



**Transcend Media Group Limited v Safaricom Limited & 10 others (Civil Case 466 of 2016) [2023] KEHC 291 (KLR) (Commercial and Tax) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 291 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 466 OF 2016  
A MABEYA, J  
JANUARY 27, 2023**

**BETWEEN**

**TRANSCEND MEDIA GROUP LIMITED ..... PLAINTIFF**

**AND**

**SAFARICOM LIMITED ..... 1<sup>ST</sup> DEFENDANT  
BOB COLLMORE ..... 2<sup>ND</sup> DEFENDANT  
SYLVIA MULINGE ..... 3<sup>RD</sup> DEFENDANT  
FLORA OMUHAKA MANGALA ..... 4<sup>TH</sup> DEFENDANT  
EMILY TOO ..... 5<sup>TH</sup> DEFENDANT  
FLORA BAIYA ..... 6<sup>TH</sup> DEFENDANT  
JANICE KEMOLI ..... 7<sup>TH</sup> DEFENDANT  
THOMAS OMANGA ..... 8<sup>TH</sup> DEFENDANT  
TIMLA TIENG ..... 9<sup>TH</sup> DEFENDANT  
SARACEN MEDIA KENYA LIMITED ..... 10<sup>TH</sup> DEFENDANT  
FIELDSTONE HELMS LIMITED ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

1. When this matter came up on November 10, 2022, this court issued several directions, including that the ruling for the application dated September 26, 2017 would be delivered on December 2, 2022.



2. However, when the court retired to write the ruling, it noted from the court file that the application had already been determined and ruling delivered by Hon J G L Nzioka on July 9, 2019.
3. In that ruling, the court made the following orders: -
  - a. The final decision in the application herein shall be stayed pending the hearing and determination of the respondent's application dated November 17, 2016;
  - b. The parties shall thus file the necessary responses if that has not been done and file their respective submissions on the subject application within the timelines to be set;
  - c. Upon compliance and highlighting of the submissions, the court shall render its decision on the issue raised in the two applications;
  - d. Even then, having considered the nature of this matter and the issues raised in the various affidavits filed, the court is of the opinion that it will serve the interest of justice for the parties to close the pleadings and comply with order 11 of the Civil Procedure Rules, for the expeditious disposal of the matter in compliance with the overriding objectives under section 1A and 1B of the Civil Procedure Act;
  - e. The costs of the application shall be determined after the final orders are made.
4. Among the orders issued on November 10, 2022 was that; the application dated November 17, 2016 is hereby marked as withdrawn...". This then paves way for the final determination of the application dated September 26, 2017.
5. From a reading of the application dated September 26, 2017 and the aforementioned ruling dated July 9, 2019, it is apparent the application dated September 26, 2017 was founded upon the now withdrawn application which had attached a forensic report dated March 2, 2017. According to the defendants, the forensic report raised serious allegations of fraud against them. They thus sought production of the 3 computers being which were the subject of that forensic report vide their application dated September 26, 2022 in order to conduct their own independent forensic examination of the computers before responding to the allegations raised.
6. This court takes judicial notice that the computers the subject to which the forensic report was conducted were seized pursuant to the *ex parte* order made on June 7, 2016 in CMCC No 3644 of 2016 (Now consolidated) under the supervision of the Kenya Copyright Board (KCB).
7. KCB in turn handed over the devices to the DCI and the forensic report was prepared. Though the defendants alleged that KCB acted beyond its mandate which was limited to supervision and the preservation of any seized devices or records, there was an agreement amongst the parties including the advocate for the 8<sup>th</sup> - 11<sup>th</sup> defendant that a forensic examination be carried out to give effect to the anton pillar orders and establish whether there was a copyright infringement by the defendants.
8. The defendants also averred that the forensic report was based on information that had been fabricated, manipulated and/or fraudulently obtained by the plaintiff or its agents. They also challenged the manner in which the gadgets were recovered from the defendants and challenged the entire report and its conclusions.
9. In this court's view, these are issues that can be addressed during the full trial through cross-examination of the plaintiff and its witnesses. The defendants will also have an opportunity to address the allegations of fraud against them during the trial.



10. The main issue now is whether the pending prayer (number 4) of the application ought to be granted, that is, orders compelling the plaintiff to provide full access to the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendant to inspect, copy, reproduce or preserve data saved on the Macbook Pro and the iMac desktop computers referred to in the subject forensic report dated March 2, 2017.
11. The plaintiff submitted that it had handed over to East Africa Data Handlers for forensic analysis three devices being; one Hewlett Packard (HP) laptop, one Macbook pro laptop and one iMac desktop, which were used by the 8<sup>th</sup> and 9<sup>th</sup> defendant and one Christine Muchendu while still in the plaintiff's employment.
12. That the forensic report dated March 2, 2017 was forwarded to it and the three aforementioned devices returned to it and were now being used as tools of trade by the plaintiff, and there was no basis in law for the respondent to submit them to the custody of court.
13. The defendants on the other hand submitted that it was necessary that they have access to the computers to allow for the conduct of a forensic examination as it was the only way they could adequately respond to the allegations of fraud and statements of opinion. That it was contrary to principles of a fair hearing to permit a one-sided narrative to be presented unchallenged where the opportunity exists for full facts and evidence of a matter to be presented to court.
14. This court has already found that there was a legal foundation for the forensic analysis to be conducted. It has also been established that any challenges against the report can be addressed at the full trial where the defendants will have an opportunity to examine the expert witness producing the report and put up a defense against any claim arising from the report. It is thus not the case that another forensic report has to be conducted for the defendants to ably defend themselves or challenge the findings of the report.
15. In any event, it is now over 5 years since the said devices were returned to the plaintiff and have been in use since. The lapse of time is too long to make the orders sought.
16. In the circumstances, this court agrees with the opinion in the ruling by Nzioka J, that parties ought to close pleadings and comply with order 11 of the Civil Procedure Rules and proceed with the trial.
17. This court has already given directions on filing of documents. Let the directions be complied with within the strict timelines indicated and the suit proceed to trial.
18. The upshot is that the application dated September 26, 2017 is unmeritorious and is dismissed with costs to the plaintiff.

It is so ordered

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2023.**

**A MABEYA, FCIArb**

**JUDGE**

