

## **Daniel Arap Moi / Anglo-Leasing Case / First Mercantile Securities Corporation**

**Case ID:**

ARW-46

**Jurisdiction of Origin of Public Official or Entity Allegedly Involved:**

Kenya

**Position of Public Official(s) (yrs in office):**

President (1978-2002)

**Jurisdiction of Asset Recovery:**

Switzerland

**Jurisdiction of Asset Recovery ? Description:**

Asset Location / Alleged Asset Location

**Asset Recovery Start:**

2004

**Asset Recovery End:**

Ongoing

**UNCAC Offenses Implicated:**

Art.17

Art.19

Art.23

**Money laundering Implicated:**

Yes

**Legal Basis for Asset Recovery:**

Actions Initiated by Foreign Jurisdiction; Domestic Criminal Investigation

**Intl.Cooperation: MLAT/Letter of Request?:**

MLAT

**Basis for Intl Cooperation:**

Mutual Legal Assistance Treaty

**Contributing Factors in Asset Recovery:**

Ongoing Case

**Status of Asset Recovery :**

Ongoing

**Stage in Asset Recovery Chain:**

Investigation/Asset Tracing/Asset Restraint

**Assets Frozen or Seized (USD):**

Unknown Amounts Frozen

**Agreement for Returned Assets:**

NA

**Agreement for Returned Assets - Description:**

NA

**Case Summary:**

In June 2014, the Office of the Attorney General of Switzerland announced that "as part of its own criminal investigation into the Anglo Leasing case, [the OAG] has requested support from

the Kenyan judicial authorities to obtain evidence of a possible predicate offence to money laundering.

Companies based in Switzerland are suspected of being involved in the Kenyan Anglo Leasing scandal and related assets are believed to have been moved to Switzerland. This is the starting point for the OAG's criminal proceedings against three suspects, which began in April 2009 following a report from the Money Laundering Reporting Office (MROS).

Since then, the OAG has successfully identified and frozen several bank accounts in Switzerland. Financial transfers were assessed and the results of the comprehensive cash flow analysis of cross-border links led the OAG to request mutual legal assistance from various states. England, Scotland and Jersey have already provided the OAG with a considerable amount of useful information.

The OAG is now requesting Kenya for active mutual legal assistance in order to obtain evidence of the predicate offence committed outside Switzerland. The suspected predicate offence to money laundering is the alleged bribery of Kenyan public officials in return for the award of lucrative government contracts. The OAG has requested the transmission of evidence obtained in the course of the Kenyan criminal proceedings in the Anglo Leasing scandal. Assistance from the Kenyan judicial authorities is therefore essential and their contribution will be decisive to the success of the Swiss criminal investigation.

The OAG has previously granted mutual legal assistance to Kenya, providing the Kenya Anti-Corruption Commission with documents on Swiss links to the Anglo Leasing affair and on the associated funds that were identified in Switzerland (See OAG press release dated 20.09.2012: <https://www.news.admin.ch/message/index.html?lang=de&msg-id=46040>). (Source: Switzerland, Office of the Attorney General Media Releases: "Anglo Leasing affair: Office of the Attorney General of Switzerland requests Kenya for mutual legal assistance," June 20, 2014.)

On July 16, 2010, in the matter between the Kenya Anti-Corruption Commission and First Mercantile Securities Corporation, the Court of Appeal of Kenya at Nairobi set aside a ruling by the lower court which had permitted First Mercantile to have set aside the request for mutual legal assistance made by the anti-corruption agency to the Swiss authorities in connection with its investigation into the Anglo-Leasing scandal. (Source: Between Kenya Anti-Corruption Commission and First Mercantile Securities Corporation, In H.C. Misc. C.C. No. 695 of 2007, Civil Appeal 194 of 2008, July 16, 2010). As explained in the court's judgment, on July 22, 2002, the Government of Kenya entered into an US\$811,787,000 agreement with First Mercantile Securities Corporation. The Postal Corporation of Kenya had wanted to purchase telecommunications equipment from an American company, but neither the Government of Kenya or the Postal Corporation could immediately pay the \$811 million in lump sum. The court then writes "But for some unexplained reason" instead of the Postal Corporation, the Government of Kenya entered into a contract with First Mercantile to finance the purchase. The 2002 contract required the Government to make installment payments to First Mercantile. In 2003, the Anti-Corruption and Economic Crimes Act came into force and established the Kenya Anti-Corruption Commission. According to the Court, the Government of Kenya made payments to First Mercantile up to June 14, 2004, leaving an outstanding balance of US \$5,936,910.09, when "For some reason or reasons which we need not concern ourselves with in the judgment, GOK [Government of Kenya] thereafter refused to pay any further instalments. We only need to point out that this agreement is one of those now notoriously referred to in Kenya as the Anglo-Leasing Scandal. when it stopped the payments." In December 2005, First Mercantile sued the Kenyan government for unpaid

sums. In May 2007, the Director of the Kenyan Anti-Corruption Commission sent a letter of request to the Federal Office of Justice and Police Section of Mutual Assistance in Criminal Matters, which stated that the Commission "is investigating in the present case serious criminal offences which include breach of laws, procedures and regulations, corrupt transactions with agents, in which Government of Kenya officials acting on false and or fraudulent information, awarded a contract for US\$12.8 million. About US\$6.8 million was paid out to First Mercantile Securities Corporation, Tortala, Succursale de Geneva, a subsidiary of First Mercantile Securities Corporation, British Virgin Islands...to Swiss Bank Accounts which is the reason for the present request for MLA is make to Swiss Authorities." A month after the request was made, the company filed suit in June 2007, in the High Court in Nairobi to seek an order to prohibit the Anti-Corruption Commission's mutual legal assistance request and to stay enforcement of the letter of request for assistance. The High Court granted leave which also operated as a stay on the assistance request. The Court of Appeals reversed, writing, in part, that the Anti-Corruption Commission is independent of the Government of Kenya and that it "can investigate GOK [Government of Kenya] officials if they are suspected to have been involved in corrupt practices or to have committed economic crimes." Moreover, it was up to the Swiss government to agree to the request or not. The Court stated that one of the grounds presented by the Commission as the basis for its mutual legal assistance request was that Kenya was a signatory to the United Nations Convention on Corruption. The Court wrote, "We have already held that the Appellant [Anti-Corruption Commission] was entitled to issue the LMA [Letter for Mutual Assistance] under section 12(3) of its creating statute and we see no reason to go into the question on principles of international law." (Source: Id.)

**Disposition of Criminal Case(s):**

None

**Jurisdiction of Origin: Investigative Agency:**

Kenya Anti-Corruption Commission

**Jurisdiction of Origin: Prosecuting Authority/Civil Attorney(s):**

Kenya Anti-Corruption Commission

**Jurisdiction of Origin: Courts Involved:**

High Court of Nairobi; Court of Appeal of Kenya at Nairobi

**Jurisdiction of Asset Recovery: Investigative Agency:**

Federal Office of Justice and Police, Section of Mutual Assistance in Criminal Matters

**Jurisdiction of Asset Recovery: Prosecuting Authority/Civil Attorney(s):**

Office of the Attorney General of Switzerland

**Jurisdiction of Asset Recovery: Courts Involved:**

NA

**Documents:**

Moi\_Profile\_Statehousekenya\_Gov\_Apr\_29\_2011.pdf

Moi\_Special\_Audit\_Security\_Projects\_Mar\_2006.pdf

**Documents:**

<b>Attachment</b>	<b>Size</b>
 Anglo_Leasing_Switzerland_OAG_MLA_Request_to_Kenya_Jun_20_2014.pdf	89.93 KB
 Anglo_Leasing_Switzerland_Dossiers_to_Kenya_Sep_20_2012.pdf	81.24 KB
 Anglo_Leasing_Special_Audit_Security_Projects_Mar_2006.pdf	1.77 MB

**Documents Links:**

**Other Sources:**

Between Kenya Anti-Corruption Commission and First Mercantile Securities Corporation, In H.C. Misc. C.C. No. 695 of 2007, Civil Appeal 194 of 2008, Court of Appeal of Kenya at Nairobi (July 16, 2010), accessed at [http://kenyalaw.org/Downloads\\_FreeCases/76031.pdf](http://kenyalaw.org/Downloads_FreeCases/76031.pdf); Profile of Daniel Toroitich arap Moi from the Official Website of State House, Kenya, accessed at <http://www.statehousekenya.go.ke/presidents/moi/profile.htm>.

Switzerland, Office of the Attorney General Media Releases: "Anglo Leasing affair: Office of the Attorney General of Switzerland requests Kenya for mutual legal assistance," June 20, 2014, at <https://www.news.admin.ch/message/index.html?lang=en&msg-id=53434> and "Further legal assistance dossiers handed over to Kenya," September 20, 2012, at <https://www.news.admin.ch/message/index.html?lang=en&long=de&msg-id=46040>