (i) evidence of registration or incorporation;
 - (ii) the Act establishing the body corporate;
 - (iii) a corporate resolution authorising a person to act on behalf of the body corporate together with a copy of the latest annual return submitted in respect of the body corporate in accordance with the law under which it is established; and
 - (vi) or any other item as may be prescribed;
- (c) in the case of a government department, a letter from the accounting officer.

(2) Upon the coming into force of this Act, a reporting institution shall undertake customer due diligence on the existing customers or clients.

(3) Where an applicant requests a reporting institution to enter into—

- (a) a continuing business relationship; or
- (b) in the absence of such a relationship, any transaction,

the reporting institution shall take reasonable measures to establish whether the person is acting on behalf of another person.

(4) If it appears to a reporting institution that an applicant requesting to enter into any transaction, whether or not in the course of a continuing business relationship, is acting on behalf of another person, the reporting institution shall take reasonable measures to establish the true identity of a person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as trustee, nominee, agent or otherwise.

(5) In determining what constitutes reasonable measures for the purposes of subsection (1) or (3), regard shall be given to all the circumstances of the case, and in particular to—

- (i) whether the applicant is a person based or incorporated in a country in which there are in force applicable provisions to prevent the use of the financial system for the purpose of money laundering; and
- (ii) any custom or practice as may, from time to time, be current in the relevant field of business.

(6) The Minister may, by notice in the *Gazette*, list the countries to which subsection (5)(i) applies.

(7) Nothing in this section shall require the production of any evidence of identity where there is a transaction or a series of transactions taking place in the course of a business relationship, in respect of which the applicant has already produced satisfactory evidence of identity.

46. Obligation to establish and maintain customer records

(1) Subject to subsection (4), a reporting institution shall establish and maintain—

- (a) records of all transactions, in accordance with the requirements of subsection (3); and
- (b) where evidence of a person's identity is obtained in accordance with section 45, a record that indicates the nature of the evidence obtained, and which comprises either a copy of the evidence or such information as would enable a copy of it to be obtained.

(2) A reporting institution shall ensure that its customer accounts are kept in the correct name of the account holder.

(3) Records required under subsection (1)(a) shall contain particulars sufficient to identify—

- (a) the name, physical and postal address and occupation (or where appropriate business or principal activity) of each person—
 - (i) conducting the transaction; or
 - (ii) on whose behalf the transaction is being conducted,as well as the method used by the reporting institution to verify the identity of that person;
- (b) the nature, time and date of the transaction;
- (c) the type and amount of currency involved;
- (d) the type and identifying number of any account with the reporting institution involved in the transaction;

- (e) if the transaction involves a negotiable instrument other than currency, the name of the drawer of the instrument, the name of the institution on which it was drawn, the name of the payee (if any), the amount and date of the instrument, the number (if any) of the instrument and details of any endorsements appearing on the instrument;
- (f) the name and address of the reporting institution and of the officer, employee or agent of the reporting institution who prepared the record.

(4) The records required under subsection (1) shall be kept by the reporting institution for a period of at least seven years or such longer period as the Centre may in writing require, from the date the relevant business or transaction was completed or following the termination of an account or business relationship, without prejudice to any other records required to be kept by or under any other written law, and shall be made available on a timely basis to competent authorities.

[Act No. 51 of 2012, s. 12.]

47. Obligation to establish and maintain internal reporting procedures

A reporting institution shall establish and maintain internal controls and internal reporting procedures to—

- (a) identify persons to whom an employee is to report any information which comes to the employee's attention in the course of employment and which gives rise to knowledge or suspicion by the employee that another person is engaged in money laundering;
- (b) enable any person identified in accordance with paragraph (a) to have reasonable access to information that may be relevant in determining whether a sufficient basis exists to report the matter under section 44(2); and
- (c) require the identified person in paragraph (a) to directly report the matter under section 44(2) in the event that he determines that sufficient basis exists.

47A. Obligation to register with the Centre

(1) All reporting institutions to which this Act applies shall register with the Centre within such period and in such manner as the Centre may prescribe.

(2) The registration of a reporting institution under sub section (1) shall be accompanied by such particulars as the Centre may require.

(3) The Centre shall keep and maintain a register of every reporting institution registered in terms of this section.

(4) A reporting institution shall notify the Centre, in writing, of any changes to the particulars furnished in terms of this section within 90 days of such change.

(5) A reporting institution that fails to register with the Centre as required by sub section (1) commits an offence.

[Act No. 51 of 2012, s. 13.]

48. Application of reporting obligations

The reporting obligations under this Part shall apply to accountants when preparing or carrying out transactions for their clients in the following situations—

- (a) buying and selling of real estate;
- (b) managing of client money, securities or other assets;
- (c) management of bank, savings or securities accounts;
- (d) organisation of contributions for the creation, operation or management of companies;
- (e) creation, operation or management of buying and selling of business entities.

PART V – THE ANTI-MONEY LAUNDERING ADVISORY BOARD**49. The Anti-Money Laundering Advisory Board**

(1) There is established a Board to be known as the Anti-Money Laundering Advisory Board consisting of—

- (a) the Chairperson, who shall be appointed by the Minister from among members of the Board appointed under paragraphs (f) to (h);
- (b) the Permanent Secretary in the Ministry for the time being responsible for finance;
- (c) the Attorney-General;
- (d) the Governor, Central Bank of Kenya;
- (e) the Commissioner of Police;
- (f) the Chairman, Kenya Bankers' Association;
- (g) the Chief Executive Officer, Institute of Certified Public Accountants of Kenya;
- (h) two other persons appointed by the Minister from the private sector who shall have knowledge and expertise in matters relating to money laundering;
- (ha) the Director-General of the National Intelligence Service;
- (hb) the Director, Asset Recovery Agency; and
- (i) the Director-General, who shall be the secretary.

(2) The members under paragraphs (b) to (i) may attend in person or through a designated representative.

(3) A person appointed under subsection (1)(h) shall hold office for a term of three years but shall be eligible for re-appointment for one further term of not more than three years.

(4) In deliberation of a matter, the Board may co-opt such other persons as appear to it to have special knowledge or experience in anti-money laundering.

[Act No. 3 of 2017, s. 17.]

50. Functions of the Board

(1) The functions of the Board shall be to—

- (a) on the request of the Cabinet Secretary or at its own initiative, advise the Cabinet Secretary on—
 - (i) policies, best practices and related activities to identify proceeds of crime or proceeds of unlawful activities and to combat money laundering activities;
 - (ii) the exercise of the powers conferred to the Cabinet Secretary under this Act.
- (b) advise the Centre generally on its functions and the exercise of its powers under this Act;
- (c) act as a forum in which the Centre, associations representing categories of reporting institutions, state organs and supervisory bodies can consult one another on anti-money laundering developments, concerns and initiatives;
- (d) to perform any other duty as may be prescribed under this Act.

(2) The Centre shall provide administrative support and sufficient resources to the Board to enable it perform its functions effectively.

[Act No. 3 of 2017, s. 18.]

51. Conduct of business of the Board

The business and affairs of the Board shall be conducted in accordance with the provisions of the Fifth Schedule but subject thereto, the Board may regulate its own procedure.

PART VI – THE ASSETS RECOVERY AGENCY**52. Definitions applicable to Parts VI-XII**

(1) In Parts VI to XII, except where it is inconsistent with the context or clearly inappropriate, any reference to—

- (a) a person who holds property shall be construed as a reference to a person who has any interest in the property, and—
 - (i) if the estate of such person has been sequestrated, also to the trustees of his estate; or
 - (ii) if the person is a company or other legal entity which is being wound up, also to the liquidator thereof;
- (b) a person who transfers property to another person shall be construed as a reference to a person who transfers or grants to any other person any interest in the property;
- (c) anything received in connection with an offence shall be construed as a reference also to anything received as a result of and in connection with the commission of that offence.

(3) For the purposes of Parts VI to XII, a person will have benefited from an offence if that person has at any time, whether before or after the commencement of this Act, received or retained any proceeds of crime.

53. The Agency and its Director

(1) There is established a body to be known as Assets Recovery Agency, which shall be a body corporate with perpetual succession and a common seal, and shall in its corporate name, be capable of—

- (a) suing and being sued;
- (b) holding and alienating movable and immovable property;
- (c) borrowing and lending money;
- (d) doing and performing all such other acts or things as may be lawfully done by a body corporate.

(2) The Attorney-General shall appoint a fit, competent and proper person to be the Director of the Agency (hereinafter referred to as the “Agency Director”).

(3) For a person to be appointed as the Agency Director, the person shall—

- (a) hold a degree in law, economics or finance from a recognized university;
- (b) hence in a relevant field, five of which shall been at senior management level;
- (c) have such other requirements that may be prescribed by the Attorney-General.

(4) The Agency Director may, with the approval of the Attorney-General, obtain such number of staff on secondment and on such terms and conditions of service as may be approved by the Attorney-General, and may make such arrangements for the provision of services, as he considers appropriate for or in connection with the exercise of his functions.

(5) Anything which the Agency Director is authorised or required to do may be done by—

- (a) a member of staff of the Agency, or
- (b) a person providing services under arrangements made by the Agency Director,

if authorised by the Agency Director (generally or specifically) for that purpose.

[Act No. 3 of 2017, s. 19.]

53A. Staff of the Agency

(1) Despite the provisions of section 53, the agency may, for the proper discharge of its functions, appoint professional and technical staff and other staff, upon such terms and conditions as the Attorney General, in consultation with the Salaries Remuneration Commission, approve.

(2) The staff referred to in subsection (1) may include deputy directors, assistant directors, forensic and financial investigators, asset managers and other staff as the Agency may determine.

(3) In determining the terms and conditions of service for the Agency Director and staff, the Attorney General shall be guided by the following principles—

- (a) that asset recovery falls in a strategic sector in the administration of justice process of the country and the nature of the service entailed requires commensurate compensation; and
- (b) that the nature of the operations of the Agency requires probity, integrity and incorruptibility.

(4) The Agency shall, with the approval of the Cabinet Secretary for finance, establish a suitable social security scheme for the Agency Director and staff of the Agency.

(5) For the purposes of their functions under the Act, the Agency Director, certified forensic and financial investigators, shall have all the powers, privileges and immunities of a police officer in addition to any other powers they may have under the Act.

(6) Any public officer who is transferred or seconded to the Agency under section 53(4) shall be regarded as a member of staff of the Agency and subject to the control and direction of the Agency.

(7) The Agency may, with the approval of the Attorney General, make regulations for the better management, administration and operations of the Agency.

[Act No. 3 of 2017, s. 20.]

54. Functions and powers of the Agency

(1) The functions of the Agency shall be to implement the provisions of Parts VII to XII inclusive and to exercise all powers set forth therein.

(1A) Notwithstanding any provisions in any other written law, all cases of recovery of the proceeds of crime or benefits accruing from any predicate offence in money laundering, shall be handled by the Agency, in accordance with this Act.

(2) The Agency shall have all the powers necessary or expedient for the performance of its functions.

[Act No. 3 of 2017, s. 21.]

54A. Funds of the Agency

(1) Parliament shall allocate adequate funds to the Agency to enable the Agency perform its functions under the Constitution, this Act and any other written law and the budget shall be a separate vote in accordance with Article 249(3) of the Constitution.

(2) The funds of the Agency shall consist of—

- (a) monies provided for by Parliament for the purposes of the Agency;
- (b) a percentage of the total proceeds recovered or realized from any property seized or forfeited to the Government, as may be prescribed, from time to time, with the approval of the Cabinet Secretary for finance;
- (c) such monies or assets as may accrue to the Agency in the course of the exercise of its powers or the performance of its functions under this Act; and
- (d) all monies from any other source provided, donated or granted to the Agency towards the achievement of the objects of the Agency.

(3) The Agency shall not accept any grant, gift, donation or bequests made on condition that the Agency performs any function or discharges any duty or obligation other than duties under the Constitution or this Act.

(4) The Agency shall disclose any grants, gifts, donations or bequests made to it in each financial year.

(5) The Agency Director shall, subject to the law, be charged with the responsibility of accounting for state monies received or paid out or on account of the Agency.

(6) The receipts, earnings or accounts of the funding and balance of the funding at the close of each financial year, shall not be paid into the Consolidated Fund, but shall be retained for the purposes of the Agency.

[Act No. 3 of 2017, s. 22.]

54B. Bank Accounts

The Agency shall open and maintain such bank accounts as are necessary for the exercise of the functions of the Agency.

[Act No. 3 of 2017, s. 22.]

54C. Estimates of expenditure

(1) The financial year of the Agency shall be the period of twelve months beginning first July and ending on the thirtieth June in each year.

(2) The Agency shall within three months before the commencement of the financial year, prepare annual estimates of the expenditure of the Agency for that financial year.

(3) The annual estimates shall make provisions for all the estimated expenditure of the Agency for the financial year concerned and in particular, shall provide for—

- (a) the payment of salaries, allowances and other charges in respect of the Agency Director and other staff of the Agency;
- (b) the payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Agency;
- (c) the maintenance of the buildings and grounds of the Agency;
- (d) the funding of training, research and development of activities of the Agency; and
- (e) the creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Agency may deem expedient.

(4) The annual estimates shall make provisions for all estimated expenditure of the Agency for the financial year to which they relate, including of reserve fund to provide for contingency in the event of an unforeseen increase in expenditure and other emergencies not contemplated at the time of making the estimates.

(5) The Agency shall review the estimates forwarded under subsections (2) and (3) and may make such alterations thereto as it may consider necessary, and shall forward the same to the National Assembly for approval.

(6) Upon approval of the estimates by the National Assembly, all monies from time to time required for the purposes of this Act shall be paid from the Consolidated Fund into the Agency's bank account.

[Act No. 3 of 2017, s. 22.]

54D. Accounts and audit

(1) The Agency shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Agency.

(2) Within a period of three months after the end of each financial year, the Agency shall submit to the Auditor-General the accounts of the Agency in respect of that year together with a—

- (a) statement of the income and expenditure of the Agency during that year; and
- (b) statement of the assets and liabilities of the Agency on the last day of that financial year.

(3) The annual accounts of the Agency shall be prepared, audited and reported upon in accordance with the provisions of the Constitution and the Public Audit Act.

[Act No. 3 of 2017, s. 22.]

54E. Annual reports

(1) The Agency shall within four months after the end of each financial year, make a report on its activities and operations during the financial year and submit the report to the Attorney-General.

(2) The Attorney-General shall within fourteen days after receipt of the report from the Agency, submit the report to the President.

[Act No. 3 of 2017, s. 22.]

54F. The common seal of the Agency

(1) The common seal of the Agency shall be such device as may be determined by the Agency Director.

(2) The common seal of the Agency shall be kept in such custody as the Agency Director shall direct and shall not be used except on the order of the Agency Director.

(3) The common seal of the Agency when affixed to a document and duly authenticated shall be judicially and officially noticed and unless the contrary is proved, any necessary order or authorization of the Agency under this section shall be presumed to have been duly given.

[Act No. 3 of 2017, s. 22.]

55. Co-operation with the Agency

A person who or a body which has functions relating to investigation or prosecution of offences under this Act and the Agency shall co-operate in the exercise of their powers or the performance of their functions under this Act.

PART VII – CRIMINAL FORFEITURE

Proceeds of Crime

56. Nature of proceedings

(1) For the purposes of this Part, proceedings on application for a confiscation order or restraint order are civil.

(2) The rules of evidence applicable in civil proceedings shall apply to proceedings on application for a confiscation order or a restraint order.

57. Realizable property

(1) Subject to the provisions of subsection (2), the following property shall be realizable in terms of this Part—

- (a) any property held by the defendant concerned; and

- (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.

(2) Property shall not be realizable property so long as a forfeiture order is in force in respect thereof.

58. Value of property

(1) For the purposes of this Part the value of property, other than money, in relation to any person holding the property, shall be—

- (a) where any other person holds an interest in the property, the market value of the property, less the amount required to discharge any encumbrance on the property; and
- (b) where no other person holds an interest in the property, the market value of the property.

(2) Notwithstanding the provisions of subsection (1), any reference in this Part to the value at a particular time of a payment or reward, shall be construed as a reference to—

- (a) the value of the payment or reward at the time when the recipient received it; or
- (b) where subsection (3) applies, the value set out in that subsection, whichever is the higher.

(3) If, at the particular time referred to in subsection (2) the recipient holds—

- (a) the property, other than cash, which that person received, the applicable value shall be the value of the property at the particular time; or
- (b) property which directly or indirectly represents in his hands the property which he received, the applicable value shall be the value of the property, in so far as it represents the property which he received, at the relevant time.

59. Gifts

(1) For the purposes of this Part, a defendant shall be deemed to have made a gift if he has transferred any property to any other person directly or indirectly for a consideration which is significantly less than the value of the property.

(2) For the purposes of subsection (2) the gift which a defendant is deemed to have made shall consist of that share in the property transferred by the defendant which is equal to the difference between the value of that property as a whole and the consideration received by the defendant in return.

60. Conclusion of proceedings against defendant

For the purposes of this Part, proceedings against a defendant shall be concluded when—

- (a) the defendant is acquitted or found not guilty of an offence;
- (b) subject to section 61(2), the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him;

- (c) the conviction in respect of an offence is set aside on review or appeal; or
- (d) the defendant satisfies the confiscation order made against him.

Confiscation Orders

61. Confiscation orders

(1) Whenever a defendant is convicted of an offence, the court convicting the defendant shall, on the application of the Attorney-General, the Agency Director or of its own motion, inquire into any benefit which the defendant may have derived from—

- (a) that offence;
- (b) any other offence of which the defendant has been convicted at the same trial; and
- (c) any criminal activity which the court finds to be sufficiently related to that offence,

and, if the court finds that the defendant has so benefited, the court shall, in addition to any punishment which it may impose, make an order against the defendant for the payment to the Government of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

(2) The amount which a court may order the defendant to pay to the Government under subsection (1)—

- (a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Part; or
- (b) if the court is satisfied that the amount which is just as contemplated in section 63(1) is less than the value referred to in paragraph (a), the amount payable shall not exceed an amount which, in the opinion of the court might be so realized.

(3) A court convicting a defendant may, when passing sentence, indicate that it will hold an inquiry as contemplated in subsection (1) at a later stage if—

- (a) it is satisfied that inquiry would unreasonably delay the sentencing of the defendant; or
- (b) the Attorney-General applies to the court to first sentence the defendant and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.

(4) If the judge or magistrate who convicted the defendant is absent or for any other reason not available, any judge or magistrate of the same court shall consider an application referred to in subsection (1) and hold the inquiry referred to in that subsection and that person may, in the proceedings, take such steps as the judge or magistrate who is absent or not available could lawfully have taken.

(5) A court before which proceedings under this section are pending, may, in considering an application under subsection (1)—

- (i) refer to the evidence and proceedings at the trial;

- (ii) hear further oral evidence or take documentary evidence as the court may deem fit;
- (iii) direct the Agency Director to tender to the court the affidavit referred to in section 64(1); and
- (iv) direct a defendant to tender to the court an affidavit referred to under section 64(5).

(6) The amount ordered to be paid under a confiscation order shall be paid on the making of the order:

Provided that if the defendant indicates to the court that he needs time to pay the amount ordered to be paid, the court making the confiscation order may make an order allowing payment to be made in a specified period.

62. Value of proceeds of crime

(1) Subject to the provisions of subsection (2), the value of the defendant's proceeds of crime shall be the sum of the value of the property, services, advantages, benefits or rewards received, retained or derived by him at any time after the commencement of this Act in connection with the offence committed by him or any other person.

(2) In determining the value of a defendant's proceeds of crime, the court shall—

- (a) where it has made a forfeiture order or where a forfeiture order has previously been made in respect of property which is proved to the satisfaction of the court to have been—
 - (i) the property which the defendant received in connection with the criminal activity carried on by him or any other person; or
 - (ii) property which, directly or indirectly, represented in the defendant's possession or control, which he received in that connection,
leave the property out of account;
- (b) where a confiscation order has previously been made against the defendant, leave out of account, those proceeds of crime which are proved to the satisfaction of the court to have been taken into account in determining the amount to be recovered under that confiscation order.

63. Amount which might be realized

(1) For the purposes of sections 61(2)(b) and 67(4)(a), the amount which might be realized at the time of the making of a confiscation order against a defendant shall be the amount equal to the sum of the values at that time of all—

- (a) realizable property held by the defendant; and
- (b) affected gifts made by the defendant,

less the sum of all obligations, if any, of the defendant having priority and which the court may recognize for this purpose.

(2) Notwithstanding the provisions of section 58(1) but subject to the provisions of section 59(2), the value of an affected gift at the time of the making of the relevant confiscation order shall be—

- (a) the value of the affected gift at the time when the recipient received it, as adjusted to take into account subsequent fluctuations in the value of money; or
- (b) where subsection (3) applies, the value mentioned in that subsection, whichever is the greater value; or
- (c) such amount as the court believes is just.

(3) If at the time of the making of the relevant confiscation order the recipient holds the property—

- (a) other than in monetary instruments, which such person received, the value concerned shall be the value of the property at that time; or
- (b) which directly or indirectly represents in their hands the property which that person received, the value concerned shall be the value of the property, in so far as it represents the property which that person received, at the time.

(4) For the purposes of subsection (1), an obligation has priority at the time of the making of the relevant confiscation order if it is an obligation—

- (a) of the defendant, where the defendant has been convicted by a court of any offence to pay—
 - (i) a fine imposed before that time by the court; or
 - (ii) any other amount under any resultant order made before that time by the court;
- (b) which—
 - (i) if the estate of the defendant had at that time been sequestered; or
 - (ii) where the defendant is a company or other legal entity, if that company or that legal entity is at that time being wound up, would be payable in pursuance of any secured or preferential claim against the insolvent estate or against such company or legal entity, as the case may be;

(5) A court shall not determine the amounts which might be realized as contemplated in subsection (1) unless it has afforded all persons holding any interest in the property concerned an opportunity to make representations to it in connection with the realization of that property.

64. Statements relating to proceeds of crime

(1) The Agency Director may or, if so directed by the court, shall tender to the court an affidavit by the defendant or any other person in connection with any matter which is being inquired into by the court under section 61(1), or which relates to the determination of the value of a defendant's proceeds of crime.

(2) A copy of the affidavit referred to in subsection (1), shall be served on the defendant.

(3) The defendant may dispute the correctness of any allegation contained in an affidavit referred to in subsection (1), and if the defendant does so, he shall state the grounds upon which he relies.

(4) In so far as the defendant does not dispute the correctness of any allegation contained in the affidavit under subsection (1), that allegation shall be considered to be conclusive proof of the matter to which it relates.

(5) A defendant may or, if so directed by the court, tender to the court an affidavit or affirmation in writing by him or another person in connection with any matter which relates to the determination of the amount which might be realized as contemplated in section 59(1).

(6) A copy of the affidavit or affirmation tendered under subsection (5) shall be served on the Agency Director.

(7) The Agency Director may admit the correctness of any allegation contained in an affidavit or affirmation tendered under subsection (5).

(8) In so far as the Agency Director admits the correctness of any allegation contained in an affidavit or affirmation tendered under subsection (5), that allegation shall be considered to be conclusive proof of the matter to which it relates.

65. Evidence relating to proceeds of crime

(1) For the purpose of determining whether a defendant has derived a benefit in an inquiry under section 61(1), if it is found that the defendant did not, at the fixed date, have legitimate sources of income sufficient to justify the interests in any property that he holds, the court shall accept this fact as *prima facie* evidence that the interests form part of the benefit.

(2) For the purpose of an inquiry under section 61(1), if it is found that a court had ordered the defendant to disclose any facts under section 64(5) and that the defendant had without sufficient cause failed to disclose the facts or had, after being so ordered, furnished false information, knowing that information to be false or not believing it to be true, the court shall accept these facts as *prima facie* evidence that any property to which the information relates—

- (a) forms part of the defendant's benefit, in determining whether he has derived a benefit from an offence; or
- (b) is held by the defendant as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 61(1).

(3) For the purposes of determining the value of a defendant's proceeds of crime, in an inquiry under section 61(1) if the court finds that defendant has benefited from an offence and that the defendant held property at any time, or since, his conviction, the court shall accept these facts as *prima facie* evidence that the property was received by him at the earliest time at which he held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 61(1).

(4) If the court finds that the defendant has benefited from an offence and that expenditure had been incurred by him since the beginning of the period contemplated in subsection (3), the court shall accept these facts as *prima facie*

evidence that any such expenditure was met out of the advantages, payments, services or rewards, including any property received by him in connection with the offences or related criminal activities referred to in section 61(1) committed by him.

(5) For the purpose of determining the value of any property in an inquiry under section 57(1), if the court finds that the defendant received property at any time as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in that subsection committed by the person or by any other person, the court shall accept this fact as *prima facie* evidence that such person received that property free of any other interest therein.

66. Effect of confiscation orders

Where a court makes a confiscation order, the order shall have the effect of a civil judgment.

67. Procedure where person absconds or dies

(1) If a court is satisfied—

(a) that—

- (i) a person had been charged with an offence; or
- (ii) a person had been convicted of any offence; or
- (iii) a restraint order had been made against a person; or
- (iv) there is sufficient evidence for putting a person on trial for an offence; and

(b) a warrant for that person's arrest had been issued and that the attendance of that person in court could not be secured after all reasonable steps were taken to execute that warrant;

(c) the proceedings against that person cannot be resumed within a period of six months due to his continued absence; and

(d) there are reasonable grounds to believe that a confiscation order would have been made against that person were it not for his continued absence,

the court may, on an application by the Agency Director, inquire into any benefit he may have derived from that offence.

(2) Whenever a defendant who has been convicted of an offence dies before a confiscation order is made, the court may, on an application by the Agency Director, inquire into any benefit he may have derived from that offence if the court is satisfied that there are reasonable grounds to believe that a confiscation order would have been made against him were it not for his death.

(3) The administrator of the estate of the deceased may appear before the court and make representations for the purposes of any inquiry.

(4) The court conducting an inquiry under this section may—

- (a) if the court finds that the person referred to in subsection (1) or (2) has so benefited, make a confiscation order and the provisions of this Part shall, with the necessary changes, apply to the making of that order;

- (b) if a receiver has not been appointed in respect of any of the property concerned, appoint a receiver in respect of realizable property; and
- (c) authorise the realization of the property concerned in terms of Part VIII.

(5) A court shall not exercise its powers under subsection (4)(a) or (c) unless it has afforded all persons having any interest in the property concerned an opportunity to make representations to it in connection with the making of the orders.

(6) Sections 64 and 65 shall not apply to an inquiry under this section.

(7) If a person, excluding a person contemplated in subsection (1)(a)(ii), against whom a confiscation order had been made under subsection (4), is subsequently tried and—

- (a) convicted of one or other of the offences in respect of which the order had been made, the court convicting that person may conduct an inquiry under section 61(1) and make an appropriate order;
- (b) acquitted of the offence in respect of which the order had been made, the court acquitting that person may make an appropriate order.

Restraint Orders

68. Restraint orders

(1) The Agency Director may apply to a court *ex parte* for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.

(2) A restraint order may be made in respect of—

- (a) realizable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;
- (b) all property which, if it is transferred to that person after the making of the restraint order, would be realizable property.

(3) A court to which an application is made under subsection (1) may make a temporary restraint order if the court is satisfied that—

- (a) a criminal investigation has been started in Kenya with regard to an offence; or
- (b) there is reasonable cause to believe that a person leads a criminal lifestyle and has benefited from his criminal conduct.

(4) A restraint order shall provide for the period of the notice to be given to persons affected by the order.

(5) Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provisions as the court may think fit for the reasonable—

- (a) living expenses of a person against whom the restraint order is being made and his family or household; and

- (b) legal expenses of that person in connection with any proceedings instituted against him in terms of this Part or any criminal proceedings to which the proceedings may relate;
- (c) carrying on of any trade, business, profession or occupation:

Provided that the court may place conditions as it believes appropriate for the purpose of ensuring that the restraint order is effective and the court is satisfied that the person whose expenses shall be provided for has disclosed, under oath, all his interests in the property subject to a restraint order and that the person cannot meet the expenses or carry on the trade or profession concerned out of his unrestrained property.

(6) A court making a restraint order may also make further order in respect of the discovery or disclosure of any facts, including facts relating to any property over which the defendant may have effective control and the location of such property, as the court may consider necessary or expedient with a view to achieving the objects of the restraint order.

(7) A court making a restraint order shall at the same time make an order authorising the seizure of all movable property concerned and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(8) Property seized under subsection (7) shall be dealt with in accordance with the directions of the court that made the relevant restraint order.

(9) A court that made a restraint order—

- (a) may, on application by a person affected by that order, vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied that the—
 - (i) operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship to the applicant; and
 - (ii) hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
- (b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded.

(10) When a court orders the rescission of an order authorising the seizure of property in terms of subsection (9)(a) the court shall make such other orders as it considers appropriate for the proper, fair and effective execution of the restraint order concerned.

69. Cases in which restraint order may be made

(1) A court may exercise the powers conferred on it by section 68(1)—

- (a) when—
 - (i) a prosecution for an offence has been instituted against the defendant concerned; and

- (ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
 - (iii) the proceedings against that defendant have not been concluded; or
- (b) when—
- (i) that court is satisfied that a person is to be charged with an offence; and
 - (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that person.

(2) Where the court has made a restraint order under subsection (1)(b), that court shall rescind the restraint order if the relevant person is not charged within such period as the court may consider reasonable.

70. Order to remain in force pending appeal

A restraint order and an order authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision by the court in relation to the making of a confiscation order, shall remain in force pending the outcome of any appeal against the decision concerned.

71. Seizure of property subject to restraint order

(1) In order to prevent any realizable property from being disposed of or removed contrary to a restraint order, a police officer may seize that property if he has reasonable grounds to believe that the property will be so disposed of or removed.

(2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the court that made the relevant restraint order.

72. Appointment of manager in respect of property subject to restraint order

- (1) Where a court has made a restraint order, that court may, at any time—
- (a) appoint a manager to do any one or more of the following on behalf of a person against whom the restraint order has been made—
 - (i) perform any particular act in respect of any or all the property to which the restraint order relates;
 - (ii) take care of the said property;
 - (iii) administer the said property;
 - (iv) where the said property is a business or undertaking, carry on, with due regard to any law which may be applicable, the business or undertaking; and
 - (v) in the case of property that is perishable, or liable to deterioration, decay or injury by being detained in custody, to sell or otherwise dispose of the said property;

- (b) order the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a receiver has been appointed under paragraph (a), into the custody of that receiver.

(2) A person affected by an order under subsection (1)(b) may at any time apply for the variation of—

- (a) rescission of the order; or
- (b) the terms of the appointment of the manager concerned or for the discharge of that manager.

(3) The court that made an order under subsection (1)(b)—

- (a) may at any time—
 - (i) vary or rescind the order; or
 - (ii) vary the terms of the appointment of the manager concerned or discharge that manager;
- (b) shall discharge the manager concerned if the relevant restraint order is rescinded;
- (c) may make an order relating to the fees and expenditure of the manager as it considers fit, including an order for the payment of the fees of the manager from the confiscated proceeds, if a confiscation order is made, or by the Government if no confiscation order is made.

73. Orders in respect of immovable property subject to restraint order

(1) A court that has made a restraint order in respect of immovable property may at any time, with a view to ensuring the payment to the Government where a confiscation order has—

- (a) not been made, of an amount equal to the most recent value of the immovable property; or
- (b) been made, of an amount exceeding the amount payable under the confiscation order,

order the Registrar of Lands to place a restriction on the land register in respect of that immovable property.

(2) A person affected by an order in subsection (1) may at any time apply for rescission of the order.

(3) The court that made an order in subsection (1)—

- (a) may at any time rescind the order; and
- (b) shall rescind the order if the relevant restraint order is rescinded or the amount payment of which is secured by the order has, with the consent of the court, been paid into court;
- (c) shall if, the order is rescinded, the court shall direct the Registrar of Lands to lift the restriction placed by virtue of that order on the land register in respect of that immovable property and the Registrar of Lands shall give effect to such direction.

74. Variation and rescission of certain orders suspended by appeal

The lodging of an appeal against a decision to vary or rescind any order referred to in sections 68(10), 72(3) and 73(3) shall act as a stay of such a variation or rescission pending the determination of the appeal.

*Realization of Property***75. Realization of property**

- (1) A court may exercise the powers conferred upon it by subsection (2) when—
- (a) a confiscation order has been made against the defendant concerned;
 - (b) that confiscation order is no longer subject to review or appeal; and
 - (c) the proceedings against that defendant have been concluded.

- (2) A court may, on the application of the Agency Director—

- (a) if a receiver has not been appointed in respect of any of the property concerned, appoint a receiver in respect of the realizable property;
- (b) subject to subsection (3), authorise a manager appointed under section 72(1)(a) or a receiver appointed under paragraph (a) of this subsection, as the case may be, to realize any realizable property in such manner as that court may determine;
- (c) order any person who holds realizable property to surrender the said property forthwith into the custody of a manager appointed under section 72(1)(a) or a receiver appointed under paragraph (a) of this subsection, as the court may determine.

(3) A court shall not exercise its powers under subsection (2)(b) unless it has afforded all persons known to have any interest in the property concerned an opportunity to make representations to it in connection with the realization of that property.

- (4) If the court is satisfied that a person—

- (a) is likely to be directly affected by the confiscation order; or
- (b) has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 61(1) which was committed by the defendant,

the court may allow that person to make representations in connection with the realization of that property.

(5) If the court is satisfied that a person who has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 61(1) which was committed by the defendant—

- (a) has instituted civil proceedings, or intends to institute such proceedings within a reasonable time; or
- (b) has obtained a judgment against the defendant,

in respect of that damage, loss or injury, the court may order that the receiver suspend the realization of the whole or part of the realizable property concerned

for the period that the court deems fit in order to satisfy such a claim or judgment and related legal expenses and may make such ancillary orders as it deems expedient.

- (6) The receiver shall, as soon as possible after—
- (a) the proceedings referred to in subsection (5)(a) have been disposed of; or
 - (b) the judgment referred to in subsection (5)(b) has been satisfied, as the case may be; or
 - (c) the period determined under subsection (5) has expired,

whichever is the earliest, realize the realizable property concerned as contemplated in subsection (2).

76. Application of certain sums of money

(1) Subject to subsection (2), the following sums of money under the control of a receiver appointed under this Part, namely—

- (a) the proceeds of any realizable property realized by virtue of section 75; and
- (b) any other sums of money, being property of the defendant concerned,

shall, after such payments as the court may direct, have been made out of the sums of money, be applied on that defendant's behalf in satisfaction of the confiscation order made against that person.

(2) Notwithstanding subsection (1), where the court directs payments out of the sums of money referred to in that subsection—

- (a) the Government shall not have a preferential claim; and
- (b) if any money remains under the control of the receiver after the amount payable under the confiscation order has been fully paid, the receiver shall distribute such money—
 - (i) among such persons who held realizable property realized by virtue of section 76; and
 - (ii) in such proportions as the court may direct after affording the persons an opportunity to make representations to it in connection with the distribution of those sums of money.

(3) Without limiting the generality of subsection (1), the payments that a court may direct to be under that subsection shall include any payment in respect of an obligation which was found to have priority under section 64.

77. Exercise of powers by court and receiver

(1) The powers conferred upon a court by sections 68, 69, 71, and 72 or upon a receiver appointed under this Part shall—

- (a) subject to paragraphs (b) and (c), be exercised with a view to making available the current value of realizable property for satisfying any confiscation order made or which might be made against the defendant;

- (b) in the case of realizable property held by a person to whom that defendant has directly or indirectly made an affected gift, be exercised with a view to realizing not more than the current value of the gift;
- (c) be exercised with a view to allowing a person other than the defendant or the recipient of such gift to retain or recover the current value of any property held by that person,

and, except as provided in sections 61(1) and 68(6), any obligation of that defendant or the recipient of the gift which conflicts with the obligation to satisfy a confiscation order shall be left out of account.

(2) The provisions of subsection (1) shall not be construed as prohibiting any court from making any additional order in respect of a debt owed to the Government.

78. Variation of confiscation orders

(1) If the court is satisfied that the realizable property is inadequate for the payment of the balance of the amount to be recovered under a confiscation order against the defendant concerned, the court may, on the application of that defendant, issue a certificate to that effect stating the reasons for the court being so satisfied.

(2) For the purpose of subsection (1), the court may—

- (a) in the case of realizable property held by—
 - (i) a person whose estate has been sequestered, take into account the extent to which the proceeds of property in that estate may be distributed among the creditors; or
 - (ii) a company or other legal entity which is being wound up, take into account the extent to which the assets of that company or legal entity may be distributed among the creditors;
- (b) leave out of account any inadequacy in the realizable property which is in the opinion of that court, wholly or partly attributable to anything done by the defendant for the purpose of preserving any property held by a person to whom the defendant had directly or indirectly made an affected gift from the risk of any realization in terms of this Part.

(3) If a certificate referred to in subsection (1) has been issued, the defendant may apply to the court that made the confiscation order against that person for the reduction of the amount to be recovered under that confiscation order.

(4) In making an order under subsection (3), the court may substitute for the amount to be recovered under that confiscation order such lesser amount as that court may consider just in the circumstances of the case.

79. Effect of bankruptcy on realizable property

(1) When a person who holds realizable property is adjudged bankrupt—

- (a) the property for the time being subject to a restraint order made before the date of the bankruptcy order; and

- (b) the proceeds of any realizable property realized by virtue of section 75 and for the time being under the control of a receiver appointed under this Part,

shall not vest in the Registrar of the High Court, Official Receiver or the Public Trustee.

(2) When a defendant who has directly or indirectly made an affected gift to any other person is adjudged bankrupt—

- (a) no court shall set aside the disposition of that gift under the Bankruptcy Act (Cap. 53), if—
 - (i) a prosecution for an offence has been instituted against the defendant and the proceedings against that person have not been concluded; or
 - (ii) the property of any other person is subject to a restraint order;
- (b) any court that sets aside any disposition in paragraph (a) after the conclusion of the proceedings against the defendant, shall take into account any realization of the property of other person in terms of this Part.

(3) Where a person has been adjudged bankrupt, the powers conferred upon the court by sections 64 to 72 and 73(2) or upon a receiver appointed under this Part, shall not be exercised in respect of any property which—

- (a) forms part of the bankrupt's estate; or
- (b) the Official Receiver concerned is entitled to claim from the bankrupt under the Bankruptcy Act (Cap. 53).

(4) Nothing in the Bankruptcy Act (Cap. 53) shall be construed as prohibiting a court or a receiver appointed under this Part from exercising any power contemplated in subsection (3) of any property or proceeds mentioned in subsection (1).

80. Effect of winding-up of companies or other legal entities on realizable property

(1) When a court has made an order for the winding-up of any company or other legal entity which holds realizable property or a resolution for the voluntary winding-up of that company or legal entity has been registered in terms of any applicable law, no—

- (a) property for the time being subject to a restraint order made before the relevant time; or
- (b) proceeds of any realizable property realized by virtue of section 75 and for the time being under the control of a receiver appointed under this Part,

shall form part of the assets of any that company or legal entity.

(2) Where an order mentioned in subsection (1) has been made in respect of a company or other legal entity or a resolution mentioned in that subsection has been registered in respect of that company or legal entity, the powers conferred

upon a court by sections 68 to 73 and 75(2) or upon a receiver appointed under this Part, shall not be exercised in respect of any property which forms part of the assets of such company or legal entity.

(3) Nothing in the Companies Act (Cap. 486) or any other law relating to legal entities in general or any particular legal entity, shall be construed as prohibiting any court or receiver appointed under this Part from exercising any power in subsection (2) in respect of any property or proceeds mentioned in subsection (1).

(4) For the purpose of subsection (1), “**the relevant time**” means where—

- (a) an order for the winding-up of the company or legal entity, as the case may be, has been made, the time of the presentation to the court concerned of the application for the winding-up; or
- (b) no such order has been made, the time of the registration of the resolution authorizing the voluntary winding-up of the company or legal entity, as the case may be.

(5) The provisions of section 79(2) are, with the necessary changes, applicable to a company or legal entity which has directly or indirectly made an affected gift.

PART VIII – CIVIL FORFEITURE

Recovery and Preservation of Property

81. Nature of proceedings

(1) All proceedings under this Part shall be civil proceedings.

(2) The rules of evidence applicable in civil proceedings shall apply to proceedings under this Part.

82. Preservation orders

(1) The Agency Director may, by way of an *ex parte* application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned—

- (a) has been used or is intended for use in the commission of an offence; or
- (b) is proceeds of crime.

(3) A court making a preservation order shall at the same time make an order authorising the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.

83. Notice of preservation orders

(1) If a court makes a preservation order, the Agency Director shall, within twenty-one days after the making of the order, give notice of the order to all persons known to the Agency Director to have an interest in property which is subject to the order; and publish a notice of the order in the *Gazette*.

(2) A notice under subsection (1) shall be served in accordance with the provisions of the Civil Procedure Act (Cap. 21).

(3) A person who has an interest in the property which is subject to a preservation order may give notice of his intention to oppose the making of a forfeiture order, or to apply for an order excluding his interest in the property concerned from the operation thereof.

(4) A notice under subsection (3) shall be served upon the Agency Director, in the case of—

- (a) a person upon whom a notice has been served under subsection (1), within fourteen days after service; or
- (b) any other person, within fourteen days after the date upon which a notice under subsection (1) is published in the *Gazette*.

(5) A notice served under subsections (3) or (4) shall contain full particulars of the address for the delivery of documents concerning further proceedings under this Part and shall be accompanied by an affidavit stating—

- (a) full particulars of the identity of the person entering the appearance;
- (b) the nature and extent of his interest in the property concerned; and
- (c) the reasons which the person intends to rely on in opposing a forfeiture order or applying for the exclusion of his interest from the operation thereof.

84. Duration of preservation orders

A preservation order shall expire ninety days after the date on which notice of the making of the order is published in the *Gazette*, unless—

- (a) there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order;
- (b) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order; or
- (c) the order is rescinded before the expiry of that period.

85. Seizure of property subject to preservation orders

(1) In order to prevent property subject to a preservation order from being disposed of or removed contrary to that order, any police officer may seize any of that property if he has reasonable grounds to believe that the property will be so disposed of or removed.

(2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.

86. Appointment of manager in respect of property subject to preservation orders

(1) Where a court has made a preservation order, the court shall, if it deems it appropriate or at the request of the Agency Director, at the time of the making of the order or at a later time—

- (a) appoint a manager to do, subject to the directions of that court or the Agency Director, any one or more of the following on behalf of the person against whom the preservation order has been made, namely—
 - (i) to assume control over the property;
 - (ii) to take care of the said property;
 - (iii) to administer the said property and to do any act necessary for that purpose;
 - (iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and
 - (v) in the case of property that is perishable, or liable to deterioration, decay or injury by being detained in custody to sell or otherwise dispose of the said property;
- (b) order any person holding property subject to the preservation order to surrender forthwith, or within such period as that court may determine, any such property into the custody of the manager.

(2) The court that made an order under subsection (1) may make the order relating to the fees and expenditure of the receiver as it deems fit, including an order for the payment of the fees of the manager—

- (a) from the forfeited property if a forfeiture order is made; or
- (b) by the Government if no forfeiture order is made.

87. Orders in respect of immovable property subject to preservation order

(1) A court that has made a preservation order in respect of immovable property may at any time, with a view to ensuring the effective execution of a subsequent order, order the Registrar of Lands to place a restriction on the land register in respect of that immovable property.

(2) An order under subsection (1) may be made in respect of the following restrictions—

- (a) that the immovable property shall not without the consent of the court be mortgaged or otherwise encumbered;
- (b) that the immovable property shall not without the consent of the court, be attached or sold in execution; and
- (c) that the immovable property shall not, without the consent of the court—
 - (i) vesting the Registrar of the High Court or Official Receiver concerned, as the case may be, when the estate of the owner of that immovable property is sequestrated;

- (ii) where the owners of the immovable property is a company or other corporate body which is being wound up,

form part of the assets of that company or corporate body.

(3) In order to give effect to subsection (1), the Registrar of Lands concerned shall—

- (a) make the necessary entries in his registers and the necessary endorsement on the office copy of the title deed, and thereupon any such restriction shall be effective against all persons except, in the case of a restriction contemplated in subsection (2)(b), against any person in whose favour a mortgage bond or other charge was registered against the title deed of immovable property prior to the endorsement of the restriction on the title deed of the immovable property, but shall lapse on the transfer of ownership of the immovable property concerned;
- (b) when the original of the title deed is produced to him, make the necessary endorsement thereon.

(4) Unless the court directs otherwise, the custody of immovable property on the title deed of which a restriction contemplated in subsection (2)(c) was endorsed shall, from the date on which—

- (a) the estate of the owner of the immovable property is sequestered; or
- (b) where the owner of the immovable property is a company or other corporate body, that company or corporate body is being wound up,

vest in the person or persons in whom the said custody would have vested if such a restriction were not so endorsed.

(5) Where the court granted its consent in respect of a restriction contemplated in subsection (2)(c) and endorsed on the title deed of immovable property, the immovable property shall be deemed, if the—

- (a) estate of the owner of the immovable property was sequestered, to have vested in the Registrar of the High Court or Official Receiver concerned, as the case may be, as if such a restriction were not so endorsed; or
- (b) owner of the immovable property is a company or other legal entity which is being wound up, to have formed part of the assets of such company or legal entity as if such a restriction were not so endorsed.

(6) A person affected by an order contemplated in subsection (1) may at any time apply for the rescission of the order.

88. Provision for expenses

(1) A preservation order may make such provision as the court deems fit for reasonable living expenses of a person holding an interest in property subject to a preservation order and his family or household.

(2) A court shall not make provisions for any expenses under subsection (1) unless it is satisfied that—

- (a) the person cannot meet the expenses concerned out of his property which is not subject to the preservation order; and
- (b) the person has disclosed under oath all his interest in the property and has submitted to that court an affidavit.

89. Variation and rescission of orders

(1) A court which makes a preservation order—

- (a) may, on application by a person affected by that order, vary or rescind the preservation order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—
 - (i) that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and
 - (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
- (b) shall rescind the preservation order when the proceedings against the defendant concerned are concluded.

(2) When a court orders the rescission of an order authorising the seizure of property under paragraph (a) of subsection (1), the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation order concerned.

(3) A person affected by an order for the appointment of a manager may at any time, apply for the—

- (a) variation or rescission of the order;
- (b) variation of the terms of the appointment of the manager concerned; or
- (c) discharge of the manager.

(4) The court that made an order for the appointment of a manager—

- (a) may, if it deems it necessary in the interests of justice, at any time—
 - (i) vary or rescind the order;
 - (ii) vary the terms of the appointment of the manager concerned; or
 - (iii) discharge that manager;
- (b) shall rescind the order and discharge the manager concerned if the relevant preservation order is rescinded.

(5) A person affected by an order in respect of immovable property may, at any time, apply for the rescission of the order.

(6) The court that made an order in respect of immovable property—

- (i) may, if it deems it necessary in the interests of justice, at any time rescind the order; or
- (ii) shall rescind the order if the relevant preservation order is rescinded.

(7) If an order in respect of immovable property is rescinded, the court shall direct the Registrar of Lands concerned to lift any caveat entered by virtue of that order on the land registry in respect of that immovable property, and the Registrar shall give effect to such direction.

Forfeiture of Property

90. Application for forfeiture order

(1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.

(2) The Agency Director shall give fourteen days notice of an application under subsection (1) to every person who served notice in terms of section 83(3).

(3) A notice under subsection (2) shall be served in accordance with the provisions of the Civil Procedure Act (Cap. 21).

(4) A person who served notice under section 83(3) may appear at the hearing of the application under subsection (1) to—

- (a) oppose the making of the order; or
- (b) apply for an order—
 - (i) excluding his interest in that property from the operation of the order; or
 - (ii) varying the operation of the order in respect of that property,

and may adduce evidence at the hearing of the application.

91. Late service of notice

(1) A person who, for any reason, does not serve notice in terms of section 83(3) may, within fourteen days of his becoming aware of the existence of a preservation order, apply to the court for leave to serve that notice out of time.

(2) An application under subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 90(1), but shall be made before judgment is given in respect of such an application for a forfeiture order.

(3) The court may grant an applicant referred to in subsection (1) leave to serve notice in terms of section 83(3) within the period which the court deems appropriate, if the court is satisfied on good cause shown that such applicant—

- (a) has for sufficient reason failed to serve notice in terms of section 83(3); and
- (b) has an interest in the property which is subject to the preservation order.

(4) When a court grants an applicant leave to serve notice out of time, the court—

- (a) shall make any order as to costs against the applicant; and
- (b) may make any order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order, which it deems appropriate.

(5) A notice served after leave has been obtained under this section shall contain full particulars of the chosen address of the person who serves such notice for the delivery of documents concerning further proceedings under this part and shall be accompanied by the affidavit referred to in section 83(5).

92. Making of forfeiture order

(1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—

- (a) has been used or is intended for use in the commission of an offence;
or
- (b) is proceeds of crime.

(2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.

(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.

(5) The Registrar of the High Court making a forfeiture order shall publish a notice thereof in the *Gazette* as soon as practicable but not more than thirty days after the order is made.

(6) A forfeiture order shall not take effect—

- (a) before the period allowed for an application under section 89 or an appeal under section 96 has expired; or
- (b) before such an application or appeal has been disposed of.

93. Protection of third parties

(1) Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities—

- (a) that the person was not in any way involved in the commission of the offence; and
- (b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—
 - (i) for sufficient consideration; and

- (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property,

the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.

(2) Subject to subsection (3), where a forfeiture order has already been made directing the forfeiture of property, a person who claims an interest in the property may, before the end of the period of twelve months commencing on the day on which the forfeiture order is made, apply under this subsection to the court for an order under subsection (1).

(3) A person who—

- (a) had knowledge of the application for the forfeiture order before the order was made; or
- (b) appeared at the hearing of that application,

shall not be permitted to make an application under subsection (2), except with leave of the court.

(4) A person who makes an application under subsection (1) or (2) shall give not less than fourteen days written notice of the making of the application to the Agency Director who shall be a party to any proceedings in the application.

(5) An applicant or the Agency Director may in accordance with the High Court rules, appeal to the Court of Appeal against an order made under subsection (1).

(6) A person appointed by the court under this Act as a receiver or trustee shall, on application by any person who has obtained an order under subsection (1), and where the period allowed by the rules of court with respect to the making of appeals has expired and any appeal against that order has been determined—

- (a) direct that the property or Part thereof to which the interest of the applicant relates, be returned to the applicant; or
- (b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

(7) The Court may—

- (a) before making a confiscation order; or
- (b) in the case of property in respect of which a restraining order was made, where that order was served in accordance with section 68, or in the case of property in respect of which a court order has been made authorizing the seizure of the property,

set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the restraining order, unless the conveyance or transfer was made for value to a person acting in good faith and without notice.

[Act No. 51 of 2012, s. 14.]

94. Exclusion of interests in property

(1) The High Court may, on application—

- (a) under section 90(3); or

(b) by a person referred to in section 91(1),

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

(2) The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of crime if it finds, on a balance of probabilities, that the applicant for the order—

- (a) has acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that such person neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of crime.

(3) The High Court may make an order under subsection (1), in relation to the forfeiture of property which has been used or is intended for use in the commission of an offence, if it finds, on a balance of probabilities, that the applicant for the order had acquired the interest concerned legally and—

- (a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held has been used or is intended for use in the commission of an offence; or
- (b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned in connection with the commission of an offence.

(4) If an applicant for an order under subsection (1) adduces evidence to show that he did not know or did not have reasonable grounds to suspect that the property in which the interest is held is tainted property, the Agency Director may submit a return of the service on the applicant of a notice issued under section 90(3) in rebuttal of that evidence in respect of the period since the date of such service.

(5) Where the Agency Director submits a return of the service on the applicant under subsection (4), the applicant shall, in addition to the facts referred to in subsections (2)(a) and (b), also prove on a balance of probabilities that, since such service, he has taken all reasonable steps to prevent the further use of the property concerned in the commission of an offence.

(6) The High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the High Court deems appropriate, including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the High Court may determine, to prevent the future use of the property in connection with the commission of an offence.

95. Forfeiture order by default

(1) If the Agency Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an

application under section 91(1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who served notices in terms of section 83(3) have knowledge of notices given under section 91(2), the High Court may—

- (a) make any order by default which the High Court could have made under sections 88(1) and (2);
- (b) make such order as the High Court may consider appropriate in the circumstances; or
- (c) make no order.

(2) The High Court may, before making an order in terms of subsection (1), call upon the Agency Director to adduce such further evidence, either in writing or orally, in support of his application as the High Court may consider necessary.

(3) A person whose interest in the property concerned is affected by the forfeiture order or other order made by the High Court under subsection (1) may, within twenty days after that person has acquired knowledge of such order or direction, set the matter down for variation or rescission by the High Court.

(4) The court may, upon good cause shown, vary or rescind the default order or give any other direction on such terms as it deems appropriate.

96. Exclusion of interests in forfeited property

(1) A person affected by a forfeiture order who was entitled to receive notice of the application for the order under section 91(2), but did not receive such notice, may, within forty five days after the notice is published in the *Gazette*, apply to the High Court for an order excluding his interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property.

(2) The hearing of the application shall, to the extent practicable and consistent with the interests of justice be held within thirty days of the filing of the application.

(3) The High Court may make an order under subsection (1) if it finds on a balance of probabilities that the applicant for the order falls within the provisions of subsections (2) or (3) of section 91.

(4) The provisions of section 94(4) and (5) shall apply to any proceedings under this section.

97. Appeal against forfeiture order

Any preservation order and any order authorizing the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under section 92(1) shall remain in force pending the outcome of any appeal against the decision concerned.

98. Effect of forfeiture order

(1) Where the High Court has made a forfeiture order and a manager has not been appointed in respect of any of the property concerned, the High Court may appoint a manager to perform any of the functions referred to in section 99 in respect of that property.

(2) On the date when a forfeiture order takes effect the property subject to the order shall be forfeited to the Government and vests in the manager on behalf of the Government.

(3) Upon a forfeiture order taking effect the manager may take possession of on the property subject to the order on behalf of the Government from any person in possession, or entitled to possession, of the property.

99. Fulfilment of forfeiture order

(1) The manager shall, subject to any order for the exclusion of interests in forfeited property under section 94(2)(a) or 96(3) and in accordance with the directions of the Agency Director—

- (a) deposit any moneys forfeited into the Fund;
- (b) deliver any property forfeited into the Fund; or
- (c) dispose of property forfeited by sale or any other means and deposit the proceeds of the sale or disposition into the Fund.

(2) Any right or interest in forfeited property not exercisable by or transferable to the Government, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect.

(3) A person who has possession, or was entitled to possession, of forfeited property immediately before the forfeiture order took effect, or any person acting together with, or on behalf of that person, shall not be eligible to purchase forfeited property at any sale held by the manager.

(4) The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and the High Court costs shall be defrayed out of the Fund.

PART IX – GENERAL PROVISIONS RELATING TO PRESERVATION AND FORFEITURE OF PROPERTY

100. Offence may form the basis of multiple orders

The fact that a preservation order or a forfeiture order has been made on the basis of an offence in which a specific person has been involved shall not prevent the making of another or other preservation orders or forfeiture orders on the basis of the same offence.

101. Application of part to deceased estates

(1) Any notice authorised or required to be given to a person under this Part shall, in the case of a deceased person, be sufficiently given to the administrator of the deceased's estate.

(2) A reference in this Part to the property of a person shall, in the case of a person who is deceased, be a reference to property that the deceased held immediately before his death.

(3) An order may be applied for and made under this Part—

- (a) in respect of property which forms part of a deceased's estate; and
- (b) on evidence adduced concerning the activities of a deceased person.

102. Effect of death of joint owner of preserved property

(1) If a person has an interest in property as a joint owner, his death after a preservation order is made in respect of the interest does not, while the order is in force, operate to vest the interest in the surviving joint owner or owners and the preservation order continues to apply to the interest as if the person had not died.

(2) A forfeiture order made in respect of that interest applies as if the order took effect in relation to the interest immediately before the person died.

(3) Subsection (1) does not apply to an interest in property if a preservation order ceases to apply to that interest without a forfeiture order being made in respect of that interest.

PART X – PRODUCTION ORDERS AND
OTHER INFORMATION GATHERING POWERS

103. Production orders

(1) Where a person has been charged with or convicted of an offence, and a police officer has reasonable grounds for suspecting that any person has possession or control of—

- (a) a document relevant to identifying, locating or quantifying property of the person, or to identifying or locating a document necessary for the transfer of property of such person; or
- (b) a document relevant to identifying, locating or quantifying tainted property in relation to the offence, or to identifying or locating a document necessary for the transfer of tainted property in relation to the offence,

the police officer may make an *ex parte* application with a supporting affidavit to a court for an order against the person suspected of having possession or control of a document of the kind referred to.

(2) A police officer to whom the documents are produced may—

- (a) inspect the documents;
- (b) make copies of the documents; or
- (c) retain the documents for as long as is reasonably necessary for the purposes of this Act.

(3) Where a police officer retains documents produced to him, he shall make a copy of the documents available to the person who produced them.

104. Evidential value of information

(1) Where a person produces a document pursuant to an order under this Part, the production of the document, or any information, document or things obtained as a direct or indirect consequence of the production of the document, shall not be admissible against the person in any criminal proceedings except proceedings under section 107.

(2) For the purposes of subsection (1), proceedings on an application for a restraining order, or a confiscation order are civil proceedings.

105. Failure to comply with a production order

(1) Where a person is required by a production order to produce a document to a police officer, the person shall commit an offence under this section if he—

- (a) contravenes the order without reasonable cause; or
- (b) knowingly produces or makes available a document known to the person to be false or misleading in a material particular.

(2) A person who contravenes the provisions of this section commits an offence and shall, on conviction, be liable—

- (a) in the case of a natural person, to imprisonment for a term not exceeding seven years or a fine not exceeding two million shillings or to both; or,
- (b) in the case of a body corporate, to a fine not exceeding ten million shillings.

106. Power to search for and seize documents relevant to locating property

(1) A police officer may, under warrant issued under section 107—

- (a) enter upon land or into premises;
- (b) search the land or premises for any document of the type described in section 103(1); and
- (c) seize any document found in the course of that search that the police officer believes, on reasonable grounds, to be a relevant document in relation to an offence, provided that the entry, search and seizure is made.

(2) Any authority or officer exercising powers under this Act or any regulations made thereunder who, without reasons recorded in writing—

- (a) searches or causes to be searched any building or place; or
- (b) detains, searches or arrests any person,

commits an offence and is liable on conviction to imprisonment for a term not exceeding five years, or a fine not exceeding one million shillings, or to both.

107. Search warrant for location of documents relevant to locating property

(1) Where—

- (a) a person has been charged or convicted of an offence; or
- (b) a police officer has reasonable grounds for suspecting that there is or may be, within the next seventy-two hours, upon any land or in any premises, a document of the type described in section 103(1) in relation to the offence,

the police officer may make an application supported by an affidavit to a court of competent jurisdiction for a search warrant in respect of that land or those premises.

(2) Where an application is made under subsection (1) for a warrant to search land or premises, the court may, subject to subsection (4) issue a warrant authorizing a police officer, whether or not named in the warrant, with such assistance and by such force as is necessary and reasonable—

- (a) to enter upon the land or into any premises and to search the land or premises for property of that kind; and
- (b) to seize property found in the course of the search that the police officer believes on reasonable grounds to be property of that kind.

(3) A court shall not issue a warrant under subsection (2) unless it is satisfied that—

- (a) a production order has been given in respect of the document and has not been complied with; or
- (b) a production order in respect of the document would be unlikely to be effective; or
- (c) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the police officer does not gain immediate access to the document without any notice to any person; or
- (d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained.

(4) A warrant issued under this section shall state—

- (a) the purpose for which it is issued, including a reference to the nature of the relevant offence;
- (b) a description of the kind of documents authorised to be seized;
- (c) a time at which the warrant ceases to be in force; and
- (d) whether entry is authorised to be made at any time of the day or night or during specified hours.

(5) If during the course of searching under a warrant issued under this section, a police officer finds—

- (a) a document of the type described in section 103(1) that the police officer believes on reasonable grounds to relate to the relevant offence, or to another offence; or
- (b) anything the police officer believes on reasonable grounds will afford evidence as to the commission of an offence,

the police officer may seize that property or thing and the warrant shall be deemed to authorise such seizure.

108. Searches conducted without written reasons

An officer or any authority exercising powers under this Act or Regulations made thereunder who, without reasons recorded in writing—

- (a) searches or causes to be searched any building or place; or
- (b) detains or searches or arrests any person,

commits an offence and is liable upon conviction to imprisonment for a term not exceeding five years, or a fine not exceeding one million shillings, or both.

PART XI – CRIMINAL ASSETS RECOVERY FUND

109. Establishment of Criminal Assets Recovery Fund

There is established a fund to be known as the Criminal Assets Recovery Fund.

110. Finances of the Fund

The Fund shall consist of—

- (a) all moneys derived from the fulfilment of confiscation and forfeiture orders stipulated in Part VII to X;
- (b) all property derived from the fulfilment of forfeiture orders as stipulated in section 100;
- (c) the balance of all moneys derived from the execution of foreign confiscation orders after payments have been made to requesting countries under this Act;
- (d) any moneys 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 Anti-Corruption and Economic Crimes Act, 2003 (Cap. 65), 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; and
- (h) all property or moneys transferred to the Fund pursuant to the provisions of this Act.

111. Administration of the Fund

The Fund shall be administered by the Agency.

112. Functions of the Agency under this Part

In the administration of the Fund, the following shall apply—

- (a) all monies derived from concluded confiscation and forfeiture orders stipulated in Parts VII to X shall be paid into the Consolidated Fund; and
- (b) all property derived from concluded confiscation or forfeiture orders stipulated in Parts VII to X shall vest in the Government and be disposed of in accordance with relevant law relating to disposal of public property.

113. Other matters to be prescribed

(1) The Minister may prescribe, by way of regulations, matters in connection with—

- (a) the administrative operations of the Fund;

(b) the utilization of properties and monies standing to the credit of the Fund.

(2) Regulations issued under subsection (1) shall be laid before Parliament.

PART XII – INTERNATIONAL ASSISTANCE
IN INVESTIGATIONS AND PROCEEDINGS

114. Principles of mutuality

For the purposes of this Part, the principles of mutuality and reciprocity shall at all times be recognised.

115. Request made by Kenya to other countries

(1) For the purpose of an investigation or proceedings under this Act, the Attorney-General may request an appropriate authority of another country to arrange for—

- (a) evidence to be taken, or information, documents or articles to be produced or obtained in that country;
- (b) a warrant or other instrument authorizing search and seizure to be obtained and executed in that country;
- (c) a person from that country to come to Kenya to assist in the investigation or proceedings;
- (d) a restraint order or forfeiture order made under this Act to be enforced in that country, or a similar order to be obtained and executed in that country to preserve property that had it been located in Kenya would be subject to forfeiture or confiscation under this Act;
- (e) an order or notice under this Act to be served on a person in that country; or
- (f) other assistance to be provided, whether pursuant to a treaty or other written arrangement between Kenya and that country or otherwise.

(2) Requests by other countries to Kenya for assistance of a kind specified in subsection (1) may be made to the Attorney-General.

116. Evidence, etc., obtained from another country

Evidence, documents or articles obtained pursuant to a request made under section 115 shall—

- (a) be received in evidence in Kenya;
- (b) not be used for a purpose other than that specified in that request, except with the consent of the appropriate authority of the foreign country; and
- (c) be returned when its use is no longer required, unless that authority indicates to the contrary.

117. Transfer to Kenya of a person to assist in an investigation or proceedings

(1) The effect of a request made pursuant to section 115(c) shall be to authorise the entry into and departure from Kenya of the person who is the subject of the request, as well as the presence of the person in Kenya for so long as required for the purposes of the request.

(2) Where the person who is the subject of a request under section 111(c) is in custody in the other country by virtue of a sentence or order of a court or tribunal exercising criminal jurisdiction, the effect of a request under section 115(c) shall be to authorise the detention in custody of the person in transit to and from Kenya, and while in Kenya at such places as the Attorney-General may specify.

(3) A person in Kenya pursuant to a request under section 115(1) shall not—

- (a) be detained, prosecuted or punished for any offence that is alleged to have been committed, or was committed, prior to that person's departure from the requested country pursuant to the request;
- (b) be subjected to any civil suit in respect of any act or omission that is alleged to have occurred, or occurred, prior to that person's departure from the requested country pursuant to the request;
- (c) be required to give evidence or produce a document or thing which he could not be required to give or produce—
 - (i) in any criminal proceeding in Kenya; or
 - (ii) subject to the requesting country conceding any claim by the person to a privilege or immunity under the law of the requested country in any criminal proceedings in the requested country; or
- (d) be required to give evidence or produce a document or thing in any proceeding in Kenya other than the proceeding to which the request relates.

118. Requests to Kenya for evidence

(1) Where country requests assistance from Kenya in obtaining evidence for the purpose of an investigation or a proceeding in relation to any offence under corresponding law of that country, the Attorney-General may nominate a court in Kenya to receive such evidence as appears to the court appropriate in order to give effect to the request.

(2) The court nominated pursuant to subsection (1) shall have the same power to secure the attendance of witnesses, administer oaths and receive evidence as it has for the purposes of other proceedings before the court—

(3) The evidence received by the court shall be certified or verified by the court in such manner as the Attorney-General specifies and then furnished to the Attorney-General for transmission to the requesting country.

119. Requests to Kenya for search warrants

(1) Where a country requests assistance from Kenya in obtaining and executing a search and seizure warrant for the purposes of an investigation or proceedings relating to the corresponding law of that country, the Attorney-General may apply to the High Court for the warrant requested.

(2) Where, on application, the High Court is satisfied that—

- (a) a proceeding or investigation relating to a serious offence has commenced in the requesting country; and
- (b) there are reasonable grounds for believing that evidence relevant to the investigation or proceedings is located in Kenya,

it may issue a warrant under this section authorizing entry for the purpose of search for the thing and if found the thing shall be seized.

(3) Any written law with respect to the procedure for the making and disposal of an application for the execution of a search warrant shall apply, as if the application were for the issue of a warrant under the Criminal Procedure Code (Cap. 75).

120. Requests to Kenya for the enforcement of certain orders

(1) Where—

- (a) a court or tribunal of another country issues a restraint order or confiscation order, (whether based upon criminal or *in rem* or other non-conviction based proceedings), in respect of an offence against the corresponding law of that country; and
- (b) that country requests assistance from Kenya in enforcing those orders against property believed to be located in Kenya,

the Attorney-General may apply to the High Court for the registration of the order.

(2) Where the Attorney-General applies to the High Court for the registration of an order pursuant to subsection (1) the High Court shall register the order.

(3) An order registered in accordance with this section shall have effect and shall be enforced, as if it were an order made under this Act or forfeiture orders, as the case may be where the High Court is satisfied that—

- (a) the order is final, not subject to appeal, and a certified copy of such order bearing the seal or the signature of the court has been submitted;
- (b) the person against whom, or in relation to whose property the order has been made, received notice of the proceedings outside of Kenya and had an opportunity to defend his interest in the property; and
- (c) enforcement of the order would not be contrary to the interests of justice.

(4) To preserve the availability of property in Kenya that is subject to confiscation proceedings that have been or are likely to be instituted in another country, the Attorney-General may apply to the court to issue an order of restraint of the said property.

(5) In issuing the order of restraint the court may rely on information set forth in the request from the other country describing the nature of the pending investigations or proceedings and setting forth a reasonable basis to believe that the said property will be named in a confiscation order at the conclusion of the proceedings.

(6) A copy of the application to register and enforce orders from another country shall be provided to any person who appears to own or control or otherwise have a legal interest in the property in the manner prescribed in section 79.

(7) A person entitled to notice pursuant to subsection (6) shall have thirty days from the date of such receipt of notice or publication, whichever is later, to file an objection contesting the enforcement of the order from another country.

(8) Unless a person contesting enforcement of an order from another country is able to establish one of the conditions of section 93(1) the court may enter such orders as may be necessary to give effect to the orders of a court or tribunal of the other country and the court shall be bound by the findings of fact to the extent that they are stated in the foreign order.

(9) Where an amount of money is to be paid under an order from another country is expressed in a currency other than that of Kenya, the amount shall be converted into the currency of Kenya on the basis of the official exchange rate prevailing as of the date of the registration of the order.

(10) Where the Attorney-General considers it appropriate either because an international arrangement so requires or because it is permits or in the public interest, the Attorney-General may order that the whole or any part of any property forfeited pursuant subsection (7) or the value thereof be returned or remitted to the requesting state.

PART XIII – MISCELLANEOUS PROVISIONS

121. Access to information

(1) The Attorney-General may request any person employed in or associated with a government department or statutory body to furnish him with all information that may reasonably be required for any investigation in terms of this Act and such person shall notwithstanding anything to the contrary contained in any law which prohibits or precludes that person—

- (a) from disclosing any information relating to the activities, affairs or business of any other person; or
- (b) from permitting any person to have access to any registers, records or other documents, or electronic data which have a bearing on the said activities, affairs or business,

furnish the Attorney-General with such information and permit the Attorney-General to have access to any registers, records, documents, and electronic data, which may contain such information.

(2) The provisions of subsection (1) shall not be construed as prohibiting any Minister by whom or any other department or institution by which, or under the control of whom or which, any law referred to in subsection (4) is administered, or any board, institution or body established by or under any such law, from making

any practical and reasonable procedural arrangements with regard to the furnishing of such information or the granting of the access contemplated in subsection (1) and according to which the information or the granting of the access contemplated in that subsection shall be furnished or granted with regard to any reasonable safeguards which any such Minister, authority, board, institution, body or person, subject to the provisions of subsection (3), requires to maintain the confidentiality of such information, registers, records, documents or electronic media.

(3) No person shall, without the written permission of the Attorney-General disclose to any other person any confidential information, registers, records, documents or electronic data which came to his knowledge in the performance of that person's functions in terms of this Act and relating to the activities, affairs or business of any other person, except—

- (a) for the purpose of performing that person's functions in terms of this Act;
- (b) in the course of adducing evidence in any criminal proceedings or proceedings in terms of this Act; or
- (c) when required to do so by an order of a court of law.

(4) A person who contravenes subsection (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years, or to a fine not exceeding two million shillings, or to both.

122. Investigations

Whenever the Attorney-General has reason to believe that any person may be in possession of information relevant to the commission or intended commission of an alleged offence in terms of this Act, or any person or enterprise may be in possession, custody or control of any documentary material relevant to such alleged offence, the Attorney-General may, prior to the institution of any civil or criminal proceeding, under written authority direct a specific investigation.

123. Sharing of information

Notwithstanding the provisions of the Income Tax Act (Cap. 470), and with regard to any other secrecy provision in any other Act, whenever any investigation is instituted in terms of this Act, including an investigation into any other offence, and an investigation into the property, financial activities, affairs or business of any person, the Commissioner General of the Kenya Revenue Authority or any official designated by that person for this purpose, shall be notified of such investigation with a view to mutual cooperation and the sharing of information.

124. Hearings of court to be open to public

(1) Subject to the provisions of this section, the hearings of the court contemplated in this Act, except for *ex parte* applications, shall be open to the public.

(2) If the court, in any proceedings before it, is satisfied that—

- (a) it would be in the interest of justice; or

- (b) there is a likelihood that harm may ensue to any person as a result of the proceedings being open,

it may direct that such proceedings be held behind closed doors and that the public or any category thereof shall not be present at such proceedings or any part thereof.

(3) An application for proceedings to be held behind closed doors may be brought by the Attorney-General or the manager referred to in section 68 and any other person referred to in subsection (2), and such application shall be heard behind closed doors.

(4) The court may at any time review its decision with regard to the question whether or not the proceedings shall be held behind closed doors.

(5) Where the court pursuant to subsection (2) on any grounds referred to in that subsection directs that the public or any category thereof shall not be present at any proceedings or part thereof, the court may—

- (a) direct that no information relating to the proceedings, or any part thereof held behind closed doors, shall be made public in any manner;
- (b) direct that no person, in any manner, shall make public any information which may reveal the identity of any witness in the proceedings; and
- (c) give such directions in respect of the record of proceedings as may be necessary to protect the identity of any witness:

Provided that the court may authorise the publication of any information it considers just and equitable.

(6) A person who discloses information in contravention of subsection (5) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding two years, or to a fine not exceeding five hundred thousand shillings, or to both.

125. Monitoring orders

(1) An authorised officer may apply, *ex parte*, for a monitoring order directing a reporting institution to give information to that officer.

(2) A monitoring order shall—

- (a) direct a reporting institution to disclose information obtained by it about transactions conducted through an account held by a particular person with it;
- (b) be for such a period as the court may deem necessary.

(3) A monitoring order shall not be issued unless the court is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the order is sought has—

- (a) committed or was involved in the commission, or is about to commit or be involved in the commission of, a serious offence; or
- (b) benefited directly or indirectly, or is about to benefit directly or indirectly from the commission of a serious offence.

(4) A monitoring order shall specify—

- (a) the name or names in which the account is held or believed to be held; and
- (b) the information that the institution is required to give.

(5) Where a reporting institution which has been given notice of a monitoring order, knowingly—

- (a) contravenes the order; or
- (b) provides false or misleading information in purported compliance with the order,

commits an offence.

(6) A person who contravenes the provisions of this section shall, on conviction, be liable—

- (a) in the case of a natural person, to imprisonment for a term not exceeding three years, or to a fine not exceeding two million shillings, or to both; or
- (b) in the case of a body corporate, to a fine not exceeding ten million shillings.

126. Monitoring orders not to be disclosed

(1) A reporting institution that is, or has been subject to a monitoring order shall not disclose the existence or operation of the order to any person except—

- (a) an officer or agent of the institution for the purpose of ensuring compliance with the order;
- (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or
- (c) a police officer authorised in writing to receive the information.

(2) A person who contravenes subsection (1) shall, on conviction, be liable—

- (a) in the case of a natural person, to imprisonment for a term not exceeding three years, or to a fine not exceeding two million shillings, or to both; or
- (b) in the case of a body corporate, to a fine not exceeding ten million shillings.

(3) A person described in subsection (1) shall not disclose the existence or operation of a monitoring order except to another such person, and may do so only for the purposes of the performance of his duties or functions.

(4) A person who contravenes the provisions of subsection (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding two million shillings or to both.

(5) Nothing in this section prevents the disclosure of information concerning a monitoring order for the purposes of or in connection with legal proceedings or in the course of proceedings before a court, provided that nothing in this section shall be construed as requiring a legal adviser to disclose to any court the existence or operation of a monitoring order.

127. Conduct of person outside Kenya

The conduct of a person that takes place outside Kenya constitutes an offence under this Act if the conduct would constitute an offence against a provision of any law in Kenya if it occurred in Kenya.

128. Admissibility of Electronic Evidence

Notwithstanding the provisions of the Evidence Act (Cap. 80), any court hearing any matter in relation to this Act may admit electronic evidence.

129. Admissibility of statements and documents of persons who are dead or cannot be traced, etc

Notwithstanding any written law to the contrary, in any proceedings against any person for an offence under this Act—

- (a) any statement made by any person to an officer of any enforcement agency in the course of an investigation under this Act; and
- (b) any document, or copy of any document, seized from any person by an officer of any enforcement agency in exercise of his powers under this Act,

shall be admissible in evidence in any proceedings under this Act before any court, where the person who made the statement or the document or the copy of the document is dead, or cannot be traced or found, or has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which appears to the court unreasonable.

130. Preservation of secrecy

(1) Except for the purpose of the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court or under the provisions of any written law, no person shall disclose any information or matter which has been obtained by him in the performance of his duties or the exercise of his functions under this Act.

(2) A person who has any information or matter which to his knowledge has been disclosed in contravention of subsection (1) shall not disclose that information or matter to any other person.

(3) A person who contravenes subsection (1) or (2) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding one year or a fine not exceeding one million shillings or to both.

131. Supersession

Where there is a conflict between the provisions of this Act and the provisions of any written law with regard to any matter, the provisions of this Act shall prevail.

132. Amendments of Schedules

(1) The Minister may, by order in the *Gazette*, amend the First, Second or the Fourth Schedules.

(2) An Order made under subsection (1) shall not decrease the monetary sums specified in the Second and Fourth Schedules.

133. Consequential amendments

The Acts identified in the Sixth Schedule are amended as indicated in the Sixth Schedule.

134. Regulations

(1) The Minister shall make regulations—

- (a) with regard to the nature of the information contemplated in section 44 and the manner in which it is to be reported;
- (b) with regard to the designation of persons for purposes of section 47;
- (c) in consultation with the Chief Justice, prescribing from time to time the maximum allowable costs for legal services in connection with an application for a preservation of property order or forfeiture order or the defending of a criminal charge which may be met out of property that is subject to a preservation of property order;
- (d) providing for high risk customers or clients; and
- (e) providing for any matter which he may consider necessary or expedient to prescribe or to regulate in order to achieve the objects of this Act.

(2) Notwithstanding the provisions of subsection (1), the Minister may make regulations generally for carrying out the purposes and provisions of this Act, including the following—

- (a) regulations that require reporting institution to exercise due diligence and take reasonable measures to satisfy themselves as to the true identity of any person seeking to enter into a business relationship with them, or seeking to carry out a transaction or series of transactions with them, by requiring the person to produce an official record reasonably capable of establishing the true identity of the person;
 - (b) regulations that require reporting institution to establish and maintain records of transactions;
 - (c) regulations that require reporting institution to report transactions or activities that they have reasonable grounds to believe are suspicious or unusual as defined by the regulations and this Act;
 - (d) regulations that require reporting institution to establish and maintain internal reporting procedures to make employees aware of domestic laws relating to money-laundering, and the procedures and related policies established and maintained by them pursuant to this Act, to provide employees with appropriate training in the recognition and handling of suspicious activities that may be indicative of money-laundering, to provide for an independent auditing of monitoring procedures, and to maintain an adequate anti-money laundering compliance programme.
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FIRST SCHEDULE

[Section 2.]

SUPERVISORY BODIES

1. The following institutions are the supervisory bodies referred to in section 2—

- (a) Central Bank of Kenya;
- (b) Insurance Regulatory Authority;
- (c) Betting and Licensing Control Board;
- (d) Capital Markets Authority;
- (e) Institute of Certified Public Accountants of Kenya;
- (f) Estate Agents Registration Board;
- (g) Non-Governmental Organizations Co-ordination Board;
- (h) Retirement Benefits Authority.

SECOND SCHEDULE

[Section 12(1).]

CONVEYANCE OF MONETARY INSTRUMENTS TO OR FROM KENYA

A person who transports monetary instruments of US \$10,000 or its equivalent in Kenya Shillings or any other currency into or out of Kenya shall declare, in a prescribed form, at the port of entry or exit.

THIRD SCHEDULE

[Section 32(a).]

OATH OF CONFIDENTIALITY

I, (full names)
 DO HEREBY SWEAR BY THE ALMIGHTY GOD/SOLEMNLY AND
 SINCERELY AFFIRM THAT I will not, without due authority, disclose or make
 known to any person any information acquired by me by reason of the duties
 performed by me on behalf or under the direction of the Financial Reporting
 Centre or by reason of any office or employment held by me pursuant to The
 Proceeds of Crime and Anti-Money Laundering Act, SO HELP ME GOD.

DATED this day of 20.....

Name of Officer..... Signature

SWORN/AFFIRMED by the said at

BEFORE ME

FOURTH SCHEDULE

[Section 44(3).]

REPORTING THRESHOLD

A reporting institution shall file reports all cash transactions exceeding US\$ 10,000 or its equivalent in any other currency carried out by it.

FIFTH SCHEDULE

[Section 51.]

PROVISIONS AS TO THE CONDUCT OF
BUSINESS AND AFFAIRS OF THE BOARD**1. The Board to meet at least four times in a year**

The Board shall meet as often as necessary for the transaction of business but it shall meet not less than four times every financial year and not more than four months shall elapse between the date of one meeting and the next.

2. The Chairperson to preside all meetings

(1) The Chairperson shall preside at every meeting of the Board at which the chairperson is present but in the absence of the chairperson, the members present shall appoint one from among their number to preside at that meeting.

(2) The Chairperson or, in the absence of the chairperson a member appointed by the Board to act in the place of the chairperson, may at any time call a special meeting upon a written request by a majority of the members.

3. Notice of meeting

Unless six members otherwise agree, at least seven days written notice of every meeting of the Board shall be given to every member of the Board.

4. Decision of the Board to be by majority

Unless a unanimous decision is reached, a decision on any matter before the Committee shall be by a majority of votes of the members present and in the case of an equality of votes, the Chairperson or the member presiding shall have a casting vote.

5. A member is entitled to have opinion recorded

Any member present at a meeting of the Board or a sub-committee thereof, shall have the right to require his opinion to be recorded in the minutes if the Board or the sub-committee, as the case may be, passes a resolution, which in the opinion of that member is contrary to his advice or to law.

6. Board member to disclose interest

A member of the Board who has a direct or indirect interest in a matter being considered or to be considered by the Board shall, as soon as possible after the

relevant facts concerning the matter have come to his knowledge, disclose the nature of his interest to the Board and shall not be present during any deliberations on the matter.

7. The Board to cause minutes to be recorded and kept

The Board shall cause the minutes of all proceedings of its meetings to be recorded and kept, and the minutes of each meeting shall be confirmed by the Board at the next meeting of the Board and signed by the Chairperson or the member presiding at the meeting.

8. Quorum

(1) Subject to subsection (2), six members shall constitute a quorum for the conduct of business at any meeting of the Board.

(2) When there is no quorum at or for the continuation of a meeting of the Board only because of the exclusion of a member under paragraph 6, the other members present may, if they deem it expedient so to do—

- (a) postpone the consideration of that matter until there is a quorum; or
- (b) proceed to consider and decide the matter as if there was quorum.

SIXTH SCHEDULE

[Section 133.]

CONSEQUENTIAL AMENDMENTS

2. Extradition (Contiguous and Foreign Countries) Act (Cap. 76)

1. (1) This paragraph amends the Extradition (Contiguous and Foreign Countries) Act (Cap. 76)

(2) The schedule to the Act is amended by inserting at the end the following paragraph.

“any offence that constitutes an offence of money laundering under the Proceeds of Crime Anti-Money Laundering Act, 2009 (Cap. 59B).”

1. Extradition (Commonwealth Countries) Act (Cap. 77)

1. (1) This paragraph amends the Extradition (Commonwealth Countries) Act (Cap. 77)

(2) The schedule to the Act is amended by inserting at the end the following paragraph:

“31. any offence that constitutes an offence of money laundering under the Proceeds of Crime and Anti-Money Laundering Act, 2009 (Cap. 59B).”

3. Narcotic Drugs and Psychotropic Substances (Control) Act (No. 4 of 1994)

1. (1) This paragraph amends the Narcotic Drugs and Psychotropic Substances (Control) Act (No. 4 of 1994)

(2) Section 49 of the Act, is repealed.
