



**Njenga & 2 others v Kiwipay PTE Limited & 3 others (Commercial Petition E010 of 2022)
[2024] KEHC 11197 (KLR) (Commercial and Tax) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION E010 OF 2022
JWW MONG'ARE, J
SEPTEMBER 23, 2024**

BETWEEN

**MAINA STEPHEN NJENGA 1ST PETITIONER
FELIX RANTUU LEKISHE 2ND PETITIONER
SOLOMON JOSEPH MAINA 3RD PETITIONER**

AND

**KIWIPAY PTE LIMITED 1ST RESPONDENT
MONTHINDA RASHI 2ND RESPONDENT
VICTOR NGURE GITHUA 3RD RESPONDENT
KIWIPAY (KENYA) LIMITED 4TH RESPONDENT**

RULING

Introduction And Background

1. It is common cause that by the “Further Consent” dated 10th November 2022 and the “Amended Consent” dated 11th November 2022 (“the Consents”), this matter was marked as settled on the following terms:
 - a. The 4th Respondent’s Bank Accounts Nos 66XXXXXXX058, 66XXXXXXX059 and 66XXXXXXX378 in the name Kiwipay (K) Limited, the 4th Respondent herein, be operated in accordance with the prior existing instructions (prior to the issuance of the Court Order on 24th October, 2022 by Honourable Justice David Majanja) between the 4th Respondent and Ecobank Kenya Limited or as the 4th Respondent shall instruct the Bank in future



- b. Kiwipay Kenya Limited, the 4th Respondent shall meet Ecobank Kenya Limited's Advocate's Legal fees from the aforementioned bank accounts.
 - c. The Registrar of Companies be and is hereby directed to revert and restore the Petitioners' directorship and the Petitioners' shares in the 4th Respondent transferred to them, which shares had hitherto been obtained by the 2nd Respondent.
2. The Consents have since been adopted as orders of the court but the 4th Respondent has now filed the Notice of Motion dated 8th May 2023 seeking to set aside and stay the execution of the same. The application is supported by the affidavits of the 2nd Respondent, Monthinda Rashi, who is also the 4th Respondent's director and shareholder, sworn on 8th May 2023 and 6th June 2023. It is opposed by the Petitioners through the replying affidavit and supplementary affidavit sworn by their advocate Isaac Rene on 22nd May 2023 and 30th May 2023 respectively. The application is also opposed by an advocate, Otieno Rodgers Oscar, through a replying affidavit sworn on 30th May 2023. The application was canvassed by way of written and oral submissions by the parties' respective counsel.
3. The 4th Respondent's position is that no such Board Resolution was ever filed and/or presented before the Court to prove the veracity of the terms of the Consents, given that the 2nd Respondent, on her own, could not make such a personal decision on behalf of the 4th Respondent and that she never gave the said purported advocates instructions to act on her behalf in this matter which involved the interests of the 4th Respondent.
4. In short, the 4th Respondent states that it never gave authority nor was any Board resolution entered for the terms of the Further Consent Order to be entered upon and recorded in Court and that the same were therefore a nullity ab initio and therefore the Further Consent Order ought to be set aside as sought. The 4th Respondent deposes that the purported advocates for the 2nd Respondent connived with the advocates for the Petitioners (Rene & Hans LLP Advocates) to enter into the Further Consent so as to defraud the 4th Respondent given that at some point during the proceedings of this matter the Petitioners' advocates filed a Notice of Appointment dated 4th November 2022 on behalf of the 2nd Respondent yet they were already on record for the Petitioners. That unless the prayers sought herein are granted, the 4th Respondent shall continue suffering prejudice and incomprehensible financial hardships since, through the derivative matter filed in Nbi HCCOMM Misc. No E804 of 2022 in which orders were given against the 4th Respondent in favour of the Petitioners' Advocates herein (Rene & Hans LLP Advocates), funds were already remitted thereby leading to the crippling of the 4th Respondent's day-to-day operations.
5. Further, that this matter was already settled through the Consents, it is imperative for the Court to grant leave to the firm of Kithi & Company Advocates to come on record on behalf of the 4th Respondent as it is desirous to appoint the said firm to come on record and represent its interests in this matter. The 4th Respondent asserts that it is in the interest of justice to allow the instant application given that it has already been highly prejudiced by the effect of the Consents and shall continue being prejudiced by incurring further financial losses.
6. In opposition, the Petitioners state that the application is devoid of merit on the facts and the law and should be dismissed. They depose that the 2nd Respondent has consistently been pushing a false narrative that the Petitioners had resigned from the 4th Respondent and transferred all their shares to her which is an extremely false and misleading averment as the Directorate of Criminal Investigations has already concluded that the signatures appended to the impugned documents of transfer were forgeries and made by different authors. That the court order of 24th October 2022 was



to the effect that Ecobank Limited, Muthangari Branch was to forthwith restrict any transactions on account numbers 668XXXXXX58; 668XXXXXX59 and 668XXXXXX78 in the name Kiwipay (K) Limited via Internet/Mobile Banking Platform by either Gregory Schmidt (of French Passport Number 18XXXX41) or any signatory thereof, and only permit transactions by either the 1st Petitioner or 2nd Respondent via SWIFT RTGS, Cheques or over the counter withdrawals. That this order was for the benefit of not only the Petitioners but also the 2nd Respondent, who the Court directed would be the signatories of the 4th Respondent's Bank Accounts and that upon learning that an Order had been issued in her favour the 2nd Respondent reached out to the Petitioners' deponent, Mr. Rene through her mobile phone number +8562XXXXXXX99 and requested for a meeting.

7. The Petitioners further depone that sometime in early November, 2022, Mr. Rene met the 2nd Respondent in the company of her friend named DC at Cedars Restaurant along Lenana Road. At the said meeting, the 2nd Respondent expressed appreciation in the efforts Mr. Rene had made in persuading the Court to grant Court Order of 24th October, 2022 which now restricted access to Internet/Online Banking which Gregory Schmidt had relied upon in moving funds from the 4th Respondent's accounts. Noting that the Order of 24th October, 2022 granted the 2nd Respondent and the 1st Petitioner access to the 4th Respondent's Bank Accounts, 2nd Respondent expressly instructed Mr. Rene to ensure that the 1st Petitioner and herself present a united position to Ecobank (K) Limited in 4 order that the 1st Petitioner and 2nd Respondent can control the 4th Respondent's Bank Account. That since the 1st Petitioner and 2nd Respondent were now the signatories to the Bank Accounts, the 2nd Respondent took the view, which Mr. Rene advised was sound, that it would certainly make no sense that on the one hand, the 1st Petitioner is a signatory to the 4th Respondent's Bank Accounts and on the other hand, he is not in the 4th Respondent's CR12 as a director and shareholder.
8. Mr. Rene depones that thereafter, the 2nd Respondent instructed him to get an Advocate to appear on her behalf in this matter with a view of restoring the Petitioners' directorship and shareholding in order that the 2nd Respondent and 1st Petitioner would not face challenges at Ecobank (K) Limited when accessing the Bank Accounts of the 4th Respondent. That the 2nd Respondent, DC, Mr. Rene and Rodgers Oscar, Advocate had a subsequent meeting at Palacina Residences where Mr. Rene introduced the 2nd Respondent to Rodgers Oscar, Advocate to her and she agreed that the said Advocate comes on record on her behalf for purposes of the restoration of the Petitioners' shareholding and directorship, to enable the 2nd Respondent and 1st Petitioner transact the 4th Respondent's Bank Accounts without any legal challenges from Ecobank (K) Limited. For these reasons, the Petitioners aver that it is completely dishonest for the 2nd Respondent to now turn around and claim she did not authorize the execution of the Consent of 10th November, 2022 and that even more telling is the fact that the 2nd Respondent has herself executed numerous instructions to the Bank and sought to benefit from the very same Consent she is now challenging. That the 2nd Respondent cannot therefore be heard to blow hot and cold, by on the one hand, seeking to benefit from the Court Order of 24th October, 2022 and the Consent and on the other hand, when not convenient for her, seeking to set aside the Consent
9. The Petitioners state that various events are key; that on the strength of the Court Order of 24th October, 2022, on 3rd November, 2022, the 1st Petitioner and the 2nd Respondent jointly signed and presented a Resolution of the 4th Respondent indicating that they shall be the signatories to the 4th Respondents' Bank Mandates; that on 3rd November, 2022, the 1st Petitioner and the 2nd Respondent jointly signed and presented an Instruction of even date to Ecobank (K) Limited instructing the Bank to transfer a sum of USD 4,750,000 to LTK International Limited, they also jointly signed and presented an Instruction of even date to Ecobank (K) Limited revoking all payment instructions



initially received by the Bank on 27th October, 2022 and; jointly signed and presented a Resolution that they shall be the joint signatories to the Bank Account of LTK International Limited.

10. The Petitioners further claim that the 2nd Respondent has taken the strategy of conveniently taking different contrasting positions in the dispute before the Court and that in HCCOMM/E469/2022; *Monthida Rashi v Kiwipay Kenya Limited & Ecobank Kenya Limited & 3 Others*, the 2nd Respondent confirms that indeed she took actions and signed resolutions pursuant to the Consent of 10th November, 2022. They further state that the Consent Order of 10th November, 2022 has already been complied with by the Registrar of Companies and not capable of being stayed. The Petitioners thus state that save for approbating and reprobating, the 2nd Respondent has therefore not been candid with the truth and has not laid any factual or legal basis at all for the setting aside of the Consent of 10th November, 2022. They thus urge the court to dismiss the application.
11. Mr. Rodgers Oscar also depones that the application and deposition of the 2nd Respondent is entirely misleading and incorrect. He states that sometime on 4th November 2022, Mr. Rene visited his offices at Town House - 8th Floor, Kaunda Street and informed him of this matter in which he had been instructed by the 2nd Respondent. That Mr. Rene informed him that the 2nd Respondent instructed him because he had secured an Order issued on 24th October, 2022 which favoured the 2nd Respondent by permitting her to transact the bank accounts of Kiwipay (K) Limited, the 4th Respondent. Mr. Rene further informed him that pursuant to the instructions above, he had filed a Notice of Appointment of Advocates to represent the 2nd Respondent and attended Court on 4th November 2022 when the Court (Hon. Justice Majanja, J) pointed out that there was a potential conflict of interest noting that he was already acting for the Petitioners. Mr Rene informed him that he had brought the Court's observation to the attention of the 2nd Respondent who then instructed him to get a different lawyer to represent her. Thereafter, a meeting was held at a Palacina Residences and that present at the meeting was Mr. Rodgers Oscar, Mr. Rene, the 2nd Respondent and a lady who he learnt is known as DC; a friend to the 2nd Respondent.
12. Mr. Rodgers Oscar depones that at the meeting, the 2nd Respondent instructed him to take over her representation in this matter for the purpose of ensuring the restoration of the Petitioners' directorship and shareholding in the 4th Respondent that the 2nd Respondent and another director known as MSN could effectively transact the Bank Accounts of the 4th Respondent in tandem with the Court Order issued on 24th October, 2022.
13. Mr. Rodgers Oscar then proceeded and filed a Notice of Appointment of Advocates and executed a Consent in order to give effect to the instructions aforementioned. In recognition of the Consent, on 16th November, 2022 the 2nd Respondent together with MSN, both directors at the 4th Respondent executed and furnished Ecobank (k) Limited with a Resolution of the Board of Directors of the 4th Respondent dated 14th November, 2022 received by Ecobank (k) Limited on 16th November, 2022. The resolution expressly ratified the Consent dated 10th November, 2022 which was adopted on 14th November, 2022 as an Order of the Court.
14. Mr Rodgers Oscar thus states that it is "ridiculously dishonest, misleading and in bad faith" for the 2nd Respondent to now turn around and purport to feign ignorance of the instructions that led to the adoption of the Consent. He urges that this Court ought to be very wary of the misleading averments and the ill intention of the 2nd Respondent. As such, he also prays that the application be dismissed with costs.



Analysis and Determination

15. I have carefully considered pleadings filed by the parties herein and the written and oral rival submissions in support thereto and I note that the question that arise for the court's determination is "whether the court should set aside the Consents and stay their execution."
16. It is trite that a consent order is basically an agreement between the parties to the suit and I am in agreement with the 4th Respondent's submission that the principles upon which the court may set aside a consent order have been reiterated in many decisions by the courts. For instance, in the case of *Brooke Bond Liebig v Mallya* [1975] EA 266, Mustafa Ag. VP expressed the general principal by which a court may interfere with a consent order as follows:-

"The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."
17. The 4th Respondent has stated and submitted that the Consents were entered into by way of fraud and collusion of the advocates and that its advocates lacked instructions and authority to enter into the Consents. The 4th Respondent does not deny that at the time of recording the Consents, its advocates were Messrs. Wambugu & Muriuki Advocates. I am in agreement with the Petitioners' submission that as the 4th Respondent's advocates, they had ostensible authority to compromise and settle this matter unless the authority was expressly circumscribed and that limitation brought to the notice or attention of the Petitioners or otherwise known by the Petitioners (See [*Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* \[1982\] KLR 485](#)). As such, it was not necessary for the advocates to obtain a written board resolution from the 4th Respondent in order to record the Consents as averred by the 4th Respondent.
18. There is also nothing from the pleadings to demonstrate that the Petitioners or their advocates had notice of any limitation of the 4th Respondent's advocates' authority to compromise the matter. This means that the Petitioners were entitled to assume that the 4th Respondent's advocates had ostensible authority to bind their client and hence the eventual consent bound the 4th Respondent. I therefore find no reasons to impeach the 4th Respondent's advocates' bona fides.
19. From the pleadings, I find that it is also not true for the 2nd and 4th Respondents to claim that they had no knowledge of the Consents. Mr. Rene and Mr. Rodgers Oscar have deponed that they met the 2nd Respondent together with others and the 2nd Respondent informed them that the parties, including the 4th Respondent ought to present a united front in respect of the 4th Respondent's accounts held at Ecobank(K) Limited.
20. Mr. Rodgers Oscar and the Petitioners have also annexed a resolution of the 4th Respondent dated 14th November 2022 signed by among others the 2nd Respondent wherein reference is made to the Consents and that the said resolution was in part effecting the same. The 2nd Respondent has not disputed signing this resolution nor has the 4th Defendant challenged the veracity of this resolution. The 2nd Respondent's averment that she was compelled to sign the resolution out of desperation for



the sake of salvaging the 4th Respondent's funds is without proof. This demonstrates that the 2nd and 4th Respondents were always aware of the Consents and that they even took steps to effect and execute the same.

21. Having found that the 4th Respondent's advocates had ostensible authority to enter into the Consents and compromise this matter, and that there was no notice of any limitation of their instructions to the Petitioners, and since the Consents were within the knowledge of the 2nd and 4th Respondent and that they had taken steps to partly perform and effect the same, I find no valid reasons to set aside or stay the Consents. I also find that there has not been presented before this court evidence of fraud and collusion as claimed by the 4th Respondent and that its allegations on the same remain just that, allegations.
22. In the foregoing, it is my finding that the parties are bound by the terms of the Consents and that the same remain lawful.

Conclusion and Disposition

23. The 4th Respondent's application dated 8th May 2023 ought to be dismissed with costs to the Petitioners.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY of SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Isaak Rene for the Petitioner.

Ms. Jillo holding for Mr. Kithi for the 22nd Respondent.

Mr. Kiprotich for the 1st and 4th Respondents.

Amos - Court Assistant

