



REPUBLIC OF KENYA



Amailo Investment Company Limited v Equity Bank Kenya Limited & another (Miscellaneous Application E049 of 2023) [2023] KEHC 20395 (KLR) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E049 OF 2023
RN NYAKUNDI, J
JULY 17, 2023**

BETWEEN

AMAILO INVESTMENT COMPANY LIMITED APPLICANT

AND

EQUITY BANK KENYA LIMITED 1ST RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION 2ND RESPONDENT

RULING

1. The applicant approached this court vide an application dated March 20, 2023 seeking the following orders;
 - i) Spent
 - ii) That the honourable court be pleased to issue an order directing the 1st respondent to unfreeze bank account no xxxx with them at Lodwar branch unconditionally and facilitate the applicant to access the same to enable them continue their transactions.
 - iii) That costs of the suit be provided for.
2. The application is premised on the grounds set out therein and the contents of the supporting affidavit sworn by Ekorot Peter Endapal.

Applicant's case

3. The applicants' case is that the account holds their customers funds in trust and that it further holds moneys meant to pay their staff, subcontractors and other players within the Company. Further, that the 2nd respondent sought orders to freeze the said account pending hearing and determination of their previous application being Eldoret High, Misc Civil Application No E031 of 2022 which orders were granted and subsequently, matter withdrawn and file closed vide on February 28, 2023. It is the



applicant's case that despite the fact that there is no other suit pending between the Applicant and themselves are still adamant in allowing the Applicant access to their said account in utter violation of the Constitution without any justifiable reasons. The Applicant was in the process of pursuing the unfreezing of the said account including asking for shorter notice before their application is prosecuted and concluded when the second Respondent produced an Order issued on March 24, 2023 by The High Court At Milimani Acec No E025 of 2022 following an extension of the previous order issued in Eldoret High Court Misc Civil Application No E031 of 2022 around the month of July 2022 notwithstanding the fact that the same application was withdrawn on February 28, 2023 when it came up for hearing before Hon Justice J Wananda and an order was issued to that effect.

4. Learned counsel for the applicant submitted that it is a special jurisdiction of this Court under Section 56 of the Anti-Corruption and Economic Crimes Act No 3 of 2003 [ACECA] to entertain an application for orders not substantive in nature. Article 23, 24, 31, 40, 50, and 156[6] of the Constitution of Kenya gives the High Court Jurisdiction to hear and determine for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In this case, the Respondents' decision to freeze the Applicant's account wherein the Applicant has over what the 2nd Respondent is interested in is impeachable principally on one consideration, namely:
 5. a) The decision itself is irrational, unreasonable and disproportionate.
6. It is the Applicants' contention that their rights under the provisions of Article 2 of the Constitution have been violated hence necessitating this application. The import of the aforesaid Section is that;
 - i) The Respondents are bound by the said Section to let the Applicant undertake the exercise of freedom to continue their transactions. T
 - ii. He Section imposes upon the Respondents the duty to act in a judicious and reasonable/ rational manner, in utmost good faith, with fairness and without any malice towards any party allegedly involved in any act of misconduct or irregularity.
7. Counsel submitted that the 2nd Respondent acted with bias and treated the Applicant unfairly by failing to take into account the fact that the subject bank account with the 1st Respondent is holding moneys in excess of what they are interested. In the spirit fairness, they ought to have allowed the applicant partial access to the same. It is the Applicants' contention that the Respondents failed to adhere to the aforesaid constitutional and statutory requirements. Article 47 (2) makes it mandatory for any administrative body to give all persons whose right or fundamental freedom is likely to be adversely affected by administrative action to be given written reasons for the action. In this case, no specific reasons were given to the Applicants despite their rights being Effected by their action of freezing their bank account. He urged that the 2nd Respondent's forensic officer in her Replying Affidavit sworn on March 24, 2023 at paragraphs 8 makes a glaring admission 'that upon filing the recovery suit, the court issued interim orders on July 15, 2022 ordering that the funds be preserved for a period of six months ending January 15, 2023. The Court on March 9, 2023 extended the interim orders and directed that the funds in the subject Account be preserved until determination of the suit'. The order extended was a subject of an application that was wholly withdrawn by the 2nd Respondent on the February 28, 2023 before HON JUSTICE J WANANDA and an order was issued to that effect. The 2nd Respondent's decision to continue freezing the Applicant's bank account wherein the Applicant has over what the 2nd Respondent is interested in is a nullity, invalid and void ab initio for being unfair. Counsel cited the cases of *AG v Ryan [1960] AC 718* and *O'Reilly v Mackman [1983] 2 AC 237* among other authorities in support of these submissions.



8. Counsel for the applicant submitted that the Respondents acted unfairly under the Constitution, reached a wholly unreasonable, irrational and illogical decision, did not give the Applicant partial access of the subject account, acted maliciously and capriciously and failed to follow the correct procedure. Further, that the 2nd Respondent breached the principle of proportionality by failing to maintain an appropriate balance between the adverse effects which its decision may have on the right, liberties or interests of the Applicant and the purpose which the Respondent is seeking to pursue.

The applicant urged the court to allow the application as prayed.

1st Respondent's case

9. The 1st respondent filed submissions on April 6, 2023. The 1st respondent's case is that the 2nd Respondent's Affidavit has annexed a clear order showing that there have been proceedings before a court of competent jurisdiction on the issue the Applicant has again approached the court for determination which proceedings the Applicant herein mischievously failed to disclose and as such the Application is an abuse of the Court's process as it offends the provisions of sections 6 & 7 of the Civil Procedure Act. Further, that the orders granted by the Hon Lady Justice Esther Maina on the status of the account are very clear and to that end, given that the said court is of competent jurisdiction, the Applicant ought not to have instituted another Application in another court. Counsel urged that given the suit in Milimani is still pending hearing and determination, the court should decline the invitation to exercise its jurisdiction as to whether or not the account should remain frozen given that it shall not auger well on the court's reputation to have two Rulings on the same subject matter.
10. Counsel submitted that a look at the orders sought shows that the Applicant is seeking orders of Mandatory injunction regarding unfreezing of an account and unlimited access to the same through a miscellaneous Application that is not supported by any suit. As such, the Application herein is therefore bad in law and a proper candidate for striking out. He cited the cases of Rockland Kenya Limited v Commissioner General of the Kenya Revenue Authority & another [2020] eKLR and Nairobi West Hospital Limited v Joseph Kariba & Another [2018] eKLR in support of these submissions.
11. The 1st respondent urged the court to dismiss the application with costs.

2nd respondent's case

12. The 2nd respondent opposed the application vide a replying affidavit sworn on March 24, 2023 and submissions dated April 18, 2023. Counsel submitted that the application before this court was filed despite the existence of another application in ACEC Suit No E025 of 2022 filed by the applicant herein on November 25, 2022 seeking similar orders against the Respondents. It is the 2nd respondents' case that the Application in ACEC Suit No E025 of 2022 dated November 25, 2022 sought partial access to Equity Bank Account No xxxxx, Lodwar Branch, while the 2nd Respondents' application dated December 16, 2022 in the said suit sought extension of preservation orders that had been issued on the July 15, 2022. Both applications were canvassed by way of written submissions and in her ruling on March 9, 2023, Hon. Lady Justice EN Maina made orders restraining the 1st Defendant/Applicant by themselves, their agents, servants and/or employees or any other person whatsoever from withdrawing, transferring, disposing or in any other way dealing with funds held in the 1st Defendants/Applicant Bank Account No xxxx domiciled at Equity Bank, Lodwar Branch, pending interpartes hearing and determination of the suit. The orders which the Applicant wishes to have granted were considered and denied by this court, the High Court. As such the Applicant is basically seeking that this court reviews its own decision regarding the orders that were issued in ACEC Suit No E025 of 2022. Counsel submitted that concurrent jurisdiction having been exercised by the Anti-Corruption



& Economic Crimes Court in Nairobi, it is no longer tenable for this court to exercise the same jurisdiction. He cited the case of *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR* in support of this submission.

13. The 2nd respondent urged the court to dismiss the application with costs to the respondent.

Analysis & Determination

14. Upon considering the application, responses thereto and the submissions, the following issues arise for determination;
- i) Whether this court has jurisdiction to entertain the application
 - ii) Whether the application is merited

Whether this court has jurisdiction to entertain the application

15. The respondents contend that this court has no jurisdiction to entertain the application as it offends the principle of res judicata. Res judicata is governed by section 7 of the *Civil Procedure Act* which provides as follows;

' No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

16. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

'Explanation. (1)—The expression 'former suit' means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.'

17. Celestine Owiti, a forensic investigator with the 2nd respondent swore a replying affidavit where she annexed a court order issued by Hon. Justice Esther N Maina in Milimani Anti-Corruption and Economic Crimes Court Case No E025 of 2022 where the court directed that the applicant herein as restrained from accessing Equity Bank Account No xxxx domiciled at the branch in Lodwar. The orders arose from an application dated November 25, 2022 by the applicant herein seeking partial access to the said account to withdraw Kshs 11,187,155.31/-.

18. The present application seeks to have the subject bank account unfrozen, which is in essence seeking to have access to the funds in the account. From the evidence on record, to wit the court order given on March 9, 2023, it is evident that this particular issue was determined conclusively before a competent court with the parties herein being parties in the suit. I therefore find that the application is unmerited as it offends the principles of res judicata. Further, this matter being before a court of competent jurisdiction, this court cannot entertain the matter any further. As at the time of filing the application the matter was still pending in the court in Nairobi therefore it cannot be before this court at the same time as this would occasion great embarrassment and constitute a miscarriage of justice.



19. In the premises, the application is dismissed for lack of merit with costs to the respondent.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 17TH DAY OF JULY 2023

In the presence of:

.....

R. NYAKUNDI

JUDGE

