



**Rene & Hans Advocates LLP v Kiwipay (Kenya) Limited
& 4 others (Miscellaneous Civil Application E804 of 2022)
[2023] KEHC 2970 (KLR) (Commercial and Tax) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E804 OF 2022
DO CHEPKWONY, J
MARCH 27, 2023**

BETWEEN

RENE & HANS ADVOCATES LLP APPLICANT

AND

KIWIPAY (KENYA) LIMITED 1ST RESPONDENT

ECOBANK KENYA LIMITED 2ND RESPONDENT

MAINA STEPHEN NJENGA 3RD RESPONDENT

FELIX RANTUU LEKISHE 4TH RESPONDENT

SOLOMON JOSEPH MAINA 5TH RESPONDENT

RULING

1. The applicant herein approached this court vide a notice of motion application dated November 14, 2022 brought under Section 52 of the *Advocates Act*, Sections 1A, 1B and 3A all of the *Civil Procedure Act*, and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders: -
 - a. Spent;
 - b. Spent;
 - c. An order be and is hereby issued directing Ecobank Limited, Muthangari Branch to preserve the sum of Usd 2,502,675 in the 1st respondent's Bank Account Numbers 6682xxxxxx; 6682xxxxxx and 6682xxxxxx;



- d. An order be and is hereby issued directing Ecobank Limited, the 2nd respondent herein to transfer the sum of Usd 2,502,675 to the Applicant, the same being the agreed legal fees and costs on account of legal representation rendered in Nairobi High Court Commercial Petition No E010 of 2022, Maina Stephen Njenga & 2 Others v Kiwipay PTE Limited & Others;
 - e. An Order be and is hereby issued directing Ecobank Limited, the 2nd respondent herein to transfer the sum of Usd 2,502,675 to the Applicant, the same being the agreed legal fees and costs on account of legal representation rendered in Nairobi High Court Commercial Petition No E010 of 2022, Maina Stephen Njenga & 2 Others v Kiwipay PTE Limited & Others.
 - f. Costs of this application be borne by the respondents herein.
2. The Application is premised on grounds on its face and in the Supporting Affidavit of Isaac Rene sworn on November 14, 2022. The Applicant's case is that the 3rd to 5th respondents are the bonafide Directors and shareholders of the 1st respondent Company. That vide a resolution made on September 15, 2022, the 3rd to 4th respondents instructed the Applicant to act for them in securing the shareholding and directorship structure of the 1st respondent which had been irregularly altered with the result that the 3rd to 5th respondents were unlawfully and irregularly removed from the same. Consequently, the Applicant law firm filed Nairobi High Court Commercial Petition No E010 of 2022, Maina Stephen Njenga & 2 Others v Kiwipay PTE Limited & Others, which commenced a due cause of action under Section 782 of the Companies Act on oppressions and unfair prejudice and the Applicant successfully secured the interests of the 3rd and 4th respondents. In particular, the court ordered status quo with respect shareholding and operation of bank mandates of the 1st respondent confirming the 3rd respondent as a signatory.
3. The Applicant avers that it was able to secure a total sum of Usd 19,400,000/= held in the 2nd respondent bank from pilferage and misuse by Kiwipay PTE Limited. However, the Applicant's legal fees as agreed on was Usd2,502,675/= and was to be borne by the 1st respondent. On that wavelength, vide an instruction letter dated October 26, 2022, the 1st respondent instructed the 2nd respondent not to effect payment of the agreed legal fee in the sum of Usd2,502,675/= for legal representation in the Nairobi High Court Commercial Petition No E010 of 2022, Maina Stephen Njenga & 2 Others v Kiwipay PTE Limited & Others case.
4. The Applicant avers that upon learning that the 1st respondent had cancelled the instructions to be paid the legal fees which had been issued to the bank and was in the course of moving the funds held in its Bank Accounts (three bank accounts at Ecobank Limited – Muthangari Branch to wit: - 6682xxxxxx; 6682xxxxxx and 6682xxxxxx) to other different accounts, which is likely to defeat the Applicant's claim for legal fees and costs. It is contended that 1st respondent does not have any other known assets or properties in Kenya and it would be urgent that the agreed legal fees are released and paid to the Applicant.
5. A Replying Affidavit sworn on December 10, 2022 was filed on behalf of the 1st respondent by Gregory Schmidt, a Director of Kiwipay PTE Limited wherein he asserts that he is the majority shareholder of the 1st respondent herein and the 3rd to 5th respondents. He averred that the 1st respondent's financial status has been crippled by numerous court orders made and specifically the interim orders issued in the instant case which were obtained on concealment and non-disclosure of material facts.



6. He averred that the Applicant has never been engaged by the 1st respondent for any legal services. This is so because there was no resolution by the 1st respondent or its Board of Directors or a decision made in accordance with Clause 8 of the 1st respondent's Articles of Association which stipulates that the approval of the majority shareholders has to approve decisions of the other Directors.
7. According to the deponent, at the time the purported instructions were issued, the 3rd, 4th and 5th respondent were not Directors nor officials of the 1st respondent capable of making any agreements on behalf of the 1st respondent hence the process is illegal. He added that the Applicant did not enumerate how it arrived at the inordinately high and unconscionable legal fees it is claiming.
8. The instances of material non-disclosure were listed as being that the Applicant misled the court by alleging that the 3rd and 5th respondents were the majority shareholders notwithstanding that the two had relinquished their shareholding and could only issue instructions for legal representation in their individual capacity but not on behalf of the 1st respondent. It was further averred that even before relinquishing their shareholding the 3rd and 5th respondents held a cumulative 21.75 % of the Shares whereas Kiwipay PTE Limited held 58.25%.
9. Thus, the court is asked to dismiss the claim because the instructions were issued by strangers to the 1st respondent and that explains why the bank declined payment of the legal fees.
10. On that basis, the 1st respondent filed the second application which in my view, was a response to the Applicant's application. The same is a Notice of Motion application dated December 10, 2022 which seeks the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That the Hon. Court be pleased to review and set aside its orders of November 15, 2022 together with all consequential Orders.
11. The application is premised on the grounds both on its face and in the affidavit of Gregory Schmidt which are similar and a reproduction of the averments in the Replying affidavit which I have summarized above. However, it would suffice to state it is deponed therein that the interim orders were obtained on material non-disclosure especially the claim that the Applicant failed to disclose that the 3rd to 5th Defendants were not directors of the 1st respondent at the time they instructed the Applicant, that the resolution signed by the 3rd to 5th Resolution is therefore misleading, that the 3rd to 5th respondents were not majority shareholders as presented to court, and further that the 3rd to 5th respondents were not acting in the best interests of the 1st respondent company in agreeing on the unconscionable legal fees. That, it is on that basis that the 1st respondent seeks to be indemnified by the 3rd, 4th and 5th respondents for the amount claimed by the Applicant.
12. The 3rd to 5th respondents responded to the applications vide an affidavit sworn by the 3rd respondent on December 15, 2022. He confirmed that the 3rd to 5th respondents are bonafide Directors of the 1st respondent whereby the 4th and 5th respondents are the majority shareholders. He contends that on September 15, 2022, a resolution was passed by the 1st respondent instructing the Applicant to act for the 3rd, 4th and 5th respondents thus securing the shareholding structure of the 1st respondent. Consequently, the Applicant filed Nairobi High Court Commercial Petition No E010 of 2022 where he successfully persuaded the court on shareholding structure of the 1st respondent.



13. Further, on March 14, 2023, the 1st respondent filed a “Further Affidavit” sworn on January 31, 2023 which has been signed and shows where it was notarized and is accompanied with Certificate of Notarization.
14. The court directed that the applications be canvassed by way of written submissions whereby the Applicant filed submissions dated January 3, 2023 while the 1st respondent’s submissions are dated 10th December, 2023 and filed on March 14, 2023. I have read and considered the said

Submissions.

Analysis and determination

15. Having carefully considered the two applications, the affidavits on record filed by the parties and the respective submissions made on behalf of the parties as well as the authorities relied on, I find the issues which come up for determination being:-

- a. Whether the Notice of Preliminary Objection dated January 3, 2023 filed by the Applicant contesting the affidavits sworn by Gregory Schmidt has merit.
- b. Whether the “Further Affidavit” dated January 31, 2023 and sworn by Gregory Schmidt is regularly on record.
- c. Whether the 2nd respondent herein can be ordered to transfer the sum of Usd 2,502,675.00 the same being the agreed legal fees and costs to the Applicant and in the alternative, whether the court ought to set aside the status quo orders entered to preserve the said sums.

Whether the Notice of Preliminary Objection dated January 3, 2023 filed by the Applicant contesting the affidavits sworn by Gregory Schmidt has merit.

16. It is trite that where a Notice of Preliminary Objection has been raised, the same must be dealt with first before delving into any other issues in a matter. In the Notice of Preliminary Objection dated 3rd January, 2023 filed by the Applicant, what is challenged is the legal competence of the two Affidavits sworn by Gregory Schmidt on behalf of the 1st respondent on December 10, 2022.
17. A ‘Preliminary Objection’ was defined in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*[1969]EA 696:

“So far as I’m aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

18. This was followed by the finding of Sir Charles Newbold in the same case:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.



19. The Applicant has submitted that the two Affidavits of Gregory Schmidt are defective for the reason that although they appear to have been sworn before a foreign notary do not indicate where they were sworn, the court cannot be left guessing whether the Affidavits were sworn before a Notary Public in Laos or France. Further, it is the Applicant's case that where an affidavit has been sworn by a notary in other countries other than common-wealth countries, the same ought to be accompanied by a Certificate of Notarization showing it was sworn before a notary. To buttress this position, reliance was placed on the case of *Raccolta, Molnar & Greiner v Royal Trading Company Limited* [2014] eKLR, where it was held thus: -

“Affidavits taken in Countries other than commonwealth countries require proof by affidavit or otherwise to have been taken by a notary public, of the stamp and seal or the official position of the person taking the affidavit as opposed to affidavits taken in commonwealth countries. Otherwise, such affidavit is defective and struck out.”

20. Further, the Applicant has also relied on the case of *Pasatificio Lucio Garofalo SPA v Security & Fire Equipment Co & Another* (2001) eKLR, where a similar position was adopted, and the affidavit struck out.

21. In this case, it is further averred although the affidavits indicate that they were sworn before Miatre Jean Waltman, a notary of public, his signature has not been authenticated as required by law. The consequence of which is that the 1st respondent's application is deemed to be supported by a defective affidavit and must fail.

22. The court has read through the two affidavits and find the indeed when they were filed, the signature of the said Maitre Jean Waltman, the Notary Public has not been authenticated. It is also not clear where the same were sworn. According to Gregory Schmidt, he is a French citizen and his address in in Vienne Capital in Laos. However, it is not clear whether the tow affidavits were sworn before a Notary Public in Laos or France.

23. On the other hand, the 1st respondent has submitted that the failure to attach further affidavit to authenticate the affidavits of Miatre Jean Waltman are mere technicalities which do not touch on the substance of the affidavit and can be cured under Article 159 of the Constitution. That in any event the said Miatre Jean Waltman issued a notarial certificate marked as SG-1 confirming that Gregory Schmidt did indeed appear before him and he relied on a number of judicial authorities to support this line of argument including the cases of *Raccolta, Molnar & Greiner -vs- Royal Trading Company Ltd* [2014] eKLR, *Qad Software South Africa (pty) Ltd -vs Rift Valley Railways Investments (Pty) Limited* (2013) eKLR and *Tanga Investments (K) Limited -vs- N.F Metals Corporation* (2021) eKLR.

24. Section 88 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed.

25. Other courts, including the court in the case of *Alim Albamed Ali and Another v Emag Ag* Nairobi (Milimani) HCCC No 1806 of 2000 (OS), have discussed and put emphasis on this issue. In this case, the learned Judge held thus: -

“Affidavits taken in Countries other than commonwealth countries require proof by affidavit or otherwise to have been taken by a notary public, of the stamp and seal or the official



position of the person taking the affidavit as opposed to affidavits taken in commonwealth countries. Otherwise, such affidavit is defective and struck out.”

26. In the case of *Peeraj General Trading & Contracting Company Limited, Kenya & Another v Mumia Sugar Company Limited* (2016) eKLR, the court held thus:-

“In England by virtue of Order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case, which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public.

27. I have also considered the case of *Raccolta, Molnar & Greiner v Royal Trading Company Limited* [2014]eKLR where this court (differently constituted (Justice EK Ogola)) held that the failure to prove that an affidavit has been taken before a notary public is a deviation from or lapse in the form and procedure which does not go to the substance of the application and can be excused.
28. In my humble view, however persuasive the above authorities are, Article 159 of the *Constitution* was never intended to override the clear rules of Evidence as is contained under Section 88 of the *Evidence Act*, cap 80 of the Laws of Kenya which dictates what documents are admissible in evidence in the Kenyan Courts as it may be in the the English Courts of Justice.
29. Having also established that under the Rules of the England Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit and given that there is no such presumption in favour of documents made outside the commonwealth, the same position obtains in Kenya hence a document made outside the commonwealth countries cannot be elevated to be admissible in evidence by invoking the provisions of Article 159 of the Constitution which was not intended to do away with express provisions of the law.
30. Consequently, it is my considered view that the two affidavits of Gregory Schmidt which were attested by Miatre Jean Waltman in a country other than commonwealth countries are exempted under Section 88 of the *Evidence Act*.
31. It then follows that the Replying Affidavit and the Supporting Affidavit both sworn by Gregory Schmidt on December 10, 2022 had to be proved by a Certificate of Notarization or otherwise so as to be taken to have been sworn before a Notary Public and that the signature and seal of attestation affixed thereto was that of such Notary Public. Without such proof, the documents were found to be unauthenticated and I proceed to strike them out of the record. The 1st respondent’s application likewise falls.
32. As for whether the “Further Affidavit” dated January 31, 2023 by Gregory Schmidt can be deemed to be properly and or regularly, I have perused the court record and find that the same was filed on 14th March, 2023 after the Applicant had raised a Preliminary Objection in respect of the two affidavits on January 3, 2023. In such circumstances, the Defendant ought to have sought for leave to file a “Further Affidavit” to cure the defects in the first two affidavits they had filed. But it is note-worthy that



such leave was not sought for such a substantive issue. It is therefore my finding that a document filed without leave of court cannot be relied on by court and proceed to expunge the same from the record.

33. I now proceed to the third issue for determination, which is whether the 2nd respondent bank can be compelled to release the sum of Usd2,502,675 to the Applicant, the same being the agreed legal fees and costs agreed for instructions to secure the structure of the 1st respondent's shareholding. It is not denied that based on the instructions issued to them, the Applicant filed Nairobi High Court Commercial Petition No E010 of 2022, Maina Stephen Njenga & 2 Others v Kiwipay PTE Limited & Others and obtained favourable orders. The Applicant attached to the affidavit sworn in support of its application a directors' resolution dated 16th September, 2022 to pursue a cause of action and preserve the shareholding in the 1st respondent herein. The Applicant has also annexed a letter dated October 26, 2022 which were instructions by the 1st respondent to the 2nd respondent bank to pay the Applicant the sum of Usd2,502,675/=.
34. I have read through all these annexures and in my view, where a person dealing with a Company as is the case here, is not required to inquire into the regularity of the internal proceeding and may assume that all is being done regularly. The foregoing encapsulates the Indoor Management rule which is based on the general presumption of law that business cannot not be carried on if a person dealing with the apparent agent of a Company was compelled to call for evidence to confirm that all internal regulations have been duly observed and that the officials with whom he dealt with had actual authority.
35. In this case, the Applicant agreed to offer the legal services based on the directors' resolutions September 16, 2022 and indeed obtained favourable orders in the shareholding of the 1st respondent. Having been instructed vide the said resolutions, it is my view that the Applicant had no obligation to meticulously examine the 1st respondent's internal structure to ascertain that the instructing directors had the capacity to do so.
36. Further, it is my humble view that an advocate who has been instructed to act for a client has a legitimate expectation that his/her legal fees will be paid by the client whether or not the advocate/client relationship is severed. The Applicant herein having clarified that he was instructed vide a resolution dated September 16, 2022 and indeed obtained favourable orders for agreed legal fees of Usd2,502,675/=, it would be unfair and unjust to deny the Applicant its right to its legal fees for work done. So that, should it come out that the resolution dated September 16, 2022 was arrived at without authority, then the 1st respondent has the avenue to seek redress for breach of fiduciary duties against the Directors for passing the resolution in a different forum. Such would however not be a misconception for denying the Advocate legal fees for work already done.
37. In the resultant, the Notice of Motion dated November 14, 2022 and filed by the Applicant is found merited and the same is hereby allowed with no orders as to costs.
38. For the same reasons stated herein, the Notice of Motion application dated December 10, 2022 and filed by the 1st respondent is found to be incompetent, hence without merit and proceed to dismiss the same with costs.
39. For avoidance of doubt, the Notice of Motion application dated November 14, 2022 is allowed in the following terms:-
 - a. The 2nd respondent, Ecobank Limited is directed to transfer a sum of Usd 2,502,675.00 to the Applicant the same being the agreed legal fees and costs on account of legal representation in Nairobi High Court Commercial Petition No E010 of 2022, Maina Stephen Njenga & 2 Others v Kiwipay PTE Limited and Others.



b. There shall be no orders as to costs.

40 It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...27TH ... DAY OF ...MARCH... 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Isaac Rene counsel for Applicant

Mr. Kiprotich counsel for the respondent

Court Assistant – Mwenda

