Assets Recovery Agency v Flutterwave Paymnet Technology Ltd & 7 others (Anti-Corruption and Economic Crimes Civil Suit E039 of 2022) [2023] KEHC 837 (KLR) (Anti-Corruption and Economic Crimes) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 837 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E039 OF 2022

EN MAINA, J

FEBRUARY 9, 2023

BETWEEN

ASSETS RECOVERY AGENCY ..... APPLICANT

AND

FLUTTERWAVE PAYMNET TECHNOLOGY LTD ..... 1ST RESPONDENT

BOXTRIP TRAVEL AND TOURS LTD ..... 2ND RESPONDENT

BAGTRIP TRAVELS LIMITED ..... 3RD RESPONDENT

ELIVALANT FINTECH LIMITED ..... 4TH RESPONDENT

ADGURU TECHNOLOGY LIMITED ..... 5TH RESPONDENT

HUPESI SOLUTIONS ..... 6TH RESPONDENT

CRUZ RIDE AUTO LIMITED ..... 7TH RESPONDENT

SIMONS KARANJA NGIGE ..... 8TH RESPONDENT

RULING

1. By the notice of motion dated November 17, 2022 which is expressed to be brought under articles 48, 50 and 159 of the *Constitution*, orders 1 rule 8 and 13 and 51 rule 1 of the *Civil Procedure Rules* and sections 81, 83(4) & 91(1) of the *Proceeds of Crime and Anti-Money Laundering Act*, Morris Ebitumi Joseph who claims to sue on behalf of 2468 investors seeks orders as follows:

   " .....

3) That this court be pleased to join the applicant forthwith in these proceedings as an interested party.

4) That pending hearing and determination of this application, leave be and is hereby granted to the applicant to give notice of the suit to all interested persons by public advertisement in a locally published newspaper of nationwide circulation.

5. That the honourable court be and is hereby pleased to stay all proceedings in the instant matter pending hearing and determination of this application,

6. That the honourable court be and is hereby pleased to issue an order excluding a sum of USD 12,040,208.52, belonging to the applicant/intended interested party from being forfeited if that will so be the order and direction of the court for the matter.

7. That the honourable court be and is hereby pleased to issue an order directing Guaranty Trust Bank Limited, Equity Bank Limited and/or Eco-Bank Kenya to deposit the sums excluded in the bank account of the applicant/intended interested party's advocates on record.

8. That an order be and is hereby issued directing the Central Bank of Kenya to act in supervisory capacity in the enforcement of order number 8 above.

9. That the honourable court be and is hereby pleased to issue any other order that may favour the cause of justice

10. That costs of the application be in the cause."

2. The application is premised on the following grounds set out on its face thereof, certificate of urgency and supporting affidavit. That:-

a) On the July 1, 2022, this honourable court issued preservation orders against the 2nd to 9th respondent upon an application by the 1st respondent.

b. The orders were issued on the basis that the money in the bank accounts were proceeds of crime.

c. The applicants invested significant amounts of money in a false investment and trading scheme called 86 football Technology Limited, also known as 86FB, 86Z and 86W.

d. 86 football Technology Limited used the 2nd respondent as a payment gateway; in the processing of payments from the applicants.

e. That the applicants were not notified of the existence of the preservation order and only came to the realization after conducting personal research when the dubious operations of 86 football Technology Limited became apparent.

f. The joinder is significant in assisting the court in the just fair resolution of issues raised, for effectual and complete adjudication of all questions involved and will provide protection and security for the rights and interests of the applicant/intended Interested Party who will otherwise be adversely affected by the eventual issuance of forfeiture orders.

g. The applicants are reasonably apprehensive that the court will issue an order of forfeiture of funds held by the 2nd respondent at Guaranty bank, equity bank and Ecobank Limited; which funds are subject of preservation orders issued on July 1, 2022 to its detriment as they hold an identifiable stake in the subject funds. The accounts are as set out herein below:

h. Based on the factual matrix surrounding the application, there is sufficient ground to believe that there are additional persons whose interest in the matter necessitates their joinder, Therefore issuance of notice by public advertisement is imperative.

i. That the cause pursued by the applicant is in the nature of a representative suit. Therefore, issuance of notice to all interested persons is a mandatory requirement of the law.

j. It is in the interests of justice that the court is pleased to grant leave to the applicant to issue a notice of its intention to oppose the issuance of a forfeiture order pursuant to the provisions of section 91(1) as read together with section 83 of POCAMLA.

h. Section 91 of POCAMLA confers upon this court discretionary powers to grant leave to a person who has an interest in property which is subject to a preservation order; to object to the issuance of a forfeiture order out of time."

3. In his supporting affidavit sworn on even date the applicant deposes to the authority (power of attorney) donated to him to bring this application by the 2,468 investors of 86 Football Technology Limited. He has also annexed copies of the identity cards for the 2,468 investors as proof that they are not fictitious persons and hence the nature of his cause is a representative suit. He further deposes that the investors were lured into becoming members of 86 Football Technology limited thereby investing huge sums of money thereto on allegation that it was duly registered with the Corporate Affairs Commission of Nigeria; that however he has sufficient reason to believe that 86 Football Technology Limited was a fraudulent scheme intended to defraud unsuspecting investors and traders; that the joinder will assist this court in the just and fair resolution of issues raised, for effectual and complete adjudication of all questions involved and will secure the rights and interests of the interested parties as they hold an identifiable stake to the 1st respondent's funds.

4. The intended interested party continues to depose that the 1st respondent has also filed a case in the Federal High Court of Nigeria and obtained orders to restrain 86 Football Technology Limited, the 1st respondent herein, and 6 others from making any withdrawals of monies held in their accounts pending final determination of that case; that it is a matter of public notoriety and a litany of materials have circulated to that effect in public spaces, that Flutterwave in Kenya is related to Flutterwave Nigeria; that when the allegations that form the sub-stratum of these proceedings went on air Flutterwave in Nigeria made a public statement that the company was making efforts to be fully compliant in Kenya. He further deposes that the intended interested parties have an identifiable stake in this matter on the basis that the funds paid to 86 Football were processed through the 1st respondent as the payment gateway. He urges this court to grant the orders sought in the application.

5. The plaintiff/applicant did not participate in the application which however is vehemently opposed by the 1st respondent. The reasons cited for opposing the application are, inter alia, that:-

a. The ARA/applicant has voluntarily, unequivocally and unconditionally elected to withdraw this suit.

b. That the respondents are agreeable to the withdrawal with no order as to costs.

c. That in the premises the frozen assets are no longer proceeds of crime liable for forfeiture to the government hence allaying the intended interested parties apprehension of forfeiture.

d. That by opposing the withdrawal the intended interested party is approbating and reprobating.

e. That no reasonable, plausible or legally sound explanation has been tendered for opposing the withdrawal.

f. That the purpose of the preservation order has been fully satisfied and discharged and there are no funds which the intended interested party can protect from forfeiture given the withdrawal.

g. That the continued pendency of the application dated 17th November is an abuse of court process, is scandalous, frivolous and vexatious and an abuse of the court process.

h. That as the intended interested party and the members of his representative action are all foreigners domiciled outside the jurisdiction of this court classicus of escaping costs in the event of an unfavourable outcome in the application.

i. That the 1st respondent continues to suffer irreparable harm for reason of the freezing order.

j. That the intended interested party stands to suffer no prejudice as any claims he may have can be pursued as a civil claim in the appropriate forum."

6. The application was canvassed by way of written submissions as follows: learned counsel for the intended interested party reiterated that he had demonstrated that the intended interested party had an identifiable stake in the suit; that the ARA/plaintiff does not possess maximum rights to withdraw the suit as the buck stops with the court and once the intended interested party is enjoined to the suit he shall oppose the withdrawal. Counsel submitted that members of the public may furnish this court with sufficient material to enable it to make a decision on whether to forfeit the funds or to make any other order that advances the interest of justice. Counsel cited several decided cases in support of his submission that the intended interested party meets the test for joinder and further argued that the intended interested party has also satisfied this court that his is a representative cause and that he ought to be granted leave to advertise the same in a local newspaper with nationwide circulation. Counsel urged this court to allow the application and to grant orders as prayed.

7. Learned counsel for the 1st respondent submitted that the intended interested party has not demonstrated that he has an identifiable stake in this case; that he has also not demonstrated that he and the persons he represents will suffer prejudice should their application for joinder be rejected; that the intended interested party has also not shown that the preserved funds are part of the money they invested in a ponzi scheme run by a company in Nigeria; that the interested party failed to draw a connection between their said funds and those in the frozen account. Counsel contended that the intended interested party's cause of action is personal and civil in nature and should be pursued in a forum other than the Anti-Corruption and Economic Crimes Court.

Analysis and Determination

8. As correctly submitted by learned counsel for the intended interested party and as conceded by learned counsel for the 1st respondent it is pre-requisite for an application for joinder to demonstrate that the

applicant has an identifiable stake in the suit in which they seek to be enjoined. In the case of *Francis Karioko Muruatetu & another v Republic & 5 others* [2016] eKLR the Supreme Court stated:-

> " One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:
>
> i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
>
> ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
>
> iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court."

See also the decision of the Supreme court in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2014] eKLR where the court stated:-

> "(18) Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. ....."

9. It is however also trite that even in the case with an Interested party the issues determined by the court remain those presented by the principal parties in that suit and not otherwise. This was also the decision of the Supreme Court in case of *Francis Karioko Muruatetu & Another v Republic & 5 others* (supra) where it stated:-

> "(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether new issue to be introduced before the court."

10. In the case of *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (amicus curiae)* [2019] eKLR the Supreme Court reiterated that:-

> 415. What emerges from the above decisions is that an interested party is a peripheral party and cannot introduce new issues for determination by the court. Further, that in determining the matters before it, the court will only consider the issues raised in the pleadings by the principal parties. This rule will be particularly unyielding when the matter before court is a private as opposed to a public interest claim.

416. Notwithstanding that the interested party before us was joined in the matter from the outset by the petitioner, he is still only an interested party within the meaning ascribed to that phrase by the law and judicial precedents which we have set out above. His joinder ab initio does not elevate his position in the matter. The court can only grant reliefs as sought by the petitioner or as it deems appropriate as provided under article 23(3) of the Constitution."

11. As I write this ruling the ARA/applicant has intimated that it intends to withdraw this suit as against all the respondents. Applying the principle in the afore cited decisions of the Supreme Court this implies that there shall no longer be any dispute between the principal parties to determine and to allow this application would therefore be an exercise in futility. My reading of those decisions is that the intended interested party's claim cannot stand alone and accordingly once the suit is withdrawn there shall be no issues left for determination.

12. Having so found I need not go into the merits or otherwise of the application save to note that it is also instructive that the only reason that the intended interested party gives for applying to be enjoined to the proceedings is that he is apprehensive that the impugned funds might be forfeited thereby prejudicing him and those he represents. However once the suit is withdrawn the funds shall no longer be liable to be forfeited and any claim he may have against the 1st respondent can then be pursued through other proceedings.

13. It is also my finding that order 25 rule (1) of the *Civil Procedure Rules* gives liberty to the plaintiff to withdraw or to discontinue its suit and the only fetter is that it must do so by notice in writing. The instant suit was yet to be set down for hearing and accordingly order 25 rule 1 applies and nothing would justify this court to place a fetter otherwise than is set by the rules. Unlike where a suit has been set down for hearing the withdrawal is not subject to the consent of all the parties.

14. The upshot is that this application is misconceived and accordingly it is dismissed.

15. While costs follow the event the nature of this application is such that each party ought to bear their own costs. Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY, 2023.

E N MAINA

JUDGE