



**Squire Afrilaw Consult Limited v Kiwipay Kenya Limited & another (Civil Suit E220 of 2022) [2023] KEHC 2935 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2935 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL SUIT E220 OF 2022  
JK SERGON, J  
MARCH 28, 2023**

**BETWEEN**

**SQUIRE AFRILAW CONSULT LIMITED ..... PLAINTIFF**

**AND**

**KIWIPAY KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ECOBANK (K) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Pending before me for determination are two (2) applications. The first application is the Notice of Motion dated October 15, 2022 taken out by the plaintiff and supported by the grounds laid out on its face and the facts stated in the affidavit of Ernest Ombara. Here, the plaintiff sought for the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. Pending interparties hearing of the suit filed herewith, an order be and is hereby issued directing Ecobank Limited-Muthangari Branch to preserve the sum of USD 784,225 out of the funds held in Kiwipay (K) Limited's Account Numbers 6682003058; 6682003059 and 6682003378 held and maintained at Ecobank Limited-Muthangari Branch.
  - iv. An order be and is hereby issued directing Ecobank Limited-Muthangari Branch to transfer forthwith a sum of USD 784,225 to the plaintiff, from the 1<sup>st</sup> defendant's Account Numbers 6682003058; 6682003059 and 6682003378.



- v. Costs of the application be provided for.
2. The 1<sup>st</sup> defendant opposed the first application through the replying affidavit sworn by its Director, Gregory Schmidt on December 10, 2022.
3. Maina Stephen Njenga; said to also be a Director of the 1<sup>st</sup> defendant; swore the further affidavit separately on January 16, 2023 in support of the first application.
4. The second application is the Notice of Motion dated December 10, 2022 supported by the grounds presented in its body and the facts attested to in the affidavit of Gregory Schmidt. The following are the orders sought therein:
  - i. Spent.
  - ii. Spent.
  - iii. THAT this Honourable Court be pleased to review and set aside its orders of 16<sup>th</sup> November, 2022 together with all consequential orders.
  - iv. THAT costs be borne by the plaintiff.
5. The plaintiff opposed the second application by putting in the replying affidavit sworn by its Director Ernest Ombara on January 16, 2023.
6. At the interparties hearing, it was agreed that the two (2) applications would be heard together. Resultantly, the parties were directed to put in written submissions.
7. Going by the record, it is apparent that the 2<sup>nd</sup> defendant did not participate at the hearing of the applications or file any documents in response thereto.
8. I have considered the grounds laid out on the face of the respective Motions, the facts deponed to in the affidavits supporting and opposing the respective Motions, and the contending written submissions and authorities relied upon.
9. Before I consider the merits of the applications before me, I observed that the plaintiff through the replying affidavit sworn by its Director, Ernest Ombara, challenged the competency of the supporting affidavit to the second application as well as the replying affidavit to the first application (both of which were sworn by Gregory Schmidt) on the grounds that no certificate of notarization was adduced to support the notarization of the said affidavits and further, on the grounds that the affidavits do not indicate the place of swearing and/or notarization, citing inter alia, the case of *Techno Service Limited v Nokia Internation Oy-Kenya & 3 others* [2020] eKLR where the court stated that:
 

“It will be observed that from the above discussion that the affidavit of Cynthia Randall is incompetent because the Notary’s signature is not authenticated. Consequently, the Notice of Motion application before me is unsupported by affidavit and it thereupon cannot stand. It fails.”
10. The plaintiff further states and submits that the signatures of Gregory Schmidt, the deponent, have not been authenticated.
11. In retort, the 1<sup>st</sup> defendant argues that notwithstanding the averments being made by the plaintiff, this court ought to consider substantive justice since the alleged defect touches purely on form and not substance, thus constituting a mere technicality.



12. To buttress its point above, the 1<sup>st</sup> defendant has referred this court to the case of *Qad Software South Africa (Pty) Limited v Rift Valley Railways Investments (Pty) Limited* [2013] eKLR in which the court held that:

“...in the absence of any proof by the Defendant that the said Replying Affidavit would not have been admissible in a court in the United Kingdom and the Netherlands where it was notarised, the court finds that the irregularity was more on form and not substance which would not go to the substance of the matter herein. Indeed, the Replying Affidavit herein has raised very substantial issues which the court finds would cause great injustice to the Plaintiff if the same were not considered. The court finds that the Defendant has not demonstrated what prejudice it would suffer if the said Replying Affidavit was held to be valid for the purposes of the determination of its application.”

13. Upon my perusal of the respective affidavits sworn by Gregory Schmidt, it is apparent that while they do not indicate the place of swearing, they were both notarized by Maitre Jean Waltman who according to the stamp and signature borne therein, is a Commissioner for Oaths and Notary Public.
14. Be that as it may, upon my consideration of the rival positions on the above issue, I am more persuaded by the averments made on behalf of the 1<sup>st</sup> defendant that pursuant to the promulgation of the Kenyan Constitution, 2010, the courts are called upon to promote substantive justice without undue regard to procedural technicalities, as stipulated under Article 159(2)(d) therein.
15. In my view, the absence of a certificate of authentication and the related lapses touch on form and would not necessarily affect the substance of the respective affidavits to the extent of having the affidavits declared fatally defective.
16. In my reasoning above, I am supported by the case of *Qad Software South Africa (Pty) Limited v Rift Valley Railways Investments (Pty) Limited* [2013] eKLR where in addition to the court holding as it did, hereinabove, it went on to state the following:

“This court has departed from the finding in the Rajput vs Barclays Bank of Kenya Limited (Supra) as, notably, it was decided before the promulgation of the *Constitution of Kenya, 2010* which has changed the whole essence of technicalities during litigation. Article 159 (2) (d) of the *Constitution of Kenya, 2010* which was relied upon by the Plaintiff mandates the court to be guided by the principle that:-

“...justice shall be administered without undue regard to procedural technicalities...”

It is for that reason that this court finds itself in agreement with the finding of Ringera J (as he then was) in *Microsoft Corporation vs Mitsumi Computer Garage Limited & Another* (2001) KLR 470 at 482 when he stated as follows:-

“Deviations from or lapses in form and procedure which do not go into the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected, in those instances, the court should rise to the higher calling to do justice by saving the proceedings in issue.”



17. I am further find solace by the following pronouncement by the court in the recent case of *Tanga Investments (K) Limited v NF Metals Corporation* [2021] eKLR also cited in the submissions by the 1<sup>st</sup> defendant:

“I find that this defect and/or omission is a matter of form and not substance, it does not in any way affect the correctness and admissibility of the supporting affidavit. It is my finding that in line with the provisions of Order 19 Rule 7 of the *Civil Procedure Rules, 2010* and Article 159(2)(d) of the *Constitution of Kenya, 2010*, it would not be in the interest of justice to strike out the supporting affidavit on mere technicalities.”

18. In view of all the foregoing circumstances, I decline to strike out the supporting and replying affidavits sworn by Gregory Schmidt and proceed to consider the merits of the two (2) applications, beginning with the second application.

19. From a reading thereof, it is apparent that the substantive order sought therein is for a review of the order previously made by this court on November 16, 2022.

20. On its part, the 1<sup>st</sup> defendant states that the order issued has the effect of halting its operations since it essentially froze the 1<sup>st</sup> defendant’s Accounts containing substantial sums of money held with the 2<sup>nd</sup> defendant.

21. The 1<sup>st</sup> defendant further states that as a result, it continues to suffer financial hardship and constraints since it is unable to meet its financial obligations effectively.

22. The 1<sup>st</sup> defendant also states that the order made on 16<sup>th</sup> November, 2022 was borne out of concealment of material facts by the plaintiff regarding the issues in dispute.

23. In reply, the plaintiff states and submits that the second application has not been brought in good faith and that it is intended to interfere with the subject matter of the suit.

24. The germane principles to guide this court in deciding whether to review its earlier order are found under Order 45 of the *Civil Procedure Rules, 2010* and reaffirmed under Section 80 of the *Civil Procedure Act* Cap. 21 Laws of Kenya and set out in the manner below:

“ Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

25. The following are the instances in which a court can review a decision already in place:

- a. the discovery of new and important matter or evidence, or
- b. some mistake or error apparent on the face of the record, or



- c. any other sufficient reason.
26. From my study of the instant Motion, it is apparent that the applicant is relying on the principles of “any other sufficient reason.”
27. From my study of the record and more particularly the order made on 16<sup>th</sup> November, 2022 I note that upon considering the first application which was brought under a Certificate of Urgency, I issued conservatory order in the interim and further directed the 2<sup>nd</sup> defendant to preserve the sums indicated in the first application to last until 14<sup>th</sup> December, 2022 when the parties were scheduled to attend court for interparties hearing.
28. From the foregoing, it is apparent that the abovementioned orders were made in the interim and are now spent, therefore essentially leaving nothing to be reviewed.
29. In any case, it is also apparent that the order whose review is being sought forms the basis for one of the orders being sought in the first application which is also slated for determination in this ruling.
30. In view of all the foregoing circumstances, I am not satisfied that the 1<sup>st</sup> defendant has provided any sufficient reasons or put any proper grounds to warrant the order for a review sought. Consequently, the Notice of Motion dated 10<sup>th</sup> December, 2022 is hereby dismissed with costs to the plaintiff.
31. This brings me to the first application. It is apparent that the orders sought therein are two-fold in nature.
32. The first order sought is for the preservation of sum of USD 784,225 out of the funds held in the 1<sup>st</sup> defendant’s Account Numbers 6682003058; 6682003059 and 6682003378 held and maintained at the 2<sup>nd</sup> defendant’s Muthangari Branch.
33. The principles for granting preservatory orders are similar to those applicable in the granting of injunctive orders. These principles were stated by the Court of Appeal in East Africa in *Giella v Cassman Brown & Co. Ltd* (1973) EA and are as follows:
- a. The applicant must first establish a prima facie case with a probability of success.
  - b. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
  - c. Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.
34. In respect to the first principle, the plaintiff states and submits that pursuant to a retainership agreement entered into between itself and the 1<sup>st</sup> defendant, it was a term of the agreement that the plaintiff would offer consultancy services to the 1<sup>st</sup> defendant at an all-inclusive fee in the sum of USD 784,225.
35. The plaintiff states and submits that upon performing its contractual obligations, it requested the 1<sup>st</sup> defendant to pay the agreed sum, upon which the 1<sup>st</sup> defendant initially instructed the 2<sup>nd</sup> defendant to make the requisite payments but later revoked its instructions.
36. It is the contention by the plaintiff that it is entitled to the abovementioned sums.
37. The further affidavit sworn by Maina Stephen Njenga echoes the averments made in the first application and stands in support thereof.



38. However, the 1<sup>st</sup> defendant on its part states and submits that it did not enter into any such agreement with the plaintiff, and that the persons who purportedly signed the agreement on its behalf (including the abovementioned Maina Stephen Njenga) voluntarily resigned from directorship of the 1<sup>st</sup> defendant and did not therefore have any authority to make any decisions or undertake any acts on behalf of the 1<sup>st</sup> defendant at all material times.
39. In rejoinder, the plaintiff argues that the persons in question did not cease to be directors of the 1<sup>st</sup> defendant and therefore had authority to execute the retainership agreement on behalf of the 1<sup>st</sup> defendant.
40. Upon my perusal of the pleadings and material on record and without delving into the merits of the suit at this stage, I am satisfied that the plaintiff has established a prima facie case.
41. On the second principle, the plaintiff states and argues that unless the preservative order sought is granted, the 1<sup>st</sup> defendant is likely to move the requisite funds from the material Bank Accounts, thereby defeating the plaintiff's claim.
42. The plaintiff also states and submits that the 1<sup>st</sup> defendant's assets are unknown and hence it would only be in the interest of justice for this court to preserve the subject matter of the suit, which are the funds in question.
43. On its part, the 1<sup>st</sup> defendant states that the plaintiff has not shown that it stands to suffer irreparable harm if the order sought is denied.
44. Upon my consideration of the rival positions and upon taking into account the colossal nature of the monies in question, I am of the opinion that the plaintiff has reasonably demonstrated the manner in which it stands to be prejudiced, if the preservative order sought is denied.
45. In view of the foregoing, I am persuaded that the balance of convenience tilts in favour of the plaintiff.
46. Consequently, I am satisfied to exercise my discretion in favour of the plaintiff as relates to the preservative order sought.
47. Concerning the second order sought directing Ecobank Limited-Muthangari Branch to transfer forthwith a sum of USD 784,225 to the plaintiff, from the 1<sup>st</sup> defendant's Account Numbers 6682003058; 6682003059 and 6682003378, upon my study of the record, I note that this order constitutes one of the reliefs being sought in the suit and which suit is yet to be heard on merit and/or determined.
48. Upon considering the nature and subject matter of the dispute, I would be hesitant to grant the above order at this early stage since it essentially constitutes a mandatory order which can only be granted at the interlocutory stage in clear-cut cases. This was the position stated by the Court of Appeal in the case of *Kenya Breweries Limited v Washington Okeyo* (2002) 1 EA 109; (2002) eKLR and cited in the case of *Paul Mwaniki Gachoka & another v Nation Media Group Limited & another* [2019] eKLR thus:

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances it will not normally be granted. However, if the case is clear, and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff. A mandatory injunction will be granted on an interlocutory application...”



49. I am of the view that the plaintiff has not presented before me any special circumstances which would warrant the transfer order sought in respect to the funds.

50. Consequently, I hereby make the following orders:

- i. The Notice of Motion dated October 15, 2022 succeeds on prayer (iii). Consequently, pending the interparties hearing of the suit, an order be and is hereby issued directing Ecobank Limited- Muthangari Branch to preserve the sum of USD 784,225 out of the funds held in Kiwipay (K) Limited's Account Numbers 6682003058; 6682003059 and 6682003378 held and maintained at Ecobank Limited-Muthangari Branch.
- ii. The prayer seeking for the release of the aforesaid funds is declined but can only be determined at the conclusion of this suit.
- iii. Costs of the Motion dated October 15, 2022 to abide the outcome of the suit.
- iv. The Notice of Motion dated December 10, 2022 is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

