



**Gakuru & 6 others v Safaricom Limited (Civil Suit 170 of 2011)
[2022] KEHC 16352 (KLR) (Civ) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 170 OF 2011**

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

**ALEX M GAKURU 1ST PLAINTIFF
HUMPHREY ATUTI 2ND PLAINTIFF
BRIAN KIMANI 3RD PLAINTIFF
ALICE NJOKI MUCHIRA 4TH PLAINTIFF
JOSEPH MWANGI NGATIA 5TH PLAINTIFF
MWAURA DENNIS MBUGUA 6TH PLAINTIFF
JACKSON ENONDA 7TH PLAINTIFF**

AND

SAFARICOM LIMITED DEFENDANT

JUDGMENT

1. The 1st to 7th plaintiffs in the present instance filed the plaint dated May 9, 2011 and sought for judgment against the defendant by way of the following reliefs:
 - a. An order directing the defendant to fully implement the mobile network porting guidelines and without any hindrance fully activate the plaintiffs' ported mobile numbers.
 - b. Damages for loss of business.
 - c. Exemplary/Punitive damages.



- d. Costs of the suit.
 - e. Any further or other reliefs as this Honourable Court may deem fit to grant.
2. The defendant is sued in its capacity as a mobile service provider whereas the plaintiffs were at all material times subscribers to the mobile services provided by the defendant and holding the following phone numbers with the defendant:
 - a. 1st plaintiff-072xxxx
 - b. 2nd plaintiff-0713xxxx
 - c. 3rd plaintiff-0721xxxx
 - d. 4th plaintiff-0750xxxx
 - e. 5th plaintiff-0725xxxx
 - f. 6th plaintiff-0723xxxx
 - g. 7th plaintiff-0729xxxx
3. The plaintiffs pleaded in the plaint that pursuant to a policy decision issued by the Communications Commission of Kenya (“the Commission”) entailing guidelines on mobile number portability between various mobile operators including the defendant, the 2nd to 7th plaintiffs exercised their right to exit the defendant’s mobile phone network and migrate to other mobile networks while retaining their respective service numbers.
4. It is pleaded in the plaint that the 1st plaintiff being a regular caller of the remaining plaintiffs was unable to reach them on their respective phone numbers due to full or partial de-activation thereof, while the 2nd to 7th plaintiffs were unable to communicate on their mobile numbers, resulting in loss of business and personal loss/damage.
5. It is further pleaded in the plaint that the actions by the defendant are unlawful and intended to force the plaintiffs to remain in its mobile service network, thus depriving them of their freedom of consumer choice.
6. Upon service of summons, the defendant entered appearance and put in its statement of defence dated June 10, 2011 to deny the averments made in the plaint.
7. At the hearing of the suit, the 1st plaintiff testified whereas the defendants called one (1) witness.
8. The 1st plaintiff who testified on behalf of the remaining plaintiffs stated that he is a computer expert (IT) by profession and adopted his signed witness statement as his evidence-in-chief.
9. The 1st plaintiff further stated that his rights as an IT specialist were violated by the defendant since the defendant ought to have implemented mobile number portability from itself to other mobile service providers, as per the guidelines issued by the Commission, which guidelines were produced as P Exh 1.
10. The 1st plaintiff testified that he did not sign any form or contract with the defendant but that the process of portability was not implemented by the defendant.
11. In cross-examination, it is the evidence by the 1st plaintiff that he works as a consultant and that he would regularly meet with the remaining plaintiffs.



12. It is also the evidence by the 1st plaintiff that though mobile portability is now functional in the country, this was not the case back in 2011.
13. The 1st plaintiff testified that during the above period, people who opted to port out had their calls blocked by the defendant and that communications on the challenges faced while porting were made via emails which were tendered as exhibits.
14. The 1st plaintiff stated that the defendant did not fully comply with portability and further stated that where a request for porting is made, the same ought to be effected within 48 hours and that upon successful porting, the new mobile service provider will provide the network.
15. In re-examination, the 1st plaintiff testified that complaints were made to the defendant and restated that portability ought to take place within 48 hours.
16. Khalid Collins Ogotu who was DW1 stated that he was at all material times an employee of the defendant and adopted his executed witness statement as evidence, also producing the defendant's list and bundle of documents as exhibits.
17. In cross-examination, the witness testified that he works as a telecommunications engineer and that none of the documents tendered as exhibits were signed by the plaintiffs herein.
18. The witness further testified that it is presumed that any customer who walks into a shop belonging to the defendant has read the terms and conditions of service.
19. It is the evidence of DW1 that they never received instructions to block the services of any customer.
20. In re-examination, DW1 gave evidence that a customer cannot be provided with services unless he or she signs the terms and conditions.
21. The witness further gave evidence that the plaintiffs herein applied to have their numbers ported and the defendant complied with their requests.
22. Upon close of the hearing, the parties were directed to put in their respective submissions.
23. The plaintiffs on their part submit that they were at all material times the registered owners of the mobile numbers listed in the plaint and that the terms and conditions of service were never disclosed to them by the defendant.
24. The plaintiffs submit that as a result of the omissions by the defendant in complying with the portability regulations, the mobile phone numbers belonging to the 2nd to 7th plaintiffs were off at the material dates and that the 1st plaintiff was unable to reach them, thereby causing them to suffer loss and which they are entitled to the reliefs sought in the plaint.
25. On damages, the plaintiffs propose the sum of Kshs 3,000,000/= on general damages for infringement of their rights and freedoms and cite among others, the case of [Ann Njoki Kumena v KTDA Agency Ltd](#) [2019] eKLR where the court awarded the sum of Kshs 1,500,000/= on general damages for violation of the plaintiff's constitutional right to privacy.
26. On the part of the defendant, it is submitted that the plaintiffs have not proved the allegations made against it by way of evidence and cites the case of [Hellen Wangari Wangechi v Carumera Muthoni Gathua](#) [2015] eKLR in which the court reasoned thus:

“It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. As observed above, the appellant made allegations in the plaint,



hence she was under an obligation to support of the allegations. For example, since there was a denial in the defence, it was necessary to adduce evidence to show how the amount of Ksh 316,000/= was arrived at, Further, in view of the fact that the alleged admission had been denied in paragraph 7 of the defence, it could have helped a lot if the lawyer who prepared the document in question had been called as a witness to shed light on the alleged admission. Further, no evidence was tendered to rebut the allegations of paragraph 8 of the defence even though the appellant was aware about it.”

27. It is also the submission by the defendant that the relationship between itself and its subscribers is contractual in nature and that one of the terms and conditions of service is that the defendant will strive to offer seamless mobile services but does not guarantee the availability of the services at all material times and therefore cannot be held liable for fluctuations in the service.
28. The defendant further contends that the plaintiffs have not proved the loss; if any; suffered and or their entitlement to the reliefs sought in the plaint.
29. I have considered the contending submissions alongside the authorities relied upon and the evidence tendered at the trial.
30. The key issues for determination therefore are as follows:
 - i. Whether the plaintiffs have made a case for breach of contract/policy against the defendant, resulting in loss; and
 - ii. Whether the plaintiffs are entitled to the reliefs sought.
31. In respect to the first issue above, upon my examination of the pleadings and evidence tendered at the trial, it is apparent that the plaintiffs were at all material times registered as customers of the defendant under the mobile phone numbers listed in the plaint, and therefore enjoyed a contractual relationship with the defendant.
32. In view of the foregoing, I find that the plaintiffs were expected to have some knowledge on the terms and conditions of service. It is apparent that no evidence was tendered to show that the same had not been disclosed to them at all material times.
33. Upon my further examination of the pleadings and evidence tendered at the trial, it is also apparent that at some point in the year 2011 the 2nd to 7th plaintiffs opted out of the defendant’s mobile network and joined other networks.
34. Upon my consideration of the evidence, I took into account the testimony by the defence witness on the procedure of portability and particularly the evidence that the process of moving from one mobile network to another is what is known as ‘porting out’, which is to say that where a person ports out, they cease to be a subscriber of the primary mobile service provider/operator and responsibility shifts to the donor operator.
35. On the subject of unavailability of network following the process of porting out, upon my study of the record, I did not come across any credible evidence to support this averment by the plaintiffs. I note that the plaintiffs did not set out in specific detail the dates during which the network services of the defendant had not been made available to them, or that the 1st plaintiff had tried calling the remaining plaintiffs in vain.
36. In my view, in any event I am satisfied that the issue of network fluctuations had reasonably been explained by the defence witness.



- 37. From the record, I also did not come across any credible evidence by the plaintiffs to demonstrate the manner in which they suffered loss as a result thereof and that any loss suffered was the result of any act/omission by the defendant in order to give rise to liability.
- 38. I further note from the record that the plaintiffs did not adduce any credible evidence to support their allegation that the defendant had not complied with the guidelines on portability at all material times or to show the manner in which their constitutional rights/freedoms were violated by the defendant.
- 39. It is trite law that he who alleges must prove. This legal position is found under the proviso of Section 107 of the *Evidence Act* which stipulates that a person who desires judgment on liability must prove that the facts pleaded exist.
- 40. In the present instance, the onus fell upon the plaintiffs to prove their claim against the defendant on a balance of probabilities but they did not.
- 41. In view of all the foregoing circumstances, I find that in the absence of credible evidence to support the plaintiffs' claim against the defendant, the suit is hereby dismissed with costs.
- 42. On the second issue for determination, despite my finding above on liability, I am enjoined to consider the reliefs which I would have awarded if the plaintiffs' claim was successful.
- 43. In respect to the order sought directing the defendant to fully implement the mobile network porting guidelines and without any hindrance fully activate the plaintiffs' ported mobile numbers, I would have granted this relief upon a successful claim.
- 44. Concerning damages for loss of business, in the absence of any credible evidence to support the prayer for damages for loss of business/income, I would have declined to make any award for the same.
- 45. On exemplary/punitive damages, such an award of damages is deemed to apply in instances where there has been some arbitrary or calculated conduct by the defendant or where the actions by the defendant are calculated to grant some benefit. Upon considering the evidence on record vis-à-vis the nature of damages sought herein, I would not have been satisfied to make any award under this head.
- 46. Upon my finding above, I hereby make an order that the plaintiffs' suit is hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendant

