



**Rashi v Ecobank Kenya Limited & 4 others (Commercial Case E469 of 2022)
[2023] KEHC 1188 (KLR) (Commercial and Tax) (25 January 2023) (Directions)**

Neutral citation: [2023] KEHC 1188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E469 OF 2022
DO CHEPKWONY, J
JANUARY 25, 2023**

BETWEEN

MONTHIDA RASHI PLAINTIFF

AND

ECOBANK KENYA LIMITED 1ST DEFENDANT

KIWIPAY PTE LIMITED 2ND DEFENDANT

GREGORY SCHMIDT 3RD DEFENDANT

PAYGRAM COMPANY LIMITED 4TH DEFENDANT

KIWIPAY KENYA LIMITED 5TH DEFENDANT

DIRECTIONS

1. There are three applications pending in this matter. The first two applications are dated November 28, 2022 and December 9, 2022 respectively. The third application is dated January 18, 2023, and filed by the 2nd, 3rd and 5th Defendants.
2. On November 29, 2022 and on January 6, 2023 this court directed that the 1st and 2nd applications be responded to respectively. In addition, on January 6, 2023, this court granted interim orders directing that three of the 5th Defendant's accounts be operated on the basis of the bank mandate given by the Board of Director on November 22, 2022. Those orders prompted the third application by the 2nd, 3rd and 5th Defendants wherein they seek the court to review and set aside its orders dated January 6, 2023.
3. When the counsels appeared before the court on January 24, 2023 for interparties hearing of the first and second applications, Mr Kiprotich, counsel for the 2nd, 3rd and 5th Defendants sought for directions to issue dated January 18, 2023 and filed by them, which was yet to be responded to. He also, in



respect of the third application, informed the court that the 2nd, 3rd and 5th Defendants were opposed to extension of interim orders issued on January 6, 2023 on basis that on November 15, 2022, Hon Majanja ordered that the 5th Defendant's accounts ran by 1st Defendant be operated on the basis of prior existing instructions or as the 5th Defendant may instruct the bank in future. Further, he stated that, the resolution on which the orders of January 6, 2023 are based was made by Directors, who have since resigned and instructed that the extension of interim orders cannot be made on the basis of such resolutions.

4. On the other hand, Mr Wambani, counsel for the Plaintiff while seeking the court to extend the interim orders in place, argued that the concerns addressed by the 2nd, 3rd and 5th Defendants could only be dispensed with upon presentation of substantive evidence and after parties are granted an opportunity to file their respective submissions. He further argued that the resignation of Directors does not render their prior acts nugatory and while all factors taken into account, he sought the court to keep the 5th Defendant Company as a going concern.
5. Mr Gichangi, counsel for the 1st Defendant sought to be granted fourteen(14) days to file their responses to the applications. However, with abundance of caution, he sought the court to bar all the purported Directors/Shareholders from operating the 5th Defendant's accounts until its rightful Directors and Shareholders are determined.
6. In this court's view, the contentious issues which have arisen are whether the interim orders granted on January 6, 2023 should be extended and what directions should issue on canvassing of the three (3) applications.
7. The issue of whether or not to extend the interim orders issued on January 6, 2023 is matter of exercise of the court's discretion. In this case, the interim orders in question directed that the 5th Defendant's accounts (as named in the application) be operated as per the mandate given by its Directors on November 22, 2022. They were intended to do justice and safeguard the 5th Defendant's assets and its stakeholders rights/interests.
8. I have taken into account the submissions by Mr Kiprotich that this court while differently constituted, on November 15, 2022, Hon Majanja directed that the 5th Defendant's accounts may be operated as per its future instructions. With that in mind, I have perused the resolution dated November 22, 2022 under which the orders dated January 6, 2023 are premised. It has not been shown that the Directors named therein were not acting ultra vires in passing the resolution. In my view, a resolution would not be rendered invalid simply because some of the Company's Directors resigned from their positions. It is also my humble view that the resolution dated November 22, 2022, is in tandem with the consent order dated November 15, 2022, which stated that the 5th Defendant's accounts could as well be operated based on its future instructions to the bank.
9. Without any evidence to the contrary, I find no ground to hold the resolution dated November 22, 2022 as impugned to the extent of invalidating the interim orders issued on January 6, 2023. Furthermore, it should as well be noted that the interim orders being provisional in nature may be set aside upon presentation of contrary evidence by the opposing party.
10. On whether to decline the extension of the orders pending the determination of the real Shareholders and Directors of the Company, I am of the humble opinion that precluding the operations of bank accounts would stifle the 5th Defendant's day to day operations. The court should be minded to maintain the 5th Defendant as a going concern which am doubtful would be the case were the court to jump into the invite to issue orders stopping its operations.



11. The upshot is that, in exercise of my discretion, extend the interim orders issued on January 6, 2023 to run pending the determination of the applications pending herein. And for expeditious disposal of the three (3) pending applications, the following directions do issue:-
 - a. That all the parties are granted Seven (7) days to file their respective responses to the three (3) applications.
 - b. The three applications dated November 28, 2022, December 9, 2022 and January 18, 2023 be canvassed jointly by way of written submissions. Each party is granted fourteen (14) days after service of replies to file their submissions.
 - c. Highlighting of submissions on February 20, 2023 or taking further directions.

It is so ordered.

DIRECTIONS DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY, 2023.

D O CHEPKWONY

JUDGE

In the presence of:

Mr Gichangi counsel for 1st Defendant

Mr Kiprotich counsel for 2nd, 3rd and 5th Defendant

Court Assistant - Ivan

