

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. CASE NO. E038 OF 2023**

**BETWEEN**

**A & M LE MONT VENTURES LIMITED.....1<sup>ST</sup>**

**PLAINTIFF**

**FUTUREGATE LABS LIMITED.....2<sup>ND</sup>**

**PLAINTIFF**

**AIRWALLET PAYMENTS PTE LIMITED.....3<sup>RD</sup>**

**PLAINTIFF**

**GOLDEN PAY LIMITED.....4<sup>TH</sup>**

**PLAINTIFF**

**AND**

**KIWIPAY (K) LIMITED.....1<sup>ST</sup>**

**DEFENDANT**

**KIWIPAY PTE LTD.....2<sup>ND</sup>**

**DEFENDANT KIWIPAY FZE.....**

**.....3<sup>RD</sup> DEFENDANT**

**GREGORY SCHMIDT .....4<sup>TH</sup>**

**DEFENDANT**

**MAXINE ROSBURGER.....5<sup>TH</sup>**

**DEFENDANT**

**DIBRIL CISSE.....6<sup>TH</sup>**

**DEFENDANT**

**DEFENDANT**

**RULING**

1. The Plaintiffs have by a Notice of Motion application filed on 13<sup>th</sup> January 2025 moved this Honourable court pursuant to Articles 48 and 50(1) of the Constitution of Kenya, Sections 1A, 1B & 3A of the Civil Procedure Act and Order 40 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules and they ostensibly seek that this court do order a preservation of the funds held in 7<sup>th</sup> Defendant bank at its Muthaiga Branch Nairobi belonging to the 1<sup>st</sup> to the 6<sup>th</sup> Defendants in accounts numbers-6682003058, 6682003059, 6682003378. The Plaintiffs seek that the said funds be preserved pending the hearing and determination of the suit.
2. Subsequent to the present application, the Plaintiffs had filed similar motions on 18<sup>th</sup> December 2024 and 26<sup>th</sup> June 2023 and 28<sup>th</sup> June 2023 seeking similar reliefs. The Court will however proceed to consider the application filed on 13<sup>th</sup> January 2025. The application is supported by a supporting affidavit of Mr. Levi Munyeri Advocate sworn on 13<sup>th</sup> January 2025. In opposing the Application, the Defendants have filed a Replying affidavit sworn on 21<sup>st</sup> January 2025 by Montida Rashi. Parties have filed written submissions which I have carefully considered.

## **ANALYSIS AND DETERMINATION**

3. After a careful consideration of the application and the supporting affidavits herein and the rival submissions filed by the parties, I note what the court is called upon to determine is whether the present application has merit. I note that the Applicants seek a preservation of funds held in various accounts in the 7<sup>th</sup> Defendant Bank which are purportedly the property of the 1<sup>st</sup>-6<sup>th</sup> Defendants. The Defendants accuse the Plaintiffs of filing multiplicity of applications in which they seek similar orders as those sought in the present application and hence offending the principle of *res judicata* as set out at section 7 of the Civil Procedure Act. The Defendant urge the court to find the application is speculative and discloses no new information that can overturn previous orders and directions and orders of this court.

4. To persuade the Court, the Respondents urge the Court to be guided by the decision in KINATWA CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED VS KINATWA RESITGE LTD (2021) eKLR where the court held thus;- *“the rationale behind the sub-judice rule is to prevent situation of having conflicting orders emanating from two or more different courts over the same subject matter.”* I agree with above reasoning.

5. This is the situation pertaining in this matter as the court has already in other matters before it involving the subject matter especially in its orders of 12<sup>th</sup> July 2023 in HCCCOMM NO. E454 OF 2022 allowing the funds held in the same accounts to be released to the parties in the said suit. The principle of res judicata was clearly explained by the Supreme Court in the case of KENYA NATIONAL COMMISSION ON HUMAN RIGHTS VS THE ATTORNEY GENERAL; INDEPENDENT ELCTORAL & BOUNDARIES COMMISSION AND 16 OTHERS (2002) e KLR, where it held;-

***“the purpose of sub-judice rule is to stop the filing of a multiplicity of suits between same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter..... When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and***

***lastly; that the suits are between the same parties or their representatives.”***

6. It is important to note that the present suit against the Defendants is not the only suit before this court on the same subject matter. It is therefore important that this court being seized with facts surrounding the subject matter in the several disputes before it involving the Defendants and other parties not to make any orders in vain. The court is satisfied and finds that the orders being sought in the present application are not capable of being granted.

**DISPOSITION**

7. In sum, the application by the Plaintiff filed on 13<sup>th</sup> January 2025 is dismissed with costs to the Defendants.

**DATED SIGNED and DELIVERED virtually this 7<sup>th</sup> DAY of NOVEMBER 2025**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. N/A for the Plaintiff/Applicants.

2. Ms. Jillo holding brief for Mr. Kithi for the 1<sup>st</sup> Defendant/Respondent.
3. Mr. Mwangi 7<sup>th</sup> Defendant/ Respondents -Eco Bank
4. Amos - Court Assistant

ORIGINAL