Moronge & 6 others (aka Joe Hannington-Suing on their own Behalf and on behalf of the General Kenyan Public Affected) v Safaricom PLC Kenya & 3 others (Constitutional Petition E002 of 2020) [2022] KEHC 16951 (KLR) (29 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CONSTITUTIONAL PETITION E002 OF 2020

RE ABURILI, J

DECEMBER 29, 2022

IN THE MATTER OF ARTICLES 22(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 40 AND 46(1)(2)(3) AND 48 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF THE CONSUMER PROTECTION ACT

BETWEEN

CRISPINE MORONGE ..... 1ST PETITIONER

FELICIA AYOTI ..... 2ND PETITIONER

PENINA ODUKE ..... 3RD PETITIONER

AUSTINE NYAORI ..... 4TH PETITIONER

HELEN OGWANG ..... 5TH PETITIONER

FLORENCE MUSAU ..... 6TH PETITIONER

JOSEPH MUSOMBA ..... 7TH PETITIONER

AKA JOE HANNINGTON-SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE GENERAL KENYAN PUBLIC AFFECTED

AND

SAFARICOM PLC KENYA ..... 1ST RESPONDENT

PUBLIC LIKES KENYA ..... 2ND RESPONDENT

ROBERT NDUNGU GACHUHI ..... 3RD RESPONDENT

ZEGE TECHNOLOGIES ..... 4TH RESPONDENT

RULING

1. The 4th respondent Zege Technologies filed a notice of preliminary objection dated July 19, 2021 in the following terms:

    a. In Milimani Law Court's miscellaneous application criminal case No 2542 of 2017, Republic vs Co-operative Bank-head office NIC Bank-head office, Sidian Bank-head office and Equity Bank-head office, the Investigating Officer reported to court that the investigation team conducted extensive investigations and came to the conclusion that there would be no impact in terms of evidential value if Zege Technologies were allowed to access their money. The 4th respondent's cooperative account number 01109421264900 was unfrozen vide court order dated September 27, 2017 and they were allowed access to their funds invested at Britam Insurance vide court order dated December 11, 2017 both orders issued by Hon Riany (SRM). No appeals have been preferred against the orders. The principle of res judicata thus applies to the 4th respondent as relates to the instant petition and the prayers that it seeks against them and more specifically prayers 4, 5 and 6 of the petition dated October 6, 2020.

    b. The petitioners have not invoked and or exhausted the alternative dispute resolution as per clause 6.1 of the terms of service that they subscribed to upon visiting and taking up the services offered on public like's website in so far as their alleged dispute arises from the said terms of service.

    c. The court lacks jurisdiction to entertain the petition dated October 6, 2020 as per the terms of service that the petitioners subscribed to upon visiting and taking up the services offered on public likes, the 2nd respondent's website and clauses 6.2, 6.3 and 6.4 respectively.

    d. The honourable court lacks jurisdiction to entertain the petition dated October 6, 2020 for the reason that it is not properly before the court, as the petitioners seek that the respondents be publicly and or privately prosecuted for embezzlement, fraud and obtaining by false pretense. This is the sole mandate of the magistrate's court under section 6 of the *Magistrate's Court Act, 2015*, section 4 and 89 of the *Criminal Procedure Code* and sections 312 and 313 of the *Penal Code*.

    e. Granting the orders sought herein would totally prejudice the 4th respondent who has been irregularly brought to this court due to the fact the services were exclusively offered by the 2nd respondent hence the relationship was between the consumer and the 2nd respondent and not with the 4th respondent.

    f. The petition is misconceived, frivolous, scandalous and an abuse of the court process.

    g. The petition should be dismissed with costs to the 4th respondent.

2. The petition was disposed of by way of written submissions which are on record and have been given due consideration.

3. The issue for consideration is whether the preliminary objection as a whole has merit. The celebrated case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 succinctly states what a preliminary objection is. In that case, it was held that:

> " --a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration."

4. The 4th respondent asserts that the petition herein is res judicata by virtue of a court order issued in Milimani Magistrate's Court, as stated in the grounds in support of the preliminary objection herein.

5. Res judicata is a cardinal principle within our jurisdiction that bars a party from bringing a suit which has been concluded. The rationale has been explained in several cases and in *John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR where the Court of Appeal pronounced itself as follows:

> " The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

6. The 4th respondent contends that the matter has been heard and the court allowed it to access its money held in various bank accounts and invested in an insurance scheme. It is however not clear whether the criminal case alluded to by the 4th respondent was concluded. It is also not in doubt that the case mentioned is a criminal case instituted by the Republic.

7. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the *Civil Procedure Act* which provides:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

8. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others* (2017) eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

   a. The suit or issue was directly and substantially in issue in the former suit.

   b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

9. Having set out the yardstick for determining whether a suit is res judicata I am not satisfied that the instant petition is *res judicata*. The parties in the instant petition are different from the parties in Criminal Case No 2542 of 2017 whose status, in any event has not been stated, whether concluded or is still pending before that court.

10. Equally important is the similarity of subject matter in the previous and the instant suit. Whereas the case alluded to as having been concluded although no proceedings were supplied to this court was a criminal case, it is trite that sanctions and or penalties in a criminal case are different from the orders grantable in a constitutional petition. The issues in the two cases cannot be similar in the circumstances.

11. The other preliminary objection also stems from what the 4th respondent terms as failure to exhaust the dispute resolution mechanisms provided by the terms of service of Public Likes. That the failure to exhaust the mechanisms ousts the jurisdiction of this court to hear and determine the petition herein.

12. In advancing the objection, the 4th respondent makes reference to clauses 6.2, 6.3 and 6.4 of the terms of service. Variably, these clauses state that the applicable law in case of disputes and in the event that arbitration fails are the laws applicable in the state of Michigan (United States).

13. The doctrine of exhaustion of remedies disqualifies a party from prosecuting an action before a court of law until that party has exhausted the alternative methods of dispute resolution provided by the statute of the contract. In essence, unless and until the party takes the alternative route provided, the court will not entertain the matter.

14. In the case of *Martin Kabubii Mwangi v County Government of Laikipia* [20191 eKLR it was held that:

> "The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service & Another v Hulbhai Gedi Abdille (supra) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the County Governments Act, The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs."

15. The 4th Respondent, as supported by the 1st Respondent submits that time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute.

16. In *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, Court of Appeal held that:

> "... In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without

expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions...."

17. Further in *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd*, [2011] eKLR, where the Court of Appeal observed that:

> "... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."

13. The Court of Appeal decision in *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR the Court held that:

> "There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance. In terms of Republic v National Environment Management Authority (supra), we discern no exceptional circumstances in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent. Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is in our view, without basis because Section 77 has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it."

18. The principle of exhaustion was summarized in *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* (2015) eKLR, the Court of Appeal stated:

> "It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."

19. In the instant petition, the 4th respondent challenges the jurisdiction of this court until the petitioners exhaust the alternative dispute resolution mechanism provided on the platform.

20. I have considered the clauses providing the dispute resolution modules and the court with the jurisdiction incase arbitration fails and my finding on the same is that the clauses therein bind the parties as there has been no application to declare the said clauses unconscionable. The parties having submitted themselves to the application of foreign laws and jurisdiction, one party cannot run away from that agreement that was freely entered into and by pass the process agreed upon. The petitioners

have not proved that it is impractical to implement the clauses in so far as the same provides for the application of foreign laws.

21. It has not been demonstrated as to what hardship the parties will suffer if they subject the dispute to arbitration or if they submit to the application of the foreign jurisdiction as per the terms of service.

22. For the above reasons, and to that extent only, I find merit in the second part of the preliminary objection raised by the 4th respondent.

23. On what orders this court should make, I find that the appropriate order to make in this matter is to strike out the petition which I hereby do and strike it out with an order that each party do bear their own costs of the Petition and of the preliminary objection.

24. This file is hereby closed.

25. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF DECEMBER, 2022

R.E. ABURILI

JUDGE

Uncertified Ruling dispatched to the parties' Counsel via email. Parties to obtain a certified Ruling from Court.