



**Ng’etich v Safaricom PLC; Ministry of Information, Communication & Technology & 2 others
(Interested Parties) (Petition 9 of 2020) [2023] KEHC 22759 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION 9 OF 2020
HM NYAGA, J
SEPTEMBER 27, 2023**

BETWEEN

DR. ISAAC KIPLIMO NG’ETICH PETITIONER

AND

SAFARICOM PLC RESPONDENT

AND

**MINISTRY OF INFORMATION, COMMUNICATION &
TECHNOLOGY INTERESTED PARTY**

COMMUNICATION AUTHORITY OF KENYA INTERESTED PARTY

THE HON.ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The Application dated 21st November,2022 was lodged by the Petitioner, Dr. Isaac Kiplimo Ng’etich, seeking the following Orders;
 1. Spent
 2. That the Honourable Court be pleased to issue an order directing the 1st Respondent to within seven (7) days of making of this Order, to supply and/or furnish the petitioner, and to produce before this Honourable Court with:
 - a. Certified copies of subscriber details for telephone numbers 0722-XXX-788,0723-XXX-785,0721-XXX-297 and 0724-XXX-564.
 - b. Certified Copies of subscriber identity cards or passport used during the registration of phone numbers 0722-XXX-788,0723-XXX-785,0721-XXX-297, and 0724-XXX-564.



- c. SIM Card registration forms used in registration of Phone Numbers 0722-XXX-788,0723-XXX-785,0721-XXX-297, and 0724-XXX-564.
 - d. Identity and details of agents where the SIM cards numbers 0722-XXX-788, 0723-XXX-785, 0721-XXX-297, and 0724-XXX-564 were registered.
 - e. M-pesa statements from the date of registration of mobile registration of phone numbers 0722-XXX-788,0723-XXX-785,0721-XXX-297, and 0724-XXX-564 up to the 11th of June,2020.
 - f. Certificate of extraction of electronic evidence in respect to extraction of items (a) to (e) above.
3. That the costs of this Application be awarded to the Petitioner.
2. The application is premised on the grounds set out on the face of it and is supported by affidavit of Patrick Kabundu, the Petitioner herein, sworn on 21st November, 2022.
 3. The Petitioner's case is that he is a subscriber of the Safaricom PLC Mobile network and the registered holder of Safaricom SIM Card Number 0722XXX788 and that he obtained the same between the year 2000 and 2002.
 4. He averred that sometimes in the year 2013, following the amendment of Kenya Information and Communication Act and the Government regulation on mandatory registration of SIM CARD by all Telecommunication operators, he appeared personally before a Safaricom PLC agent and filled a registration form, submitted a copy of his identity card and presented his original and all his personal details required for the registration of the SIM Card in his name.
 5. That on 18th June,2019 he was summoned by an officer of the Directorate of Criminal Investigations from the Nakuru branch on allegation of selling his property being MITI MINGI/MBARUK BLOCK 4/480 measuring about 0.405 Ha and failing to transfer the same to the purchaser one Angelina Chepkemi Sigira.
 6. He deposed that upon arrival at the DCI office in Nakuru, he was detained on allegation that he had received Ksh. 20,000/= from the above named person through mobile number 0723XXX785 being the deposit for the purchase of his property.
 7. He contended that upon investigations the DCI officers discovered that the numbers that were used by fraudsters when illegally trying to defraud Angelina Chepkemi Sigira were registered in his name but he had not authorized and or appeared before the agents of the Respondent to consent to the registration of the SIM Card numbers 0723-XXX-785;0721-XXX-297 and 0724-XXX-564.
 8. He averred that previously through his advocates he had sought for the certified copies of subscriber details ,certified copies of subscriber identity cards or passport used during the registration of phone numbers 0722-XXX-788,0723-XXX-785,0721-XXX-297 and 0724-XXX-564, SIM card registration of the above phone numbers ,identity and details of agents where the SIM cards numbers were registered and Mpesa statements from the date of registration of mobile numbers up to the 11th of June 2020 from the respondent but it has failed to supply his advocates with the said documents.
 9. He averred that the information he seeks from the respondent is crucial to aid in the just determination of his claim herein in view of the prayers sought.
 10. He further deposed that Section 27 A (3) of the Kenya Information and Communication Act mandates the respondent to provide particulars of a subscriber for the purposes of civil and criminal



proceedings and that Section 27B of the same Act allows the respondent to contract a registration agent for purposes of registering new subscribers and ensure that proper registration of the subscriber is conducted prior to the selling of a SIM card, to ensure that the registration details of a subscriber are kept in a secure and confidential manner and therefore the agents who registered the aforesaid phone numbers ought to have the details of the numbers listed herein.

11. He prayed that his application be allowed.
12. The Respondent opposed the Application through its grounds of Opposition dated 16th May, 2023 on grounds that: -
 - a. Pursuant to Regulation 15(1) of the Kenya Information and Communication (Registration of SIM Cards) Regulations, 2015, the Respondent deactivated the subject mobile numbers 0724-XXX-564; 0721-XXX-297; and 0723-XXX-785.
 - b. As the Subject numbers are registered to other subscribers, who are not party to these proceedings, the Respondent cannot disclose their details under Sections 25(a), 25(c), 25(d), 26(a) and 26(c) of the Data Protection Act No. 24 of 2019 without their knowledge and express consent.
 - c. Without prejudice to the foregoing, the disclosure of these subscribers' information has no relevance and is not material to the matters in issue.
 - d. The orders sought by the Petitioner therefore, if granted, will interfere with existing contracts between the Respondent and the Subscribers of the Subject of the aforesaid Mobile Numbers.
 - e. Consequently, the Respondent urges the Court to dismiss the Application and set down the matter for substantive hearing.
13. The interested parties did not participate in this matter.
14. The Application was canvassed through written submissions.
15. The Applicant's submissions were filed on 17th May, 2023 whereas the Respondent's submissions were filed on 24th July, 2023.

Applicant's Submissions

16. The Counsel for the Applicant referred to the provisions of Section 27 A (1) & (2) and Section 27B of the Kenya Information and Communication Act (KICA) and submitted that the documents sought by the applicant are for the purpose of proving breach of the Constitutional Right to privacy pursuant to the provisions of Article 31 of *the Constitution* 2010.
17. He submitted that the right to privacy was violated the moment the Respondent allowed a third party to register SIM Cards using the identity card number of another subscriber.
18. It was submitted that the documents sought by the Applicant are in custody of the Respondent pursuant to the provisions of the Kenya Information and Communication Act which requires a telecommunication operator to keep such data and that the Respondent is obligated to ensure that the data of any mobile subscriber is not released to any person except in circumstances as provided for under Section 27 A (3) of the KICA.
19. The Counsel argued that the Respondent caused the Applicant's Identity Card number to be used and it would be in the interest of Justice that the Respondent is compelled to provide information it



used to register the aforesaid three SIM Cards that were used in extorting money from an innocent Kenyan Citizen.

20. He submitted that *the constitution* does not limit the right to access information. To support this proposition reliance was placed on the cases of Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR and President of Republic of South Africa v M & G Media (CCT 03/11)[2011]ZACC 32.

Respondent's Submissions

21. The respondent averred that disclosure of the information sought without express of the subscribers will be in violation of their respective rights to privacy and in contravention of Section 27 A (2) of the Kenya Information and Communication Authority Act. It also posited that there are limitations to the right to access information. In buttressing its submissions, the respondent cited the cases of Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR where the court held inter alia that a persons' right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her own personal affairs relatively free from unwanted intrusions & Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another (supra) where the court relied on the European Court of Justice view that disclosure should be the norm and exceptions should be strictly construed as was restated in Youth Initiative for Human Rights vs. Serbia (Application no. 48135/06) as follows:-

“The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions...

Analysis & Determination

22. I have considered the Applications, Grounds of Opposition and submissions by the respective parties. The singular issue that arises for determination is whether the respondent should be compelled to give the information sought.
23. The petitioner sought the aforesaid information through a letter dated 20th September, 2022. The letter is said to have been sent to the Respondent but no response was received from it. This necessitated the Applicant to file the instant Application.
24. The Applicant has contended that he is the registered owner of Safaricom SIM Card no. 0722XXX788 and that on 18th June 2019 he was summoned by the DCI from Nakuru on false allegation of selling his property MITI MINGI/MBARUK BLOCK 4/480 and failing to transfer the same to the purchaser.
25. He submitted that the documents sought are for the purpose of proving the breach of Constitutional right to privacy.
26. *The Constitution* grants citizens' access to information as a constitutional right. In that regard, Article 35 of *the Constitution* provides that;
 - 1) “Every citizen has the right of access to—
 - a) information held by the State; and



- b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
 - 2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
 - 3) The State shall publish and publicise any important information affecting the nation.
27. Article 35 of *the Constitution* does not in any way place conditions for accessing information. Therefore, the information in possession of the state, state officer or public body is accessible by citizens and the same should be availed to them without delay upon request.
28. For purposes of actualizing Article 35, parliament enacted *Access to Information Act* 2016. Section 4 of the Act provides for the procedure to access information. The section provides;
- “ 1) Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - a) the State; and
 - b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
 - 2) Subject to this Act, every citizen's right to access information is not affected by—
 - a) any reason the person gives for seeking access; or
 - b) the public entity's belief as to what are the person's reasons for seeking access.
 - 3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
 - 4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
 - 5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.”
29. On the other hand, section 5 of the Act further provides that a public entity should facilitate access to information held by it. Under section 8, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. The Act is also sufficiently clear that the information should be given without delay and at no fee, notwithstanding why the citizen wants to access information. Section 9 makes states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information and whether it will provide access to the information.



30. In the case of *Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission* [2016] eKLR, the Court reaffirmed the position that *the Constitution* does not limit the right to access information when it stated;

“ [270] Article 35(1) (a) of *the Constitution* does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in *The Public’s Right to Know: Principles on Freedom of Information Legislation –Article 19* at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”.

31. The right to access information as a basis for accountability, responsiveness and openness was emphasized in the case of *Brummer v Minister for Social Development & Others CCT 25/09 2009 ZACC 21* where the Court stated;

“(62) The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed, one of the basic values and principles governing public administration is transparency. And *the Constitution* demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”

(63) Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”

32. It is not in dispute that the Respondent is the custodian of the particulars of the registration of the mobile phone numbers in issue. However, the Respondent contends that the aforesaid mobile numbers were delinked from the Applicant’s national identity card following a prolonged period of inactivity and that the subject numbers have been registered to other subscribers who are not party to these proceedings, and under Section 25 (a), (c) and (d) and 26(a) and (c) of the Data Protection Act, they cannot disclose those details without their express consent.

33. Section 25 (a), (b) and (c) of the Data Protection Act provides that;

“Every data controller or data processor shall ensure that personal data is —

- (a) processed in accordance with the right to privacy of the data subject;
- (b) processed lawfully, fairly and in a transparent manner in relation to any data subject;



- (c) collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes;”

34. Section 26 of the Data Protection Act provides that;

‘A data subject has a right—

- (a) to be informed of the use to which their personal data is to be put;
- (b) to access their personal data in custody of data controller or data processor;
- (c) to object to the processing of all or part of their personal data;
- (d) to correction of false or misleading data; and
- (e) to deletion of false or misleading data about them.’

35. It is imperative to note that the Respondent has not controverted the Applicant’s claim and has not disclosed when the subject numbers were registered to other subscribers. It is not certain whether that was done before or after the undisputable detention of the Applicant.

36. The information sought is for a specific period which in my view is crucial to enable the Applicant present his case for just determination by this court.

37. The Respondent also argued that there are limitations to Right to Access information. The burden on justifying the limitation on the right to access of information rested on the person resisting disclosure, as provided for in Article 24(3) of *the Constitution* which states that the State or a person seeking to justify a particular limitation should demonstrate to the court, tribunal or other authority that the requirements of the article had been satisfied.

38. The respondents did not tender any evidence to prove that the phone numbers in issue has since been registered to other subscribers. Even if they were, the applicant’s application is not open ended. His interest is only for the period that the numbers were registered in his name, whether legally or illegally. I see no prejudice to any other party(ies) who may have subsequently been registered under the said lines. That subsequent period is not relevant to the applicant and I agree that the information sought for that period cannot be obtained without their consent.

39. Having stated the above, from my reading of the application, I note that the only number that was the subject of the police investigation was Number 0723XXX785 for allegedly having received a sum of Ksh. 20,000/- in the applicant’s name. It is not clear why the applicant wants details of all the other numbers when they had no issue at all. I do not think that the applicant has raised any legal basis for the other numbers. Therefore, the only number that the applicant is entitled to any orders on is the one that was in his name when the alleged transactions took place.

40. The respondent cannot use confidentiality or privacy to cover up for a suspected fraud. The applicant is entitled to the information that was used to register the number 0723XXX785 in his name.

41. In light of the above, I opine that the instant application has merit and it should be allowed, but only in respect to mobile phone line number 0723XXX785. The period is only when the number was in the applicant’s name.

42. I therefore grant the following orders;

- a. The Respondent shall within 21 days from the date of this ruling, provide the Applicant with certified copies of subscriber details for mobile phone number 0723XXX785 from the period



it was registered to him until the period of deregistration and any other period that the said number may have been re-registered in his name.

- b. The Respondent shall within 21 days provide all the identification documents/forms used to register the Applicant's name to the said mobile phone number 0723XXX785 for the same period.
- c. The Respondent shall within 21 days provide all Mpesa statements for mobile phone number 0723XXX785 while the number was registered/re-registered in the name of the Applicant.
- d. The applicant shall pay any reasonable fee required by the Respondent.
- e. Costs to abide the outcome of the petition.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 27TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Koigi for Njogu for petitioner

Ogwen for respondent

Dr. Owino for Ojiambo for 2nd interested party

