



**Awino v Ecobank Kenya Limited (Petition 6 of 2022) [2023] KEHC 22668 (KLR)  
(Anti-Corruption and Economic Crimes) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22668 (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  
SEPTEMBER 28, 2023**

**BETWEEN**

**FRANCIS AWINO ..... PETITIONER**

**AND**

**ECOBANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By the Petition dated November 8, 2022 which was first filed in the Constitutional Division but transferred to this Division on November 9, 2022, the Petitioner sought orders that: -
  - “a) That this Honourable Court be pleased to issue a preservation order on the bank accounts of Kiwipay Kenya held by Respondent including but not limited to, A/c Nos 66820xxxxx, 66820xxxxx & 66820xxxxx
  - b. That pending the hearing and determination of the petition this Honourable Court be pleased to order that Gregory Schmidt (of French Passport No 18FH3xxxx the Chief Executive Officer of Kiwipay Pay 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 66820xxxxx, 66820xxxxx & 6682003378 on the internet banking platform.
  - c. 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.



- d. 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.
  - e. 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.
  - f. That the Honourable Court be pleased to join the parties' necessary for the determination of the instant petition on its own merits.
  - g. That this Honourable Court be pleased to award the Petitioner costs of and incidental to these proceedings on a full indemnity basis.”
2. The petition is supported by the affidavit of the Petitioner sworn on November 8, 2022.
3. The facts constituting the case are stated to be:-
- “ a) That the Respondents Board of Directors and Management has abdicated their legal responsibility to establish appropriate policies on Anti-Money Laundering.
  - b. That the Respondent has failed to establish the Know Your Customer standard in their operations.
  - c. That the Respondent has not only failed to implement Customer Due Diligence on all clients but also Enhanced Due Diligence on the risk categories that demand it.
  - d. That the Respondent has a customer Kiwipay Kenya Limited (hereinafter referred to as Kiwipay Kenya) registered as a company in Kenya. Annexures 1, 2 & 3.
  - e. That Kiwipay Kenya fits both the product/service and customer entities risk categories that call for Enhanced Due Diligence.
  - f. That Kiwipay Kenya has a risk profile of being a business purportedly in payment processing (an activity involving credit cards and international fund transfers) and exhibits as a customer a higher risk worthy of further assessment due to the unusual nature of their transactions.
  - g. That Kiwipay Kenya conducts its business in unusual circumstances, such as a significant and unexplained geographic distance between the location of its bank accounts (Kenya) and the location of the customers (Global),
  - h. That Kiwipay Kenya receives into their Respondent accounts numerous card transaction amounts from multiple jurisdictions Annexures 4 & 5, and pays out in a lump sum always to the same account in a single jurisdiction Annexure 6.
  - i. That Kiwipay Kenya bank accounts at Respondent are suspicious for the amounts exported Annexure 6, are in no way related to the balances Annexures 4 & 5 present on the date exported.



- j. That Kiwipay Kenya has received customer complaints related to fraud and money laundering allegations involving illegal online casino gambling in its role as a payment processor. Annexure 7.
  - k. That fraud is one of the money laundering predicate offences.
  - l. That Kiwipay Kenya has been in business for more than a year Annexure 8 and is liable for tax on the vast profits exported.
  - m. That the Respondent had a duty to apply at the onset and throughout its relationship with Kiwipay Kenya a robust Know Your Customer policy but was reckless in observing the Prudential Guidelines issued by the Central Bank of Kenya.
  - n. That the Respondent did not satisfy itself if Kiwipay Kenya unusual business transactions were consistent with their stated business profile. Specifically, Respondent did not consider the three-stage money laundering model in relation to their client so clearly explained in the prudential guidelines.
  - o. That the compounded failures of Respondent have exposed Kenyans to unnecessary risk and denied the state its lawful revenue.”
4. The Petition was opposed by the Respondent vide a replying affidavit sworn by John Wambugu, A senior Legal Officer of the Respondent. The Respondent states, inter alia: -

“ .....

- (1) That the Respondent is a reputable Banking institution whose operations are regulated by the Central Bank of Kenya (CBK) similar to all banking and financial service providers within the country.
- 2. That as such, the Bank operates under strict banking laws as well as regulations passed by the CBK that exercises oversight even in implementation of all relevant laws, regulations and policies.
- 3. That in Kenya particularly, Banking institution's customer due diligence is guided and regulated by inter alia Section 45 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAML A) and Guideline 5.6 of the Central Bank of Kenya's Prudential Guidelines 2013.
- 4. That the Petitioner herein has failed to demonstrate any action and/or inaction on the Respondent's part that breach the statutory and regulation, customer due diligence requirements.
- 5. That alleging wrongdoing is insufficient as this Honourable Court must be satisfied that the Petitioner has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the Respondent.
- 6. That in any event, the key regulating statutes and/or regulations prescribe the consequences attendant to Banks in the event of non-compliance with the customer due diligence provisions which consequences are meted out by the Central Bank of Kenya in the event of default.



7. That the Petitioner herein has not adduced any evidential material demonstrating culpability on the Respondent's part or whether the Respondent has been cited for breach of any of the aforementioned statutes and/or regulations by the relevant oversight body.
8. That Kiwipay Kenya Limited is a Customer of the Respondent herein holding Bank Accounts No 66820xxxxx, 66820xxxxx and 66820xxxxx
9. That on May 18, 2022, the Assets Recovery Agency obtained an order in Magistrates Court Anti-Corruption Case No E039 of 2022 inter alia restricting debits for 45 days on Bank Accounts No 66820xxxxx with the Respondent. This order was intended to allow investigations into the operations of the aforesaid accounts which had been flagged to the Financial Reporting Centre for action. (Annexed herewith and marked "JW-1" is a copy of the said court order)
10. That in fact, the Assets Recovery Agency served the Respondent with the aforesaid order which also required the Respondent's assistance in the provision of relevant documents to aid in the investigations.
11. That in a letter dated June 20, 2022, the Assets Recovery Agency indeed confirmed compliance by the Respondent who provided all documents requested for including account opening documents, statements of account: cheque/cash deposits and withdrawal slips. (Annexed herewith and marked "JW-2" is a copy of the said letter).
12. That soon thereafter, the Assets Recovery Agency withdrew the above matter and moved this Honourable Court vide Miscellaneous Application No E028 of 2022 and obtained an order issued on June 24, 2022 for preservation of the funds held in the subject bank accounts for a period of ninety (90) days. (Annexed herewith and marked "JW-3" is a copy of the said court order)
13. That prior to the lapse of the ninety-day period, the Assets Recovery Agency moved this Honourable Court vide Civil Application No, E037 of 2022 ("the forfeiture application") primarily seeking an order forfeiting all proceeds of the subject accounts to the state as proceeds of crime. (Annexed herewith and marked "JW-4" is a copy of the said application).
14. That however, both Miscellaneous Application No E028 of 2022 and Civil Application No E037 of 2022 were voluntarily withdrawn by way of consents executed by both the Assets Recovery Agency and Kiwipay Kenya Limited. (Annexed herewith and marked "JW-5a" and "JW-5b" are copies of the said consents)
15. That the withdrawal of the said matters meant that there was no further interrogation arising out of the operations of the subject bank accounts thus paving way for continued operation by Kiwipay Kenya Limited.
16. That it is therefore evident that the Respondent herein has at all times observed and complied with its lawful obligations in identifying, averting and/or reporting suspicious transactions as and when required to do so.



17. That the subject bank accounts have indeed been subjected to scrutiny and cleared for continued operation.
18. That the Petitioner has adduced the following material as evidence in support of his petition:
  - a. Account opening email between Kiwipay Kenya Limited and the Respondent.
  - b. Email Transaction Notifications for Kiwipay Kenya Limited.
  - c. Kiwipay Kenya Limited Swift transaction slip.
  - d. Email correspondence between Kiwipay Kenya Limited and Tracy Dymond.
19. That the Petitioner is not in any way involved in the correspondence emails and the bank transaction slips attached and has failed to disclose the source from which the documents emanate.
20. That there is no evidence of consent provided by the authors and/or recipients of the attached correspondence allowing the Petitioner to adduce such documents therefore imputing illegality in the manner the documents were obtained.
21. That without such consent, it appears that the Petitioner employed unlawful means in obtaining the said documents in blatant disregard/breach of the relevant persons' right to privacy.
22. That particularly, it has not been demonstrated or explained how the Petitioner obtained access to privileged banker-customer correspondence which he seeks to rely on in pursuit of the Petition.
23. That Such evidence ought not be relied on by this Honourable Court and should therefore be expunged from the record.
24. That the Petitioner has failed to disclose to this Honourable Court the following ongoing court matters and orders affecting the operation of the subject bank accounts:
  - i. HCCOMMMISC E804 of 2022 - Order issued on November 15, 2022 for preservation of USD 2,502,675.
  - ii. HCACECMISC E054 of 2022 - Order issued on November 17, 2022 for preservation of Kshs 168,931 ,653.04.
  - iii. HCCOMMMISC E-454 of 2022 - Order issued on November 29, 2022 for preservation of USD 13,473, 110.44.
  - iv. HCCOMMMISC E-826 of 2022 - Order issued on November 2022 for preservation of USD 1,934,900.
  - v. HCCC E-220 of 2022 — Order issued on November 16, 2022 for preservation of USD 784,225.



25. That the aforesaid court matters are still active and the orders yet to be discharged or varied.
26. That issuing any order relating to the said accounts would therefore defeat the ends of justice sought in all the foregoing suits and ultimately embarrass the Court should there emanate contradicting orders.
27. That the Petition largely focuses on three (3) bank accounts operated by Kiwipay Kenya Limited and seeks reliefs demanding action by shareholders of the company and relevant state agencies,
28. That flowing from the foregoing, the Petition before this Honourable Court undermines the right to fair hearing especially when the persons against whom adverse orders are sought, have not been accorded an opportunity to defend themselves.
29. That the Petitioner has failed to establish a prima facie case with a likelihood of success warranting issuance of the orders sought.
30. That the Petitioner therefore shall not suffer prejudice if the orders sought are not granted.
31. That the Petition dated November 8, 2022 ought to collapse under its own weight and dismissed with costs to the Respondent. ”

5. Thereafter the petition proceeded by way of written submissions.

6. In his submissions the petitioner quoted extensively from several cases then urged this court to find that the Respondent has a public duty to follow the law; that the Respondent has violated the human rights of the Kenyan public; that the Respondent’s action show complicity with their customer, an act that meets the threshold of abetting for benefits (sic) and invites the compliance of the orders sought; that the Respondent’s actions require lifting of the corporate veil and hence the Petitioner has proved his case and this court ought to grant the reliefs sought.

7. In regard to the injury caused to the public the Petitioner stated as follows:-

- “a) That the Respondent by being negligent in its statutory obligations has undermined the capacity of the state to collect its lawful revenue.
- b. That State under-collection of revenue in (a) above makes implementation of programmes to realize progressive economic and social rights under Article 43 futile.
- c. That further to (b) above, under-collection of revenue has the effect of constraining state expenditures on 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.
- d. That the Respondent failed to meet the customer due diligence standard set by Section 12 of the [proceeds of crime and anti-money laundering regulations, 2013.](#)”



- e. That the Respondent failed to meet the enhanced due diligence standard set by Section 18 of the [proceeds of crime and anti-money laundering regulations, 2013](#).
  - f. That the Respondent failed to observe the ongoing monitoring of business or account activity on a continuous basis set by Section 29 of the [proceeds of crime and anti-money laundering regulations, 2013](#).
  - g. That the Respondent failed to follow the Prudential Guidelines despite their statutory underpinning of Section 33 (4) of the [Banking Act](#).
  - h. That the Respondent has failed to consider the impacts of Sections 3, 4 & 7 of the [Proceeds of Crime and Anti-Money Laundering Act, 2009](#).”
8. On its part, the Respondent submitted that the Petitioner had not proved his case on a balance of probabilities and the petition should therefore be dismissed with costs to the Respondent.

### **Analysis and Determination**

9. I have carefully considered the petition the grounds thereof, the Replying affidavit and the rival submissions. In my view, the gravamen of this petition was to compel the Respondent to comply with its obligations as a reporting institution under Part IV of the [Proceeds of Crime and Anti-Money Laundering Act](#) and more specifically Section 44 which requires it to on an ongoing basis to monitor all complex, unusual, suspicious, or large transactions whether completed or not, paying special attention to unusual patterns of the transactions and to report suspicion, if any be found, to the Financial Reporting Centre. The Petitioner also alleges that the Respondent failed to verify its customer’s identity under Sections 45A hence occasioning loss of revenue to the State and prejudice to the public.
10. Section 11 of the [Proceeds of Crime and Anti-Money Laundering](#) creates an offence of failure to comply with the requirements of Section 44, 45 and 46 of the Act. The obligation to oversee compliance by reporting institutions is placed on the Financial Reporting Center and it has power to impose civil penalties for noncompliance (Section 24(b)) to take administrative action for non-compliance (Section 24c). It is for the above reason that my view is that the orders sought in this case were within the purview of the Financial Reporting Centre but not the Petitioner.
11. Indeed, Section 39(2) of the [Proceeds of Crime and Anti-Money Laundering Act](#) clothes the Financial Reporting Centre with the power to obtain orders to enforce compliance with the obligations under the Act. The Section states:-

“39(2) The Centre may, upon application to the High Court, after satisfying the Court that a reporting institution has refused to comply with any obligation, request or requirements under this Act, obtain an order against all or any officers, employees or partners of the reporting institution in such terms as the High Court may deem necessary, in order to enforce compliance with such obligation.

(3) In granting the order pursuant to subsection (2), the High Court may order that should the reporting institution fail, without reasonable excuse, to comply with all or any provisions of the order, may order such institution, its officers, employees or partners to pay a fine not exceeding one million shillings for an individual and a fine not exceeding five million shillings for a body corporate.”



Clearly if there was any wrong doing disclosed on the part of the Respondent the Financial Reporting Centre would have been the one to approach this court. The fact that it did not implies there was no wrong doing. Moreover, a suit filed in this court against the Respondent's client (KiwiPay) by the Assets Recovery Agency was withdrawn by the Agency for reasons that it had investigated the entity and come to the conclusion that the business it was involved in was legitimate.

12. Accordingly, I find no merit in this petition and proceed to dismiss it with costs to the Respondent.

It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**E N MAINA**

**JUDGE**

