Njenga & 4 others v Ecobank (K) Limited & 3 others; Kiwipay (K) Limited (Interested Party) (Civil Suit E484 of 2022 & Civil Case E454 & E469 of 2022 (Consolidated)) [2023] KEHC 26655 (KLR) (Commercial and Tax) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26655 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E484 OF 2022 & CIVIL CASE E454 & E469 OF 2022 (CONSOLIDATED)

A MABEYA, J

DECEMBER 19, 2023

BETWEEN

MAINA STEPHEN NJENGA .... 1ST PLAINTIFF

FELIX RANTUU LEKISHE .... 2ND PLAINTIFF

SOLOMON JOSEPH MAINA .... 3RD PLAINTIFF

AVISTIA SRO LIMITED .... 4TH PLAINTIFF

MONTHIDA RASHI .... 5TH PLAINTIFF

AND

ECOBANK (K) LIMITED .... 1ST DEFENDANT

KIWIPAY PTE LIMITED .... 2ND DEFENDANT

GREGORY SCHMIDT .... 3RD DEFENDANT

PAYGRAM COMPANY LIMITED .... 4TH DEFENDANT

AND

KIWIPAY (K) LIMITED .... INTERESTED PARTY

JUDGMENT

1. This judgment is on three (3) suits, HCCC NO E454 of 2022, HCCC 469 of 2022 and HCCC E484 of 2022, respectively which were consolidated on 25/5/2023. HCCC Nos. 469 and 484 of 2022, derivative suits brought by directors and shareholders of the interested party for its benefit.

2. This suit was filed by the 1st, 2nd and 3rd plaintiff in plaint dated 5/12/2022. They sought judgment against the 1st defendant ("the bank") for a declaration that the mandate for the operation of three bank account numbers 6682003058, 6682003059 and 6682003378 ("the bank accounts") be maintained and operated in compliance with the interested party's resolution made on 15/12/2022. That the bank do refund monies that were paid out from the interested party's account irregularly from 14/11/2022 to date. It also sought damages against the bank for breach of contract, breach of the bank's duties and fraud against the interested party ("the Company") together with costs of the suit.

3. The 1st to 3rd plaintiff's case was that there was a banker-customer relationship in the operation of those accounts which the bank had breached. That the bank was under an obligation to exercise reasonable care and skill in not effecting payments without authorization from the company and further inform the customer of the state of the said accounts.

4. That on 14/11/2022, the Court adopted a consent order to the effect that the said accounts be operated in accordance with the pre-existing instructions prior to the issuance of a court order dated 24/10/2022 and the registrar of companies was directed to revert and restore the plaintiff's directorship and shares in the Company.

5. The plaintiffs complained that they had been denied access to the said accounts while the majority shareholder was single handedly permitted to access them. That as a result, the majority shareholder had transferred USD 10,000,000 from the said accounts. That the bank had refused the plaintiffs to transact in the said accounts yet it had effected payment of USD 1,800,000 as legal fees.

6. The plaintiffs contended that the bank had breached its duty of care to the Company by allowing transactions on the said accounts; without valid resolutions, transactions via internet banking, by relying on a purported resolution dated 25/6/2021 despite there being a resolution dated 22/10/2022 which altered the banks mandate. That in the premises, the bank was liable for the loss of funds from the said accounts.

7. The Company filed a defence dated 24/5/2023 wherein it contended that there was no cause of action that had arisen on account of any breach by the bank of its duty of care to it. That the plaintiffs had voluntarily resigned as directors and relinquished their shares in the Company. That the signatories to the said accounts was in accordance with the resolution of 25/6/2021 by which, the 3rd defendant being the representative of the majority shareholder was permitted to transact for unlimited value and whilst the 5th plaintiff was to transact for a value not exceeding USD 2000 per month.

8. The Company contended that the 1st to 3rd plaintiff had no authority to pass any resolution since they had resigned from the Company and were not signatories to the accounts. That the bank lawfully and procedurally facilitated its transactions and the 1st to 3rd plaintiffs, having relinquished their directorship and shareholding, they could not be given information concerning the accounts. That the bank had acted prudently to protect the Company's interests from fraudsters.

9. The bank filed its defence dated 25/5/2023. It admitted that the Company the said with itself. That the said accounts were intended to receive payments from the Company's sponsored merchants. That the bank had received Electronic Banking Services Form on 29/3/2021 signed by the 1st and 5th plaintiff to set up the three bank accounts on the internet banking platform. That the 3rd defendant was granted internet banking rights for an unlimited value whereas the 1st and 5th plaintiff were granted internet banking rights with the limit of USD 2000.

10. The bank contended that the court (Majanja J) had issued orders directing that status quo be maintained with respect to the shareholding and bank accounts and as at that date, the 2nd defendant had 23,300 ordinary shares and the 5th plaintiff had 16,700 shares. Further, on 24/10/2022 the court gave orders restricting any transactions on the accounts via internet banking platform and only permitted transactions via RTGS, cheques or over the counter withdrawals.

11. The bank stated that it declined to act on the plaintiffs' letter of 24/10/2022 because the court had restricted the use of internet banking. That the court issued further orders on 14/11/2022 by adopting two consents to the effect that the registrar of companies reverts and restores the plaintiffs' directorship and shares to them. That the bank's legal fees was to be met from the said accounts and the company be run according to the instructions existing prior to the order of 24/10/2022.

12. That acting on the said orders, the bank settled its advocate's legal fees of USD 930,000. That the transactions initiated by the 3rd defendant via internet banking failed and were reversed. In the circumstances, the bank had conducted itself lawfully and strictly adhered to the applicable laws.

HCC E469 OF 2022

13. This suit was instituted by the 5th Plaintiff vide a plaint dated 28/11/2022. It sought judgment against the bank for USD 2,220,000 and USD 4,992,000 against the 1, 2 and 3 defendant jointly and severally, and USD 3,512,831.18 against the 1, 2, 3 and 4 defendant jointly and severally together with costs.

14. It was the 5th plaintiff's case that there had been unauthorized transactions on the Company's said accounts and she claimed a refund of USD 11,134,831.20 on behalf of the Company. That the 2nd and 3rd defendant owed duties to the Company in line with sections 142 to 150 of the *Companies Act* and were in breach of the said duties when they authorized and facilitated the payments. That were no monies due to the 4th defendant and it should refund the sum of USD 3,512,831 paid to it by the 3rd defendant.

15. The 4th defendant filed a defence dated 3/7/2023. It stated that it gave the 2nd defendant the platform in furtherance of its banking business. That it had received a sum of Kshs. 422,245,246/- for services rendered to the 2nd defendant as per the software intellectual property transfer agreement dated 14/10/2022.

16. The 2nd and 3rd defendant and the Company filed their defence dated 24/5/2023. It was stated that at all material times, the lawful signatories to the accounts were in accordance with the resolution passed on 25/6/2021 by which the 3rd defendant was permitted to transact for an unlimited value and the 5th plaintiff would transact for a value not exceeding USD 2000 per month. They denied that there had been any unauthorized transactions on the accounts. That no claim lies against the bank as all the transactions that were carried out by the Company were consonance of the Company's resolution and existing instructions.

17. The bank's defence dated 25/5/2023 was the same as the one in HCCC E484 of 2022.

HCC E454 OF 2022

18. The third suit was instituted by the 4th plaintiff ("AVISTA") vide a plaint dated 17/11/2022. It sought judgment against the 1, 2, 3 and 4th defendant jointly and severally, for orders that the funds held in the said accounts be released to it. That the defendants be restrained from transacting or withdrawing a sum of USD 13,473,110.44 from the said accounts plus costs.

19. The 4th plaintiff contended that it entered into an agreement with the 2nd defendant for the Payment card processing service. That by that agreement, a buyer would order products or services from the 4th plaintiff and could make payments to the 1st defendant through its payment Card transactions platform with the 1st and 2nd defendant accepting the payment on behalf of the 4th plaintiff.

20. That it received notification from the 2nd defendant that payment could not be processed since the accounts had been frozen. It claimed that the funds held by the 1st defendant amounting to USD 13,473,110.44 on behalf of the 4th plaintiff could only be dealt with by an order for remission to the 4th plaintiff

21. The 2nd defendant and the Company defended the claim vide a defence dated 25/5/2023. They alleged that the 4th plaintiff was a stranger to them and that the 2nd defendant had not entered into any agreement with it. That the purported agreement was never executed by the 2nd defendant and that in any event, any agreement entered thereon was outside the Court's jurisdiction.

22. The 1st defendant defended the claim vide a defence dated 25/5/2023. It contended that it was not a party to any agreement between the 4th plaintiff and the 2nd defendant. That the 1st defendant did not have any knowledge concerning the settlement of USD 13,473,110.44 received by the 2nd defendant and the Company on behalf of the 4th plaintiff.

The Trial

23. The hearing commenced on 19/6/2023 with PW1 Maina Stephen. He adopted his witness statement dated 5/12/2022 and produced his bundle of documents as PExh1. In cross examination he testified that the 3 plaintiffs were the majority shareholders and there was no permission for the Company to transact electronically.

24. That the consent order dated 14/11/2022 restored the 1st to 3rd plaintiffs to the directorship and shareholding of the Company. He admitted that he wrote a letter to the bank to pay USD 784,225 to some law firm and a further USD 2,502,675 to Solomon Joseph Maina without the permission of the Company. He admitted that based on CR12 on record, he was not a director of the Company in October 2022 and the bank failed to act on the resolution of that month since he was not a director.

25. He further admitted that the Company offers payment platform on behalf of merchants. That he had not paid any money for the shares in the Company neither did he have any evidence of transfer of shares to himself. That the company transferred the shares to him on 3/6/2020.

26. P4W1 Dimitar Vladimirov Dimitov, the Chief Technology Officer of the 4th plaintiff testified on its behalf. He adopted his witness statement dated 10/7/2023 as his evidence in chief and produced the bundle of documents dated 10/7/2023 as P4 Exh1. He confirmed that the Company was not a party to the agreement dated 1/12/2021.

27. He further admitted that the Company was not directly bound by the agreement. He stated that the bank was sued because it hosted the money. That contracting with a shareholder was not the same as contracting with the Company. He admitted that the applicable law was that of Singapore and that Clause 19 of the agreement set out the venue of jurisdiction.

28. P5W1 Monthida Rashi adopted her witness statement as evidence in chief and produced her bundle of documents as P5Exh1. She testified that there was a resolution that herself and Gregory would draw a salary. That the 1st to 3rd plaintiffs had sold their shares to her. That the resolution dated 19/3/2022 did not permit internet banking. She disowned the resolution dated 25/6/2021 stating that she had not signed it.

29. In cross examination, she denied any knowledge of the consent dated 14/11/2022 in Pet. No. E010 of 2022 and stated that the Company had not agreed to pay the legal fees for the bank's advocates. That all monies in the accounts were deposited by her and 1st to 3rd plaintiff had paid nothing to the accounts. That the monies in account no 668200303059 belong to the merchants and could not be withdrawn for personal use. That the 1st to 3rd plaintiff had bound the Company to pay legal fees of USD 784,225 for being represented in Pet. No. E010 of 2022 which they should have paid from their pockets.

30. In testifying for the Company, she relied on her witness statement dated 23/6/2023 as evidence in chief and produced the document dated 23/6/2023. She stated in cross-examination that the Company held merchant money in the dollar account and the same was usually paid to the 2nd defendant (Kiwi PTE) for the merchants.

31. She further told the Court that Gregory wrote a letter dated 15/6/2022 to the bank authorizing withdrawal of Kshs. 15 million for legal fees, office expenses, rent and salaries. That he had made fake resolutions and transacted on the accounts. That she reported the matter to the police about her signature being used but she had no evidence on any complaint to the bank about unlawful transactions. That she knew that Gregory was making transactions on the accounts but she had not complained about it. That she had withdrawn US $2000 from the account to confirm the limit. She admitted that she had used the resolution dated 14/11/2022 to make the lawyer be paid Kshs 120 million

32. She admitted that she had colluded with 1st plaintiff and made a resolution dated 3/11/2022 to transfer US 4.5 million to her private account because the 2nd defendant wanted to abandon her in Kenya yet she was a citizen of Lao.

The Defendants' Case

33. D1W1 John Wambugu adopted his witness statement dated 12/6/2023 as his evidence and produced the 1st defendants bundle of documents as DExh1. In cross examination, he stated that the resolution the bank had was to open a bank account and there was no specific resolution for internet banking since that was a service within the banking service. That the company provided an amended model articles by which the accounts were to be operated by the majority shareholder. That the articles showed that Gregory had the mandate to operate the accounts vide the resolution dated 25/6/2021. He testified that the order dated 14/11/2022 was not complied with since the status of the Company showed that Maina was not a director.

34. D2W1 Gregory Schmidt adopted his witness statement dated 23/6/2023 as evidence in chief and produced his and the 2nd defendant's bundle of documents as D2Exh1. He testified that by a Shareholder's Agreement dated 18/06/2020, it was agreed that being the representative of the majority shareholder, he would run the Company and make decisions. That the Company had no merchants of its own and had only one contract with Kiwi Pay Singapore. That the agreement for the card processing service dated 1/12/2021 relied on by the 4th plaintiff was forged as it was done manually contrary to all the contracts of the 2nd defendant which are signed electronically.

35. He further told the Court that, the Company did not commence any business until structures were put in place for him to be in control of the Company. That it is after the resolution of 25/6/2021 was made and he gained control of the said accounts that the Company commenced business.

36. D4W1 Milton Lucheri, the CEO of the 4th defendant adopted his witness statement dated 3/7/2023 as his evidence in chief and produced the 4th defendant's documents as D4Exh1. In cross examination, he told the Court that the 4th defendant had signed an agreement with the 2nd defendant for provision

of a software and was paid Kshs. 422,245,246/80 from the Company. That the 4th defendant worked with the 5th plaintiff who knew about the payment.

Submissions

37. It was submitted for the 1st to 3rd plaintiff that their removal from directorship and shareholding of the Company was irregular and unlawful. That the resolution dated 7/3/2022 filed with the registrar demonstrated this irregularity. That the 5th plaintiff had admitted that there was no notice of transfer which was a requirement for the transfer of shares. That with respect to the payment card processing service agreement between the Company and the 4th plaintiff dated 1/12/2021, the Court had no jurisdiction by virtue of the existence of the foreign jurisdiction clause in that agreement.

38. I should here indicate that, the Company seems to have been represented by two sets of advocates, Messrs Kithi and Company and Ms. Wambugu and Company. It was submitted by Mr. Kithi that, funds in the accounts were deposited with the expectation that the bank would protect and deal with them as per its lawfully issued instructions. That the bank should have always consulted the Company with respect to suspicious instructions. That the bank had a duty towards the Company to exercise reasonable care to protect amounts held in the accounts and by failing to safeguard the deposits, the bank was grossly negligent.

39. That there was no contract between the Company and the 4th defendant and the suit should be dismissed for lack of privity of contract. That the 4th plaintiff was a stranger to the Company.

40. For the 4th plaintiff, it was submitted that there was no dispute that the 4th defendant entered into a contract with the 2nd defendant and conducted business with the Company. That the 2nd and 3rd defendant could not rely on the ouster clause as there was no dispute capable of being referred to arbitration. That the alleged fraud as stated by the 3rd defendant could not hold as none had been pleaded and particularized. That since there was no dispute that the funds held by the Company with the bank was for the merchants, the 4th plaintiff was entitled to its claim.

41. With respect to the 4th defendant, it was submitted that the 4th defendant had not been contracted by the Company and should refund the sum of USD 3,512,831.18 paid to it. That despite the mandate of 25/6/2021, the 3rd defendant was supposed to consult the other directors and not make unilateral decisions. That there was no resolution by the Company to contract the 4th defendant and therefore', the 3rd defendant had no authority to contract and pay the 4th defendant.

42. The 5th plaintiff submitted that the 1st defendant stole USD 980 and paid the sum to its advocates. That the 1st defendant released USD 2 million to the 3rd defendant despite the exists of a freezing order by Justice Sergon. The 5th defendant submitted that the 1st defendant owed the interested party duty of care and ought to have protected the plaintiffs and the interested party against any misappropriation of funds. That the 1st, 2nd 3rd and 5th plaintiffs did not furnish the 1st defendant with any authority or resolution permitting internet banking.

43. That the resolution dated 25/6/2021 did not give the 3rd defendant express authority to operate the Company's accounts without seeking approval from the other directors. That the 3rd defendant had breached his fiduciary duties by making payments to third parties without any regard to the other directors.

44. I have considered the pleadings, the evidence on record, the submissions by Learned Counsel and the authorities relied on. Upon that consideration, it is this Court's view that the following issues arise for determination: -

a. Whether the firms of Kithi and Company Advocates and Wambugu and Muriuki Advocates were properly on record for the Company;

b. Whether 1st defendant failed to exercise reasonable care in the operation of the Company's accounts;

c. Whether the 1st, 2nd and 3rd plaintiff suits were properly brought for the Company;

d. Whether the plaintiffs are entitled to the orders sought.

45. On the first issue whether the firms of Kithi and Company, Nyamu and Nyamu Advocates and Wambugu and Muriuki Advocates were properly on record for the Company, it was the submission of Mr. Oichoe for the 1st to 3rd plaintiff that the 1st to 3rd plaintiffs had objected to the three firms purporting to appear for the Company vide the Motion dated 4/5/2023. That where *Advocates Act* without instructions, their pleadings have no value. Mr. Kithi responded that the Motion was not prosecuted. That the matter was set for trial but was neither raised at the trial and it would be prejudicial for the Court to determine the same.

46. When the Court gave its directions on this suit on 25/5/2023, it was alive to the existence of the Motion relied on by Mr. Oichoe. The matters in that Motion remained unprosecuted. It was expected that the same should have been raised when the directors of the Company (P1w1, P5w1 and D2w1) testified. That was the best opportunity that the issue of the representation should have been resolved. The same was however not raised.

47. In view of the foregoing, that pending Motion cannot be reverted to and the Court cannot purport to make a determination thereon, when the opportunity to raise the same with the so-called directors of the Company testified and were not questioned on it. It is not lost of this Court that at the heart of these proceedings is the control and management of the Company. I decline to make a determination on that matter and rule that, the aforesaid advocates properly appeared for the parties they purported to represent.

48. On the second issue, the 1st to 3rd plaintiffs and the 5th plaintiff instituted the first and second suit as a derivative claim on behalf of the Company. They alleged that the bank had breached the banker customer relationship in the way it managed the said accounts.

49. The foundation for derivative claims stems from sections 238 to 241 of the *Companies Act* which provide as follows: -

> " 1) In this Part, "derivative claim" means proceedings by a member of a company—
>
> (a) in respect of a cause of action vested in the company; and
>
> (b) seeking relief on behalf of the company.
>
> (2) A derivative claim may be brought only—
>
> (a) under this Part; or
>
> (b) in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
>
> (3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or

omission involving negligence, default, breach of duty or breach of trust by a director of the company.

…”.

50. In [*Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another*] [2017] eKLR, described a derivative claim as follows: -

> “ Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see *Wallersteiner v Moir* (No.2) [1975] 1 All ER 849. 38.
>
> Until 2015, in Kenya, the common law guided derivative actions in Kenya.
>
> With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in Foss v Harbottle was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance”.

51. In the present case, the plaintiffs claim is based on the ground that the bank owed the Company a duty to reasonably care to protect the amounts held in the subject accounts but failed to do so. It is trite that the relationship between the bank and its customer is contractual and the bank has a duty to diligently handle the accounts of the customer.

52. In *Karak Brothers Company Ltd v Burden* [1972] AII ER 1210, the Court held that: -

> “ … a bank has a duty under its contract with its customer to exercise ‘reasonable care and skill’ in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”

53. With respect to what a mandate entails *Paget’s Law of Banking* Chapter 19 para. 19.2 read as follows: -

> “ The mandate embodies an agreement which authorizes the bank to pay if given instructions in accordance with its terms. Typically mandates will list the individuals who have authority to sign cheques or other payment orders and will specify how many individuals (if more than one) must sign in any given order. There are many possible combinations. Some mandates require orders to be signed by A and by any one of B, C and D. Others require the signature of any one of E, F and G and any one of H, I and J. There are many other possible combinations.”

54. In challenging the manner in which the bank operated the subject accounts, the 1st - 3rd and 5th plaintiff complained about internet banking. They contended that there was no resolution allowing the bank to allow internet banking with respect to the said accounts.

55. However, from the evidence of D1w1 and D2w1, the Company had permitted internet banking. The record shows that a mandate dated 25/6/2021 was given by the Company. The 1st and 5th plaintiffs attempted to disown the same on the grounds of some error in the name of the 5th plaintiff and that they had not executed the same. Firstly, there was no forensic evidence to support the allegation that the signatures appearing on the bank Forms were not those of P1w1 and P5w1.

56. Secondly, the name Lasi appearing in the impugned form was as per the pronouncement by P5w1. Throughout her testimony in Court, she pronounced her name as Lasi and not Rashi. The Court saw both P1w1 and P5w1 testify. They were both evasive and unreliable when it came to telling the truth.

57. The Court has examined the documents produced by D1w1 with respect to internet banking. It is clear that the Forms were signed by the signatories of the plaintiff, that is the 1st and 5th plaintiff. Internet banking was authorized vide the Form appearing at page 60 of D1Exh1. In that document, the 3rd defendant was authorized to transact via internet banking. The challenge on that document was an afterthought. It did not displace the firm and cogent testimonies of D1w1 and D3w1.

58. Very crucial was the testimony of D3w1. He stated that although the Company was incorporated in 2020, it did not start operations until he had to have control of the accounts. That since the business of e-commerce which the Company was entering into was controlled by the 2nd defendant, the same could only commence once it was felt that the 3rd defendant had sufficient control of the Company and its accounts.

59. That this control came when the fresh mandate of 25/6/2021 and the Amended Articles of Association were effected. The evidence produced by way of statements accounts show that, immediately after the said mandate was delivered to the bank, transactions began on the said accounts in September, 2021 lending credence to the testimony of D3w1. This testimony and that of D1w1 was never challenged nor displaced.

60. From the evidence on record, there was no need for a special resolution to authorize the bank to allow internet banking since it was within the normal banking services. Further, there was nothing suspicious on the part of the bank as the forms were presented by the authorized signatories of the accounts. Having found that the 3rd defendant was authorized to operate the accounts through internet banking, the Court finds that the bank did not breach its fiduciary relationship with the Company. It acted within the mandate given by the Company.

61. The other issue for determination is whether the 1st, 2nd and 3rd plaintiffs were directors of the interested party and whether their removal was unlawful. The said plaintiffs contended that at incorporation of the Company, they were directors of the Company with each holding 2900 ordinary shares. That vide a consent order dated 14/11/2022, the Court directed that their directorship be restored and their shares be transferred back to them.

62. On the other hand, it was the case of the 5th plaintiff that the three plaintiffs resigned as directors and transferred their shares at a consideration of Kshs. 100,000.

63. The record shows that the 1st, 2nd and 3rd plaintiffs initially held 2900 ordinary shares each. P5w1 produced documents to show that on 29/3/2022, the 1st, 2nd and 3rd plaintiffs resigned as directors of the Company and transferred their shares on the 25/4/2022. In his testimony, P1w1 challenged the resignation letter stating that it was not signed by himself nor his co-plaintiffs.

64. On her part and to buttress her contention, P5w1 produced photographs showing the 1st 2nd and 3rd plaintiffs allegedly signing the letters of resignation and receiving the monies from her. The Court is

aware that it is this act of alleged resignation and transfer of shares that led to the filing of Pet. No. E010 of 2022. That case ended with two consents being recorded.

65. It is worthy to note that there was no oral testimony in the said Pet. No. E010 of 2022. However, before this Court, the parties testified at length. The Court saw the two protagonists, the 1st and the 5th plaintiffs. It became clear from their testimonies that neither the Company nor the 5th plaintiff had appointed any advocate to act for them in the said Pet. No. E010 of 2022. That the entire proceeding was but 'stage managed' to arrive at the desired conclusion, that is, restore the 1st to 3rd plaintiffs to the register of the Company.

66. In the present case, the resignation letters were accompanied by statutory declarations on oath. In the directions of 25/5/2023, the Court had directed the parties to indicate any of the documents that they objected to and require the attendance of the makers thereof. The 1st to 3rd plaintiff never challenged the statutory statements that accompanied the resignation letters and the transfer of shares. They did not call the attendance of the commissioner for oaths who executed those documents for cross-examination.

67. In the premises, on a balance of probability, the Court believes the testimony of the 5th plaintiff. The Court finds that the 1st to 3rd plaintiffs properly resigned for the directorship of the Company and transferred their shares therein to the 5th plaintiff. The Court notes that notwithstanding the 'consent' recorded in Pet. No. E010 of 2022, the resignation letters and the transfer of shares was proper. The parties indicated that the said 'consent' was being challenged in those proceedings.

68. Having come to that conclusion, is the 1st to 3rd plaintiffs suit s derivative suit per excellence. While the suit was couched in a way that resembles a derivative suit, not so the conduct of the 1st to 3rd and 5th plaintiffs. The said plaintiffs conducted themselves in a manner that was so disastrous of the Company and the suits were but an afterthought.

69. A few examples would suffice. The 1st to 3rd plaintiffs made resolutions to bind the Company to pay huge sums of monies to 3rd parties for no services at all. The monies run into millions on dollars. At page 267 D1Exh1, is a list of people and entities the said plaintiffs authorized they be paid in excess of US$100,000,000. A sum of US$ 2.6million was paid to the 1st to 3rd plaintiffs advocates as legal fees, but within hours, the same was distributed to parties that had nothing to do with legal fees. That is a matter before another Court.

70. On her part, the 5th plaintiff attempted to transfer from the Company a sum of US$4,500,000/- to a company associated with her for no reason at all. When asked why she did so, she told the Court that she felt that the 2nd and 3rd defendant had abandoned her in Kenya.

71. The evidence on record is clear that the monies in the subject accounts do not belong to the Company. That the same belongs to merchants that are contracted by the 2nd defendant for which the 2nd defendant is liable to them. That is why the said plaintiffs behaved with abandon to the extreme prejudice of the Company. They well knew that the monies in those accounts did not belong to the Company and yet they were on a spending spree thereby exposing the Company to extreme prejudice.

72. Can their conduct be said to be of directors and/or members acting for the benefit of and/or desiring well for the Company. The answer is a resounding no. Their respective cases have no merit and are for dismissal.

73. The next issue is the case for the 4th plaintiff. The 4th plaintiff claimed the sum of USD 13,473,110.44 from the 1st and 2nd defendant and the interested party. It contended that it had entered into an agreement with the 2nd defendant on 15/12/2021 for the payment card processing service. That the 1st

defendant had received money from merchants and therefore it was entitled to that amount in view of the contract between it and the 2nd defendant.

74. The suit was opposed on the ground that there was no privity of contract and the claim had been filed in the wrong jurisdiction. Under the doctrine of privity of contract, a contract cannot confer rights or impose obligations on any person other than the parties to the contract.

75. In *Agricultural Finance Corporation v. Lengetia* (1982 -88) 1KAR 772, the Court of Appeal quoted with approval *Halsbury's Laws of England*, 3rd Edition, Volume 8, paragraph 110, and held that: -

> " As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

76. It is not in dispute that the agreement relied on was not executed by or on behalf of the Company. In view thereof, the 4th plaintiff does not have a cause of action against the Company. The money claimed is in the possession of the 1st defendant for the benefit of the Company.

77. In any event, the agreement itself provided that the applicable law is Singaporean. That means that the courts with jurisdiction in the event of a dispute are those of Singapore and not Kenya. The fact that the subject matter of the dispute is in Kenya in itself cannot clothe this Court with jurisdiction.

78. Accordingly, the 4th plaintiff's case is without basis. The same could not be sustained in the Kenyan courts.

Determination

79. In view of the foregoing, the Court makes the following findings: -

    a. The bank acted within the properly given mandate and there was no breach of its fiduciary duty to the Company. The proper mandate and/or resolution is the one dated 25/6/2021 and the same is the lawful one which is still in force.

    b. The 1st to 3rd plaintiffs had properly resigned as directors of and transferred their shares in the Company. They together with the 5th plaintiff acted against the interests of the Company. Their suits could not pass the test of a derivative suits.

    c. The monies held in the subject accounts belong to merchants who have entered into contracts with the 2nd defendant.

    d. The consolidated suits are without merit and they are all dismissed with costs. Consequently, the orders freezing the subject accounts and or restricting their operations are hereby discharged forthwith.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2023.

A. MABEYA, FCI Arb

JUDGE