



**Awino v Ecobank Kenya Limited (Petition 6 of 2022) [2023] KEHC 17649 (KLR)
(Anti-Corruption and Economic Crimes) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES**

PETITION 6 OF 2022

EN MAINA, J

MAY 25, 2023

BETWEEN

FRANCIS AWINO PETITIONER

AND

ECOBANK KENYA LIMITED RESPONDENT

RULING

1. At the same time the Petitioner filed the petition herein he filed a Notice of Motion under certificate of urgency dated November 8, 2022. The Application which is made under rule 23 of the [Constitution \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules 2013](#), and Articles 22,23 and 163 of the [Constitution](#) seeks a conservatory order for the preservation of all the bank accounts of Kiwipay Kenya held by the Respondent including but not limited to, A/c Nos xxxx, xxxx & xxxx. He also seeks orders that:-That pending the hearing and determination of the petition this Honourable Court be pleased to order that Gregory Schmidt (of French Passport No 18Fxxxxxx) the Chief Executive Officer of Kiwipay PTE Ltd and majority owner of Kiwipay Kenya Ltd, to render an account to Court with respect to all transactions effected by himself from A/c Nos xxxx, xxxx & xxxx on the internet banking platform. That this Honourable Court be pleased to issue an order that the accounts of Kiwipay Kenya be expeditiously audited for tax compliance by the Kenya Revenue Authority. That this Honourable Court be pleased to issue an order that the Respondent be subjected to an anti-money laundering compliance audit by the Financial Reporting Centre. That consequent to the grant of the prayers above the Honourable Court be pleased to make further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice. That the Honourable Court be pleased to join parties necessary for the determination of the instant petition on its own merits. That this Honourable Court be pleased to award the Petitioner's costs of and incidental to these proceedings on a full indemnity basis.



2. The Application is premised on the following grounds as stated on its face and the supporting affidavit:-
 1. This Petition and Application will be rendered nugatory if the respondent persists in his negligence the subject matter of the suit will be dissipated.
 2. The petitioner avers that if the respondent is not restrained the wanton disregard of the rule of law will continue unabated.
 3. The Rights and Freedoms of vulnerable groups including Children, Persons with disability, Youth, Minorities and marginalized groups, and Older members of society under Articles 53, 54, 55, 56, & 57 respectively continue in their violation.
 4. The public will continue to be denied their rightful public services in violation of their expectation under Article 43.
 5. The Applicant/Petitioner has established a *prima facie* case.
 6. The respondents will suffer no prejudice if the orders are granted.
 7. Granting the orders sought herein will advance the cause of justice.
 8. Granting the orders is not determinative of the Petition.
 9. The balance of convenience favours the granting of the orders sought in this application.
 10. This Honourable Court has unfettered powers and jurisdiction to make the orders sought.
 11. It is meet (sic) and just, for purpose of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.
3. The application is vehemently opposed by the Respondent through a replying affidavit sworn by John Wambugu, Senior Legal Officer of the Respondent, filed on 7th February 2023. The Respondent avers that the Petitioner/Applicant has with the intention to mislead the court into reaching an adverse finding against the Respondent failed to disclose the facts material to the adjudication of this dispute; that the Respondent is a reputable Bank and the Petitioner has not provided evidence to support the allegations against it and that the Bank is in compliance with all banking laws and regulations passed by the Central Bank of Kenya. In particular, the Bank has complied with the Know Your Client requirements on customer due diligence as required under Section 45 of *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) and Guideline 5.6 of the *Central Bank Prudential Guidelines 2013*. That the Petitioner has failed to establish any action or inaction by the Bank that amounts to a breach of the law and further that no evidence has been filed in this respect.
4. The Respondent confirmed that Kiwipay is indeed its customer, holding bank accounts No xxxx, xxxx and xxxx. That the accounts were restricted for 45 days by an order of the court made in Chief Magistrates ACC No E039 of 2022 made on May 18, 2022 to allow investigations into the accounts by the Financial Reporting Centre. Further, that the Assets Recovery Agency through a letter dated 20th June 2022 requested for documents from the Respondent including account opening documents, statements of accounts, cheque/cash deposits and withdrawal slips which the Respondent provided and that the Agency soon thereafter filed a High court Misc. Application No E028 of 2022 where a preservation order dated June 24, 2022 was granted by this court in respect of the accounts. Counsel for the Respondent averred that the Agency then filed forfeiture proceedings in HC ACEC Suit No E037 of 2022 which were however withdrawn by a consent filed by the Assets Recovery Agency and Kiwipay Kenya Limited. That the accounts were therefore subjected to scrutiny and cleared for continued operation.



5. Counsel contended that the Petitioner relied on illegally obtained evidence, including the account opening email between Kiwipay and the Respondent, email transaction notifications, swift transaction slips and email correspondence between Kiwipay and Tracy Dymond; that the consent of the authors of the email was not obtained and the use of the information is therefore a breach of banker-customer confidentiality; that the Petitioner has failed to disclose that there are pending matters in court in respect of the said bank accounts and as such any orders made by this court would affect the suits both here and in the Commercial Division namely HCCCOMM Suit No E804/2022 for the preservation of USD 2,502,675, HCACECMISC E054/2022 for the preservation of Kshs. 168,931,653.04, HCCCOMM MISC E454/2022 for the preservation of USD 13,473,110.44, HCCCOMM Misc E826/2022 for the preservation of USD 1,934,900 and HCCCOMM E220/2022 for the preservation of USD 784,225. That the orders sought by the Petitioner demands action by shareholders of the company and relevant state agencies and as such undermines the right to fair hearing as the persons against whom adverse orders are sought have not been given an opportunity to defend themselves. Lastly, that the Petitioner has failed to establish a *prima facie* case against the Respondents warranting the issuance of the order sought.
6. On March 13, 2023 this court directed parties to canvass the application through written submissions but no submissions were received, and this court has had to write this ruling on the affidavits before it.

Issue for determination:

7. The issue that arises for determination is whether the Petitioner is entitled to the conservatory order sought.
8. There is now a long line of cases on the principles that should guide the court when considering whether or not to grant a conservatory order. The leading case in that respect is the Supreme Court decision in the case of [Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR where the court stated:-
 - (86) Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
.....
 - (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the [Constitution](#) of Kenya, 2010, a third condition may be added, namely:
 - (iii) that it is in the public interest that the order of stay be granted.
 - (89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the [Constitution](#). This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest.”



9. Applying the above principles to this case it is my finding that the Petitioner/Applicant has not met the threshold for grant of the interlocutory relief sought. This is because firstly there are already other matters touching on these accounts in other courts, secondly the entity which ought to apply for the orders sought is the Assets Recovery Agency (ARA) pursuant to Section 82 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAML) and indeed the Assets Recovery Agency had applied for a preservation order in regard to that account which it then withdrew. Thirdly the Applicant has not enjoined the holder of the accounts which he seeks to have frozen and it would be unjust and unfair to grant the orders without giving the owner of the account an opportunity to be heard. Further as a private citizen the Petitioner's role in so far as the alleged matters are concerned would in my view be that of an informer making a report to the Financial Reporting Centre established under Section 21 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAML) which entity would then treat the information as expected of it under Section 44 of the *Proceeds of Crime and Anti-Money Laundering Act*. To grant the order sought would clearly prejudice the holders of the accounts who are not parties to this case and as pointed out earlier the accounts are the subject of cases before another Division of the High Court. Moreover, the Petitioner/Applicant has not demonstrated any prejudice that he is likely to suffer were this application to be dismissed.
10. The upshot is that the application has no merit and the same is dismissed with costs to the Respondent.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 25TH DAY OF MAY 2023

E N MAINA

JUDGE

