



**Joseph v Flutterwave Payments Technology Ltd; United Bank of Africa & 5 others (Interested Parties) (Civil Suit E252 of 2023)
[2023] KEHC 23305 (KLR) (Commercial and Tax) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E252 OF 2023
A MABEYA, J
OCTOBER 12, 2023**

BETWEEN

MORRIS EBITIMI JOSEPH PLAINTIFF

AND

FLUTTERWAVE PAYMENTS TECHNOLOGY LTD DEFENDANT

AND

UNITED BANK OF AFRICA INTERESTED PARTY

ACCESS BANK INTERESTED PARTY

SAFARICOM PLC INTERESTED PARTY

GUARANTY BANK INTERESTED PARTY

EQUITY BANK INTERESTED PARTY

ECOBANK (K) LTD INTERESTED PARTY

RULING

1. Before court is the notice of motion dated 5/6/2023 brought *inter-alia* under order 39 rule 1 & 2, order 26, rule 1, order 40 rule 1 & 2 and order 51 rule 1 of the [Civil Procedure Rules](#).
2. The applicant sought freezing orders on various of the defendant's bank accounts held with the 1st to 6th interested parties pending the determination of the application. The Court granted this prayer in the interim on 7/6/2023.



3. In the alternative to the freezing orders, the applicant sought an order to have the respondent deposit/ furnish \$12,040,208.52, as security, to the Court, the same being the amount claimed by the plaintiff pending the determination of this suit.
4. The grounds for the application were set out on the face of the motion and the supporting affidavit sworn by the applicant on 5/6/2023. These were that; the applicant and 2468 other investors (the applicants) were victims of a border scam perpetrated by the defendant in collusion with co-conspirators and that the applicants had invested significant amounts of money in a false investment and trading scheme called 86 football technology limited.
5. That on various dates between January 2020 and December 2022, the applicants cumulatively transferred large sums of money totaling US\$ 12,040,208.52 into the defendant's bank accounts; that the applicants paid to the respondent via their seven merchants namely; Marakwe and Sons Ltd, Hadsol Global Investment Services Ltd, Wild Cat Global, GTB Impersonal Ladger, Alicash Ltd, Marasoft Digital Technologies alias Masasoftpay and Jimbrightglobal Ltd.
6. The applicant averred that the defendant is illegally withholding the said funds in the respective accounts and a large portion of the said funds have already been withdrawn and/or transferred to other entities as they are suspected to be proceeds of crime *vide* ACEC SUIT Nos. E039 and E044 both of 2022. That the balance thereof is at risk of being misappropriated by the defendant from this Court's jurisdiction, to the applicants' detriment and prejudice.
7. Further, that this is not the first time the defendant is being accused of money laundering and conspiracy to defraud foreign nationals with the promise of good investment. That *vide* a ruling and order delivered by both Maina J and Nzioka J dated 1/7/2022 and 19/8/2022, respectively in ACECMISC E029/2022 and ACECMISC E040/22 the Court froze the defendant's bank accounts held at Guaranty Bank, Equity Bank, Ecobank, Access Bank, Safaricom utility/paybill accounts and United Bank of Africa after evidence was adduced to demonstrate that there had been fraud, collusion and false pretense by the respondent to the tune of US\$ 336, 202,872.
8. In opposition to the application, the defendant lodged a replying affidavit sworn on 15/6/2023 by David Oluranti, who oversees the legal operations of the respondent.
9. He averred that the applicant never entered into any contractual relationship with the defendant and/or any of the 2468 members that the applicant purports to represent; that the applicant had sworn and filed an affidavit in ACEC No. E039 of 2022 indicating that the cause of action in this application arose in Nigeria and the parties involved were all domiciled in Nigeria.
10. Further, that the plaintiff indicated in the said affidavit that he had filed suit before the High Court in Nigeria to wit Case No.FHC/YNG/CS/150/2022 against Flutterware Technologies Solutions Limited (FW Nigeria) and others which was subsequently dismissed by that court.
11. That Flutterwave Nigeria was a different entity from the defendant and operates in Nigeria while the defendant operates in Kenya only and that the applicant is abusing the court process by filing multiple suits in different jurisdictions. That upon investigations by the Asset Recovery Agency, no funds of the defendant were found to be proceeds of crime and as such, ACEC suit No. E039 of 2022 was withdrawn despite objection by the applicants.
12. The defendant claimed that the applicant has a quantifiable claim espoused in prayer 10 of this application, to wit, US\$12,040,208.52 which may be awarded as damages in the unlikely event of a successful outcome and that it would be in the interest of justice that the freezing orders by the court not be extended.



13. Both the applicant and the defendant filed submissions in support or against the subject application and the Court has considered the same.
14. Prayers 2-9 of the application sought freezing orders of the respondent's bank accounts held in different banks pending determination of this application. The Court granted those prayers in the interim and the same are therefore spent.
15. Thus the only prayer left for determination is prayer 10 which sought an order to have the defendant deposit/furnish US\$12,040,208.52 as security to the Court, the same being the amount claimed by the plaintiff pending the determination of this suit.
16. The first issue for determination is whether this Court has the jurisdiction to determine the application and suit.
17. The applicant swore an affidavit in ACEC No E039 of 2022 *Morris Ebitimi Joseph v Flutterwave Payments Technology Limited & 8 others* whereby he averred that he and 2486 other investors are Nigerian nationals residing in Nigeria and that the alleged investment of US\$12,040,208.52 was made in Nigeria in a company registered in Nigeria through Nigerian banks and intermediaries.
18. The said affidavit is annexed as 'D0-2' in the defendant's replying affidavit sworn on 15/6/2023. The applicant further averred that he had filed a suit before the High Court in Nigeria against 86 football technologies and FW Nigeria regarding the same subject matter to wit, the purported fraudulent investment. Although the aforesaid suit was struck out, it is clear that the High Court in Nigeria had the jurisdiction to determine the issues raised by the applicant. It appears that the applicant is guilty of forum shopping in different jurisdictions by filing suits on the same subject matter in different countries.
19. I agree with the submissions of the defendant that the High Court in Kenya cannot assert its jurisdiction on a matter whose cause of action arose in a foreign land and whose parties are domiciled in Nigeria. On this ground alone, this Court must down its tools regarding the matter before it. There was no evidence tendered to show that the monies allegedly defrauded in Nigeria had found its way into the Kenyan banks named as interested parties for this Court to assume jurisdiction over the same.
20. Be that as it may, the order to have the respondent deposit/furnish US\$12,040,208.52 as security to the Court pending determination of a suit is in the nature of a mandatory injunction. This prayer is directive rather than prohibitive.
21. In *Kenya Breweries Ltd & another v Washington O Okeya* [2002] eKLR, the Court of Appeal held: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
22. Thus special circumstances must be established or demonstrated before an interlocutory mandatory injunction can be granted as opposed to a prohibitory injunction. Special circumstances are either where the matter ought to be decided at once or where the injunction is directed at a simple and



summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff.

23. In this case, the applicant has not demonstrated the existence of any special circumstances to warrant the issuance of a mandatory injunction. In my view, it would be prejudicial and premature to order the defendant to deposit such a large amount of money before it is established that the same is payable.
24. The upshot of the foregoing is that the application lack merit and is dismissed with costs. The interim orders of 7/6/2023 are hereby vacated forthwith.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

