REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 512 OF 2015

LIPISHA CONSORTIUM LIMITED.....1ST PETITIONER

BITPESA LIMITED…….....2ND PETITIONER

VERSUS

SAFARICOM LIMITED…… RESPONDENT

RULING

Introduction

1. The Respondent Safaricom Limited is a public company. Listed in the bourse, it operates Kenya's largest mobile phone service with the largest subscriber base. It also avails other services associated with the cell-phone technology. Key amongst the services is the award winning Mpesa service, a money transaction service.
2. In the process of offering the various services, the Respondent engages various parties in commercial transactions as well. Commercial agreements are often entered into. One such commercial agreement was with the 1st Petitioner.
3. It is unclear when exactly the 1st Petitioner and the Respondent formally engaged, though it is generally stated that their association dates back to the year 2011. The 1st Petitioner however states that on 12 November 2015, the Respondent without notice suspended the services the Respondent had been offering to the 1st Petitioner and by extension the counter-services which were being offered by the 1st Petitioner to third parties including the 2nd Petitioner. The third parties in question according to the 1st Petitioner number a staggering 24,485 customers. It is such suspension, which was later conditionally lifted by the Respondent, which prompted the 1st Petitioner to move the court for various conservatory orders.
4. The orders sought basically seek to stay the Respondents directives and threats to discontinue the services to the 1st Petitioner. The orders also seek to restrain the Respondent from compelling or directing the 1st Petitioner to stop offering services to the 2nd Petitioner.
5. The application as well as the Petition is contested.

Background facts and the Petitioners' case

6. The Petitioners' case may be gathered from the Petition as well as the two affidavits sworn in support of the Petition and the application by Mr. Martin Kasomo and Ms. Amy Ludlum. The former also swore an additional affidavit on 24 November 2015.

7. The case reveals various facts and may be stated as follows.
8. The 1st Petitioner who provides mobile payment automation services to various third parties through its 'Lipisha Enterprise' operated through mobile phone service providers contends that the Respondent knew at all times that the ultimate beneficiaries of ' Lipisha ' service were third parties, yet the Respondent proceeded to suspend the services of the 1st Petitioner on 12th November 2015 without any prior notice or reasonable opportunity being afforded to the 1st Petitioner to state its case. The Respondent, it is claimed, had falsely accused the 1st Petitioner of trading in bitcoin. The 1st Petitioner then states that the Respondent caused the 1st Petitioner to terminate its contract with the 2nd Petitioner before finally restoring the services to the 1st Petitioner.
9. The Petitioners contend that by reason of such action on the part of the Respondent both Petitioners are now susceptible to multiple civil suits by other parties. The Petitioners state that the actions were in complete violation of both the law as well as the Constitution. In particular, the Petitioners state that the right to fair administrative action under Article 47, the right to property under Article 40 and the consumer rights under Article 46 have all been violated.
10. The Petitioners also contend that as many members of the public benefit from the automated payment service, it would be in the public interest to order a maintenance of the status quo *ante* 12 November 2015 until determination of the Petition.
11. The Petitioners also deny that they are in breach of any term(s) of the commercial agreement with the Respondent or in violation of any law to warrant the action taken by the Respondent.

Respondent's case

12. The Respondent's case may be retrieved largely(but not entirely) from the Replying Affidavit of Isaac Njoroge Kibere sworn on 23rd November 2015. The Respondent also filed a rather prolix Notice of Grounds of opposition.
13. The Respondent contends that the Petition is an abuse of the process of the court as there is no evidence of breach of any constitutionally guaranteed right or freedom. The Respondent further contends that the Petition is an abuse of process as the dispute is a purely commercial one governed by the terms and conditions of the Mpesa PayBill Agreement and private law. The Respondent also asserts that the dispute between the 1st Petitioner and the Respondent is an arbitrable dispute. It is stated that under the agreement between the parties all such disputes were to be resolved and determined by an independent arbitral tribunal.
14. The Respondent next contends that the 1st Petitioner is in breach of the commercial agreement with the Respondent and consequently the Petitioners are not entitled to the reliefs sought at all. In this regard, the Respondent points out that the 1st Petitioner has handed over services to a third party on whom the Respondent never undertook any due diligence and whose activities threaten the existence of the Respondent's licence issued by the regulatory authority, the Central Bank of Kenya. The Respondent adds that it is obligated to meet stringent reporting requirement, to the Central Bank of Kenya and has already reported the suspicious activities being conducted by the Petitioners.
15. The Respondent also states that the 1st Petitioner is in breach of the commercial agreement as the 1st Petitioner has without the Respondent's consent aggregated payments from various parties in breach of the express provisions of the agreement which prohibits the creation of collection accounts without the Respondent's permission.
16. As a third limb of its case, the Respondent accuses the 2nd Petitioner , and by extension the 1st Petitioner of engaging in an illegality. The Respondent's case is that the 2nd Petitioner is dealing in bitcoin without a license from the Central Bank of Kenya contrary to the provisions of the Money Remittances Regulations and Section 12 of the National Payment Service Act.
17. According to the Respondent, the Respondent had previously asked the 2nd Petitioner to obtain formal approval of its business from the Central Bank of Kenya pursuant to Section 13 of the National Payment Service Act and the Money Remittances Regulations 2013. The Central Bank of Kenya however declined to grant approval to the 2nd Petitioner. As the 2nd Petitioner is still conducting the bitcoin business through the Respondent's systems, the Respondent contends that it

has the right to also protect its own business by terminating any such illegality. The Respondent adds that there was also breach of the commercial agreement it has with the 1st Petitioner which prohibits the 1st Petitioner from conducting business which either intentionally or unintentionally violates local or international law.

18. Accordingly, the Respondent states that it has not deprived the Petitioners of their right to property and further that there can be no legitimate expectation from unlawful and illegal acts.
19. For completeness, the Respondent states that it has no issues with the 1st Petitioner so long as it does not deal directly or indirectly in bitcoins. The Respondent adds that it has not made a decision to warrant an invite to Section 4 of the Fair Administrative Act, No 4 of 2015.

Arguments

20. The Petitioners' case was urged by Mr. Kiragu Kimani whilst Mr. John M Ohaga advanced the Respondent's case.

Petitioners' submissions

21. Mr. Kimani stated that certain facts were not in dispute. He particularly pointed out; firstly, that the relationship between the 1st Petitioner and the Respondent dates back to the year 2011 and , secondly,that with the Respondent's knowledge the 2nd Petitioner has had a relationship with the 1st Petitioner since April 2014. Thirdly, Mr.Kimani stated that the Respondent had terminated its agreed services with the 1st Petitioner on 12 November 2015 following an SMS message but then restored the services on 14 November 2015 with a rider that the 1st Petitioner had to terminate its counter-services with the 2nd Petitioner. Finally, Mr Kimani pointed out that it was not in dispute that the 1st Petitioner had a customer base of over 20, 000.
22. Counsel then proceeded to submit that the Petitioners had a prima facie case with chances of success as there had been a want of fair administrative action on the part of the Respondent who never gave any notice to the 1st Petitioner prior to terminating or suspending the services. Counsel stated that this was contrary to the provisions of Article 47 of the Constitution as well as Section 2 of the Fair Administrative Action Act which both demanded that decision makers act expeditiously, efficiently, lawfully, reasonably ,fairly and also give reasons in writing for their action to any affected person.
23. Counsel further asserted that the Petitioners' right to property had been infringed in so far as the Respondent forced the 1st Petitioner to shut out one of the 1st Petitioner's customers. Additionally , counsel contended that the consumer rights of the 1st Petitioner's customers had been infringed as the customers had been unilaterally locked out of the Respondent's Application Programme Interface. According to counsel, the Respondent's actions infringed on the right to property under Article 40 and consumer rights under Article 46.
24. Counsel closed his arguments by submitting that the 2nd Petitioner had been forcefully shut out by the Respondent yet the Respondent always knew of the 2nd Petitioner's existence and link with the 1st Petitioner. Mr. Kimani further submitted that there was no reason for the Respondent's action and the reason advanced by the Respondent as to the 2nd Petitioner engaging in illegalities had no factual or legal basis. In any event , added counsel, the issue as to whether there was any illegality rested with and could only be determined by the trial court.
25. On the issue of prejudice, counsel submitted that the Petitioners are likely to be prejudiced and face hardships as there was a possibility of being sued by the many customers if no conservatory order was issued. On the other hand , the Respondent would suffer no prejudice even if orders were issued as the Respondent would continue earning fees from the transactions.
26. Counsel referred the court to the cases of **Centre for Rights Education and Awareness & 7 Others v Attorney General [2011]eKLR** as to requirement of prima facie cases during conservatory application hearings. Counsel also referred to the cases of **Rose Wangui Mambo & 2 Others v Limuru County Club & 17 Others [2014]eKLR** and **Isaac Ngugi v Nairobi Hospital & 3 Others[2013]eKLR** for the proposition that private entities and parties engaged in

private contracts and dealings should never be allowed to hide behind" private cloaks" to escape constitutional accountability. For the same proposition counsel also referred the court to the case of **Naftaly Rugara Muiga v Jomo Kenyatta University of Agriculture & Technology [2015]eKLR**.

Respondent's submissions

27. Mr. John M. Ohaga submitted that the Petitioners had failed to meet the set threshold for the issuance of conservatory orders.
28. Foremost, counsel pointed out that there were no constitutional issues to be adjudicated as the issues at stake were purely of a commercial nature guided by a formal commercial agreement as executed between the 1st Petitioner and the Respondent.
29. Mr. Ohaga also submitted that the court lacked the necessary jurisdiction as the remedies sought by the Petitioners were available as private law remedies before a commercial court. Likewise, counsel submitted that the contract executed by the parties enjoined the parties in the event of a dispute to move before an arbitral tribunal for dispute resolution. According to counsel, the arbitration agreement as read together with the Arbitration Act , was expansive enough to to include non parties to the agreement if they were claiming under either the 1st Petitioner or the Respondent. Counsel insisted that the Petitioners had not satisfied the court that there was no other remedy available to them other than constitutional remedies.
30. Counsel proceeded to submit that the Respondent had not made a decision in terms of Section 2 of the Fair Administrative Action Act to warrant the Petitioners' claims of infringement of their right to fair administrative action under Article 47 of the Constitution. Likewise, counsel submitted that the Respondent had not deprived the Petitioners of property but had legally suspended a commercial contract which in any event was never intended to run indefinitely.
31. On Article 46, Mr Ohaga's submission was that every party to a commercial contract has an economic interest to protect.
32. With regard to the parties' relationship, counsel was firm that the services which the Respondent offered to the 1st Petitioner could be offered by the 1st Petitioner to third parties but such third parties could then not counter offer the same services to other parties. This however was what the 2nd Petitioner was doing. Counsel then submitted that to ensure a proper conduct of business, the 1st Petitioner had been subjected to a due diligence process by the Respondent with a view to meeting the Know Your Customer requirements of the regulator but the same had not been applied to the 2nd Petitioner. Counsel wrapped up this point by stating that it was under stringent reporting obligations under sections 44,45, 46 & 47 of the Anti Money Laundering Act yet it had no knowledge of and control of the 2nd Petitioner who was intent on using the Respondent's systems to conduct unregulated activities. To protect its business the Respondent consequently had to have the 2nd Petitioner delinked from its platform.
33. It was indeed counsel's submission that it was evident from the affidavit of Amy Ludlum that the 2nd Petitioner's business involved international money transfer and this required the 2nd Petitioner to obtain approval from the Central Bank of Kenya. Counsel submitted that the Petitioners had failed to disclose that approval had been sought following advice from the Respondent but the Central Bank of Kenya had declined to grant approval. There was consequently an on-going illegality which not only attracted criminal sanctions but also put at risk the continued operations of the Respondent.
34. Counsel, in winding up, submitted that to allow the application for conservatory orders would be tantamount to perpetuating an illegality besides the same time placing the entire business of the Respondent at the risk of being vetoed by the regulator.
35. Mr Ohaga referred the Court to the case of **Kemraj Harrikissoon v Attorney General of Trinidad & Tobago [1980] A.C** for the proposition that it was an abuse of the process of the court for a party to apply for a judicial remedy when there was no proven breach of a fundamental right. Counsel also made references to the cases of **Mistry Amar Singh v Kulubya [1963]E.A 408** and **Kenya Pipeline Co. Ltd v Glencore Energy(UK) Ltd CACA No. 67 of 2014** for the proposition that no court should lend its aid to a man who founds his cause of action upon an immoral or illegal act. Finally, reference was also made by counsel to three cases namely; **Ex**

Parte Princess Edmond De Polignac [1917]1KB 486, The Owners of the Motor Vessel 'Lillian S' v Caltex Oil (K) Limited [1989]KLR 1 and **Tiwi Beach Hotel Ltd v Stamm [1991]KLR 658** for the proposition that where an applicant fails to disclose material facts then his case also fails flat even at the inter partes hearing.

Petitioners' rejoinder

36. Mr. Kimani, in a brief rejoinder, stated that the question as to whether the 2nd Petitioner's business constituted an illegality was to be determined at the hearing of the Petition.
37. Counsel also stated that in participating in the current proceedings, the Respondent had waived the right to go for an arbitration as the preferred dispute resolution forum adding that the Respondent ought to have made an application to stay the proceedings under section 6 of the Arbitration Act.
38. Finally, it was also submitted by the Petitioners by way of rejoinder that a court order would cushion the Respondent against any adverse action by the regulator on the basis that the 2nd Respondent's business was illegal.

Discussion and Determinations

39. I have read the Petition and the application as well as the various affidavits sworn in support. I have also read the Replying Affidavit and the Notice of Grounds of Opposition. The parties respective submissions have also been considered by me.
40. The core question is whether the Petitioners have at this stage made out a case for the conservatory orders sought. From the arguments I was also able to identify the issue as to jurisdiction which must always be determined as a preliminary point: see sthe case of **The Owners of Motor Vessel 'Lillian S' v Caltex Oil (K) Ltd [1989]1 KLR 1,14**. See also **Boniface Waweru vMary Njeri & Another HC Misc Appln No 639 of 2005** where Ojwang J (as he then was) stated that:

> ***"Jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the question"***

The court's remit

41. The Respondent assailed the Petition as well as the application on the basis that the matter in dispute was a purely commercial matter and it was unsuitable to be brought to court as a constitutional petition. Secondly, the Respondent also attacked the Petition on the basis that the Commercial agreement between the parties contained an arbitration agreement and the Petitioners consequently could not file and maintain the present petition. For those two reasons the Respondent contended that the court lacked the necessary remit, whilst also relying on the case of **Sanitam Services (EA)Limited v Tamia Ltd & Others NBI HCCP No 305 of 2012[2012]eKLR.**
42. On this issue the Petitioners countered that even in private law contracts and disputes, constitutional remedies may be availed where appropriate and this is one such case.
43. There is no doubt that this court's jurisdiction is unlimited: see **Article 165** of the **Constitution**. More specifically, the Constitution under **Article 165(3)(b)** has also conferred specific jurisdiction upon this court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied violated infringed or threatened. There is no clawback on this jurisdiction and I did not hear the Respondent say so. The Respondent is only of the view that the dispute is a purely commercial one with no constitutional question.
44. The High Court in the case of **International Centre for Policy and Conflict & 5 Others v Attorney General & 4 Others [2013]eKLR** observed as follows:

> ***"[109] An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the***

court were to act in haste, it would be presuming bad faith or inability by that body to act."

45. And in the case of **Parpinder Kaur Atwal v Manjit Singh Amrit NBI HCCP No 236 of 2011**, Lenaola J after reviewing various authorities on the court's remit under Article 165 remarked as follows:

> ***"All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes….. I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshall. <u>However, not every pain can be addressed through the Bill of Rights and alleged violation thereof."</u>*** *(Emphasis added)*

46. Outside our jurisdiction, besides the case of **Harrikissoon v Attorney General of Trinidad & Tobago [1979] 3 WLR 62** referred to by the Respondent's counsel in his oral submissions, two cases are also worthy of mention. The Supreme Court of India in **Re An application by Bahadur [1986] LRC (Const)307** held that ordinary remedies available under statute and common law must always be pursued in the ordinary manner or as provided under statute. So stated the court:

> ***The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikissoon v A-G [1979] 3 WLR 62).***

47. Then in the case of **Minister of Home affairs v Bickle & Others [1985] LRC (Const)**,the court , per Georges C.J , observed as follows:

> ***"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other <u>legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights</u>."*** (emphasis)

48. It would appear that the school of thought emerging from the above cited cases is that where there is in existence sufficient and adequate mechanisms as well as remedies to deal with a specific dispute, the courts jurisdiction under **Article 165(3)(b)** of the Constitution ought not be prompted. As I stated in the case of **C.O.D & Another v Nairobi City Water & Sewerage Co. Limited NBI HCCP No 419 of 2015[2015]eKLR** the constitutional court should not be used as a substitute for everything and where it is possible to decide any case or dispute , civil or criminal, without reading a constitutional issue then that is the course that should be followed.
49. There is however another school of thought. The school of thought that the Petitioners in the instant case appear to pledge to. This school of thought is of the view that the High Court has under **Article 165(3)(b)** of the Constitution the jurisdiction to hear and determine all allegations of violation of constitutional rights and fundamental freedoms.
50. The view is that even where there is a private agreement and breach thereof is alleged by either party, the fact that the Constitution recognizes rights including contractual rights creates a pathway for their recognition either through private or public law reliefs: see for example Mumbi Ngugi J i**n Wananchi Group (Kenya) Ltd v The Communication Commission of Kenya & Another [2013]eKLR.** See also the cases o**f Naftaly Rugara Muiga v Jomo Kenyatta University of Agriculture & Technology[2015]eKLR** an**d Isaac Ngugi v Nairobi Hospital &**

 # Others NBI HCCP No 407 of 2012[2013]eKLR.

51. In the case of **Rose Wangui Mambo & 2 Others v Limuru Country Club & 17 OthersNBI HCCP No 160 of 2013 [2014]eKLR** , the court while holding that a party cannot be allowed to wave a private entity card to bar the High Court when properly moved from assuming jurisdiction where there are allegations of breach of fundamental rights and freedoms stated as follows:

> ***"[69]To accede to the respondents' proposition that private entities are insulated from the constitutional duty to respect and uphold fundamental rights, to hold that private entities are completely shrouded by their private cloak from this Court's scrutiny is we believe, to reverse the intention of the framers of the Constitution. <u>It is to strip individual Kenyans of the very constitutional protection that the Constitution of Kenya 2010 meant to jealously guard and leave them exposed and vulnerable in private dealings. This would effectively render the constitutional protections of little or no practical value to the very persons designed to enjoy its protections and would, in our view, amount to abdication of this Court's primary responsibility conferred upon it by the people of Kenya."</u>*** *(emphasis)*

52. Evidently, the two schools of thought are loudly asymmetrical. Certainly too, in my judgement, it was never the intention of the framers of the Constitution to substitute common law and other existing statutory reliefs with constitutional actions and reliefs. There is a thin line which divides both schools of thought.
53. The court is though cognizant of the fact that enforcement of the Bill of Rights is and must be both horizontal and vertical if the constitutional aspirations of the Kenyan people are to be achieved. In **Rose Wangui Mambo & 2 Others v Limuru Country Club & 17 Others (supra)** the court observed that horizontal application of fundamental rights and freedoms is not an open cheque and each case must be individually reviewed to ensure that the court is properly seized. It is for the court to undertake a proper scrutiny based on the pleadings to determine whether the dispute and indeed the claim has taken a constitutional trajectory and the alleged violations are evident. The scrutiny needs to be painless as the principle in **Anarita Karimi Njeru v Republic [1979] KLR 154** dictates that pleadings be reasonably precise to reveal alleged breaches or violations.
54. My review of the instant pleadings would reveal that there was and indeed exists an enforceable commercial agreement between the 1st Petitioner and the Respondent. The 1st Petitioner has alleged (not proven yet) that in the course of their private dealings the Respondent's actions have violated or infringed or threatened the Petitioners' rights. The pleadings in these respects are relatively and reasonably precise. The relevant Articles of the Constitution as well as statutory provisions have been identified. With detail too, the manner of alleged breaches have also been outlined. In my view and judgment the dispute took a constitutional trajectory when there is alleged non- compliance with the right to fair administrative action. That alone would entitle the court to consider and determine the dispute.
55. Besides, I did not hear the Respondent to state that the court lacks the remit, rather the Respondent thought and submitted that the appropriate forum for resolution of the dispute would be before the Commercial Division of the High Court. The administrative divisions of the High court however do not affect and modify jurisdictions of the High Court. As I have found that this court, meaning the Constitutional and Human Rights Division of the High court, is competent to handle the current Petition, I would deem it disproportionate to down my tools and redirect the Petition to the Commercial Division of the High Court which also has an even jurisdiction to hear and determine this Petition.
56. The Respondent's second argument on the issue of forum was that the contractual arrangement between the parties provided for an alternative dispute resolution forum. It was pointed out that the agreement between the parties at Clause 15 provided for arbitration as the medium of resolving any dispute between the parties. The Petitioners on the other hand contended that the mere existence of an enforceable arbitration agreement did not and could not take away this court's jurisdiction.
57. Even as one reads Article 165 of the Constitution, Article 159 must always be taken into consideration. The court in exercising judicial authority must be guided by various principles as outlined under Article 159 of the Constitution. The application of alternative forms of dispute

resolution is one of the principles. It has not been suggested that even constitutional disputes and questions cannot be mediated or resolved amicably and outside court. Quite the contrary, they can in appropriate cases.

58. In the instant case, the parties had agreed to a dispute resolution medium. The parties had also agreed , under clause 15 that nothing in the commercial agreement would prevent or delay a party from making claims or seeking injunctive or interlocutory relief in the High Court. I am not to place any conclusive or definitive finding or interpretation of this clause but I am confident enough to state that at this stage of the proceedings the Petitioners would certainly not be barred from coming to court for interim relief. Additionally, Section 7 of the Arbitration Act is also explicit that " *it is not incompatible with an arbitration agreement for a party to request from the High Court before or during the arbitral proceedings an interim measure of protection and for the High Court to grant that measure*".

59. Conservatory orders are basically orders in the interim. They are intended to maintain a state of affairs. That is what the Petitioners seek now. I hold that I have the necessary remit to hear and determine the intermediary application pursuant to section 7 of the Arbitration Act and also Clause 15 of the commercial agreement between the parties.

The Conservatory order

60. I now come to the question as to whether the Petitioners are entitled to the conservatory orders sought.

61. I must first point out that at this stage of the proceedings , I am not expected to, and neither should I, make any conclusive or definitive findings of fact or law. I must carefully however review the case as presented.

62. The principles guiding the court when dealing with an application for conservatory orders under Article 23(3) of the Constitution are relatively clear. In the case of **Koech Kemboi v Halakhe Waqo & 2 Others NBI HCCP 456 of 2015 [2015]eKLR** , the court citing with approval the case of **Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education Science and Technology NBI HCCP No. 399 of 2015 [2015] eKLR** stated as follows:

> ***[20]A number of cases have laid out the principles applicable when the court is faced with an application for conservatory orders. The principles are now relatively well settled. In the recent case of Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education Science and Technology NBI HCCP No. 399 of 2015 [2015] eKLR the court stated as follows as concerns applications for conservatory orders:***
>
> ***[30]… the principles which govern a court considering an application for interim or conservatory relief* [are considered] *to be the following:***
>
> ***The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.***
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> ***The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.***
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> ***If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.***

The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya's decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.

The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.

[21]I would perhaps add as was correctly pointed out by Mr. Ngatia that whilst exercising my discretion I must balance the conflicting positions taken by the parties and, as may be necessary, invoke the doctrine of proportionality: see also Odunga J in Kevin K Mwiti & 2 Others –v- Kenya School of Law & 2 Others [2015] eKLR.

63. It is for the applicant to satisfy the various elements, but not every single element of the principles need be proven. Rather the totality of the facts should guide the court. Of course, once there is a demonstration of a prima facie case with a likelihood of success, the principles should emerge then with ease and even where a prima facie case is not shown the court would still be possessed with the discretion. As was stated by Ojwang J (as he then was) in **Suleiman *v* Amboseli Resort Limited [2004] 2 KLR 589**, the court should always opt for a lower risk of injustice rather than a higher one especially where factors appear even.
64. The Petitioners herein contend that they have made out a prima facie case as the Respondent is in breach of both constitutional and statutory provisions. In particular, the Petitioners pinpoint Article 47 of the Constitution and Section 4 of the Fair Administration Act. The Respondent is accused of having failed to give the Petitioners adequate notice prior to terminating the services offered to the Petitioners by the Respondent. The Respondent is also accused of acting on the basis of reasons not founded on any law or fact. The Respondent's retort is that it had to act as it did to subvert an illegality.
65. The court must as much as possible stay focused on the fact that when a party comes to court under Article 23(3) as read together with Article 22 of the Constitution, it is alleged violation of guaranteed fundamental rights and freedoms that is at stake. In the instant petition it is the right to fair administrative action that is alleged to have been violated. It is true the Constitution provides for the right to fair administrative action, which includes the right to be heard by a fair and impartial tribunal and to be notified before any decisions are taken which affect a person's rights. It is also certainly true that the age old right to freely contract and deal was not intended to be unduly hampered by the Constitution. In the instant case, the parties entered into a commercial agreement and the terms of such agreement in so far as it is not challenged cannot be ignored by the court.
66. It is stated by the Petitioners and not denied by the Respondent that the agreement was executed in the year 2011. The agreement is relatively detailed. A copy has been annexed at pages 34 through 42 of the affidavit of Martin Kasomo of 19 November 2015. I have reviewed the same briefly in the context of the Petitioners' claims.
67. On 12 November 2015, the Respondent delinked the Petitioners from its systems. The 1st Petitioner apparently protested. On 13 November 2015, the Respondent sent a short cellular message to the 1st Petitioner. It read as follows:

> *" A decision was made to suspend your account until you provide regulatory approval or licence from CBK allowing you to transact/make bitcoin settlements An email has been sent by our Risk Department*"

68. Thereafter followed a flurry of email communication. The 1st Petitioner insisted that it dealt only in the Kenya Shilling currency and likewise that the accounts handled on behalf of its clients were also operated in Kenya shillings. Finally, on 17 November 2015 the services availed by the Respondent were reinstated but not before the 1st Petitioner also agreed to shut out the 2nd

Petitioner. The 1st Petitioner's action to shut out the 2nd Petitioner's account was prompted by the Respondent's demands.

69. It is clear that the Respondent never terminated the services to the 1st Petitioner. The Respondent simply suspended the services. The reason behind the suspension was that the 1st Petitioner's account dealt with bitcoin which the Respondent argued was not the currency it had allowed the 1st Petitioner to deal in.

70. Clause 10 of the commercial agreement between the 1st Petitioner and the Respondent reads as follows:

> *" 10. Suspension Safaricom may, <u>with reasonable notice where practicable</u> suspend the availability of the service to the Client wholly or partially for any valid reason where(i) the Client fails to comply with any rules or regulations of the territory regarding the service; (ii) the client fails to observe any term or obligation set out herein; or (iii) the client carries on prohibited activities using the Mpesa service as set out in clause 13"*(emphasis)

71. A cursory reading of the above Clause10 would appear to reveal that the Respondent could suspend, not terminate, the services even without notice and for any valid reason. It would be slightly different if a party was terminating the agreement and not merely suspending the services. In such latter eventuality the party terminating would be obliged to give a mandatory notice of thirty days.

72. Considering the nature of the business the Respondent is involved in and considering the nature of the transaction services extended to the 1st Petitioner, I hold the preliminary view that the Respondent could suspend the services to the 1st Petitioner with or without notice. Where it was not possible or practicable to give a notice , service could be suspended without notice. That apparently is what clause 10 states.

73. There is no controversy that the money transfer business is a highly regulated business. This is for very obvious reasons including but not limited to curbing money laundering. All the parties to these proceedings do not and cannot question the stringent regulatory framework. Indeed, both parties referred to some of the many statutory requirements during the oral arguments. It is for this reason that it would make better commercial and business sense (see: Lord Hoffman ,generally, in **Investors Compensation Scheme Ltd v West Bromwich Building Society[1998] 1 All ER 98,114**) to accede to the argument and interpretation that parties to the agreement expected and took note of the fact that there could be instances when the service could be suspended, but not terminated, by the Respondent without notice.

74. The reasoning behind the suspension was that the 1st Petitioner was in breach of the Agreement as it dealt in bitcoin. Apparently, it would appear that it was not the 1st but the 2nd Petitioner dealing in bitcoin. The parties advanced arguments for and counter the proposition that to deal in bitcoin one had to obtain approval from the Central Bank of Kenya.

75. Bitcoin is a form of digital currency. It is created and held electronically. It is a virtual currency not printed like the ordinary known legal tender. It is not a government backed currency.It also available apparently not to all but to a select few.

76. Correspondence availed by both parties reveal that the 2nd Petitioner deals in bitcoin.The 2nd Petitioner's chief finance officer confirms as much in her affidavit of 18th November 2015. Documents as well as correspondence attached to the parties affidavits also reveal that the 2nd Petitioner had approached Respondent to directly access the same services that the 2nd Petitioner had until 12 November 2015 been accessing through the 1st Petitioner. The Respondent had refused to deal. Instead the Respondent asked the 2nd Petitioner to seek the Central Bank of Kenya's approval first as the 2nd Petitioner had revealed to the Respondent that it dealt in bitcoin. It would appear from correspondence that the Central Bank of Kenya was clear that as long as the 2nd Petitioner dealt in bitcoin it could not use the words" money remittance" or " money transfer". The Central Bank of Kenya in its letter of 28 April 2014 appeared to state that it does not regulate virtual currencies. The Petitioners agree, while the Respondent does not.

77. The controversy as to whether approval and regulation by Central Bank of Kenya is necessary in

the circumstances of the 2nd Petitioner's business is certainly a substantive point which as was pointed out by counsel for the Petitioners is suitable only for trial and determination during the substantive hearing of the Petition.

78. Suffice however to state now that when the 2nd Petitioner states that it is engaged in the business of accepting bitcoin from various countries of the world and exchanging it for local African currencies including but not limited to the Kenyan shilling, then in my preliminary view, the 2nd Petitioner is engaged in money remittance business. " Money remittance business" is defined under regulation 2 of the Money Remittance Regulations 2013 to mean

> *" a service for the transmission of money or <u>any representation of monetary value</u> without any payment accounts being created in the name of the payer or the payee…."* (emphasis)

79. Bitcoin represents monetary value. That is the only reason it can be exchanged by the 2nd Petitioner for the Kenya shilling. It would appear to me that the Petitioners are not in particularly good stead when they state that dealing in bitcoin is not part of money remittance business.
80. It would consequently appear on the face of the material before the court that the Respondent was justified in crying foul that the 2nd Petitioner had not obtained any approval from Central Bank of Kenya. It would also appear to me that the Respondent was justified in ensuring that its own licence was not ultimately questioned or put in jeopardy for so long as the Central Bank of Kenya had failed or neglected to put to rest the Respondent's fears.
81. The Petitioners also urged me to find at this interlocutory stage that their right to property under Article 40 of the Constitution had been violated or was under threat of violation. The point made was that Kenya Shillings 4,800,000/= belonging to the Petitioners customers was being held by the Respondent.Also made was the point that the 2nd Petitioner had been locked out so the 1st was being denied 'property' by such lock-out.
82. There is no doubt that every person has a right to acquire and own property. There is no doubt too that no owner of property is to be arbitrarily deprived of his property save out of public interest and subject to compensation.
83. It has not been suggested that the Petitioners have been deprived of their property. Access to the property has been denied but it is not absolute. The service was suspended for a period of time pursuant to the terms and conditions of the commercial agreement executed by the parties. It does not appear to have been arbitrary but rather pursuant to terms agreed upon by the parties themselves. In commercial sense, such suspension also does not deprive the parties of already accrued interest just the same way accrued obligations must be honoured. The same would apply even if there was termination. In any event, no suggest was made that the 1st petitioner would never access the Ksh. 4,800,000/= or that the Respondent had now appropriated the same.
84. The totality of the aforegoing would lead to the conclusion that the Petitioners have not established a prima facie case with a likelihood of success.
85. I am further not convinced that the Petition will be rendered nugatory if the conservatory orders are not granted.
86. Finally it is also my considered view that public interest would be better served if the court refrained from re-writing the very clause 15 which allows suspension of the services. Public interest also stands in better stead if the conservatory orders sought are denied. The factors appear quite balanced when one party argues for approval of the 2nd Petitioners business by the Central Bank of Kenya and the party says such approval is not necessary. Even though I have held a preliminary view that the Respondent seems to have the edge now, I hasten to add that this is a matter which requires a deeper interrogative approach. That can be achieved at the hearing of the Petition. For now it would be better if the doubtful business was not given a seal of approval by the court only for it to turn out to have been an illegality.

Conclusion and disposal

87. The application has to be dismissed for not meeting the threshold of demanded of an application for conservatory orders. It is so dismissed with costs to the Respondent.
88. I would also add that this is a matter more suitable for resolution by the forum already agreed

upon by the parties. It ought to be there resolved. I hope the parties will now move to arbitration
89.Orders accordingly.

Dated, signed and delivered at Nairobi this 14th day December, 2015

J.L.ONGUTO

JUDGE