



Transcend Media Group Limited v Safaricom Limited & 10 others (Civil Case 014 of 2022) [2023] KEHC 17780 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 014 OF 2022**

A MABEYA, J

MAY 26, 2023

BETWEEN

TRANSCEND MEDIA GROUP LIMITED PLAINTIFF

AND

SAFARICOM LIMITED 1ST DEFENDANT

BOB COLLMORE 2ND DEFENDANT

SYLVIA MULINGE 3RD DEFENDANT

FLORA OMUHAKA MANGALA 4TH DEFENDANT

EMILY TOO 5TH DEFENDANT

FLORA BAIYA 6TH DEFENDANT

JANICE KEMOLI 7TH DEFENDANT

THOMAS OMANGA 8TH DEFENDANT

TIMLA TIENG 9TH DEFENDANT

SARACEN MEDIA KENYA LIMITED 10TH DEFENDANT

FIELDSTONE HELMS LIMITED 11TH DEFENDANT

RULING

1. This is a ruling on an application dated March 21, 2023. It was brought under order 40 rule 10, order 45 rule 1, order 51 rule 1 of the [Civil Procedure Rules](#), sections 1A, 3, 3A and 80 of the [Civil Procedure Act](#) and articles 50 of the [Constitution](#).



2. The applicant sought the review and setting aside of this court's ruling of January 27, 2023 and thereby compel the plaintiff to provide full access to its Macbook Pro and iMac desktop computers referred to and the subject of the forensic report dated March 2, 2017 for purposes of obtaining full information and evidence.
3. The grounds for the application were set out on the face of it and in the supporting affidavit sworn by Thomas Omanga on March 21, 2023. It was contended that the ruling denied the prayer to compel the plaintiff to allow access to the computers.
4. That the ruling was predicated on the erroneous premises including the misperception that the computers were the same subject computers in the orders issued in CMCC 3644 of 2016, and consequently that the forensic examination and report were the outcome of a legally mandated procedure.
5. That the computers that were seized pursuant to those orders belonged to the 9th defendant and were not the subject of the applicant's application dated September 26, 2017.
6. That the plaintiff would seek to produce the forensic report of March 2, 2017 during the hearing without the 7th, 8th and 10th defendants having an opportunity to access the computers and conduct their own forensic examination.
7. That without any pre-trial or case conference procedures being undertaken as contemplated in the ruling of July 9, 2019. That the contents of the report were highly contested and it was just that the ruling be reviewed and prayers granted.
8. The plaintiff opposed the application *vide* the replying affidavit sworn by Lai Muthoka on March 30, 2023. It was contended that the applicants had not complied with the pre-trial directions issued on November 10, 2022 after the subject ruling was delivered. That the matter was set down for hearing by two different judges but even then, the applicants had never complied.
9. That the suit was set down for case management conference on August 13, 2019 and September 18, 2019 and timelines for compliance were issued, thus the applicants falsely alleged that no case management had been conducted.
10. That the subject forensic report was carried out on machines owned by the plaintiff and used by its staff, and the report was a result of a legal procedure. That the court only took judicial notice of the orders in CMCC 3644 of 2016 and did not make its findings based on those orders.
11. That the instant application was brought 2 months after the ruling was delivered thus the delay was inordinate and unexplained, and no grounds for review were met.
12. The parties disposed of the application by way of written submissions. I have considered the contestations and the submissions on record. This is an application for review.
13. It is now well settled that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of order 45 rule 1 of the [Civil Procedure Rules, 2010](#) and section 80 of the [Civil Procedure Act](#). This means that the High Court has a power of review, but such power must be exercised within the framework of section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#) 2010.
14. Under order 45 rule 1 of the [Civil Procedure Rules](#), 2010 review will be granted when there is discovery of new and important matter or evidence which was not within an applicant's knowledge or could not



be produced at the time when the decree or order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

15. In the present case, the applicants contend that there is an error apparent on the face of the impugned ruling because the court based its finding on the fact that the computers were the same subject computers in the orders issued in CMCC 3644 of 2016.
16. I have looked at the impugned ruling. I think the applicants misinterpreted the ruling. In that ruling, what the court did was to take judicial notice of the orders granted in the aforementioned case which had authorized the forensic examination.
17. The main basis for denial of the applicant's application dated September 26, 2017 is to be found at paragraphs 10-15 of the ruling. The court found that any challenges against the report could be addressed at the full trial and there was no need for another forensic report to be conducted for the applicants to ably defend themselves or challenge the findings of the report.
18. The court also found that it was now over 5 years since the devices were returned to the plaintiff and the same have been in use then, and that the lapse of time was too long to make the orders sought.
19. That was the basis upon which the court denied the applicant's application. Even if the applicants successfully demonstrated that the computers were not the subject of the orders issued in the abovementioned case, the circumstances of the findings would not change. The grounds of denial of the orders would still stand. The applicants still have an opportunity to cross examine the maker of the report and put forth its case.
20. This court also notes that the application was filed one day prior to the date scheduled for hearing of the suit, that is, 27th and March 28, 2023. It is doubtful whether the application was brought in good faith. The applicants waited for close to 2 months from the date of the ruling and only sprung the application on the eve of the trial. That alone is enough to decline the application.
21. The grounds pleaded by the applicants are similar to those pleaded in their application dated September 26, 2017. The same have been determined upon and this court cannot be seen to re-open the issues and have the same re-litigated. The same will be tantamount to the court sitting on an appeal against its own finding. This would be abuse of court process. The applicants should have appealed to the Court of Appeal.
22. Accordingly, the application is without merit and is therefore dismissed with costs.
23. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

