



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 207 OF 2015**

**SAFARICOM LIMITED .....PLAINTIFF**

**VERSUS**

**CYRIAN NYAKUNDI.....DEFENDANT**

**RULING**

1. The Plaintiff herein filed the suit herein based on the Tort of Defamation. Simultaneously with the filing of the suit, the Plaintiff filed an application seeking injunctive orders against the Defendant. Subsequently, the court granted interim orders of temporary injunction prohibiting the Defendant, his servants, agent or employees from further publishing or causing to be published on their blog or any other blogs any matters defamatory of the Plaintiff.

2. The Plaintiff on 6<sup>th</sup> June, 2016 filed an application seeking orders that a Notice to Show Cause be issued against the Defendant to show cause why he should not be cited for contempt for disobeying court orders. The application is supported by the affidavit of Daniel Ndaba, the Plaintiff's Principal In-House Counsel sworn on 3<sup>rd</sup> June, 2016.

3. In opposition to the application, the Defendant filed two replying affidavits sworn on 4<sup>th</sup> December, 2016 and on 12<sup>th</sup> April, 2019.

4. The Plaintiff subsequently filed a supplementary affidavit sworn by Daniel Ndaba on 22<sup>nd</sup> November, 2019.

5. The Defendant had on 12<sup>th</sup> April, 2019 filed the Notice to cross-examine dated 10<sup>th</sup> April, 2019. The Defendant wishes to cross-examine the Plaintiff on the contents of the affidavit sworn on 3<sup>rd</sup> June, 2016. That is the matter which is the subject of this ruling.

6. It is stated in the Notice to cross examination that the intended cross examination will focus on the following:

**“1. The KPMG Forensic Audit Report of 18<sup>th</sup> February 2016 and the findings therein with regard to governance and integrity practices in Safaricom Limited.**

**2. The CCTV project between Safaricom and Government of Kenya.**

**3. Transmission of Election Results for the 2013 General Elections in Kenya.**

**4. Protest call on Vodafone held in London in May 2016.**

**5. The refunds made to the subscribers on the Safaricom Network specifically relating to “Cheza Games” and the reasons for the same.”**

7. The Plaintiff filed the grounds of opposition dated 6<sup>th</sup> May, 2019 which are as follows:

**“1. That the Notice to cross-examine is fatally bad at law as it offends the provision and spirit of Order 19 rule 2(1).**

**2. That the Notice to cross-examine and its purported purpose offends and abrogates the provision of Article 10 of the Constitution of Kenya, 2010 as it does not abide by the rule of law.**

3. That the Notice is an abuse of the court process and an attempt to stagnate, scuttle and/or defeat expeditious prosecution and conclusion of this suit contrary to provisions of law, especially the oxygen principles.

4. That further, the Notice to Cross-examine does not demonstrate and/or disclose any substantive and/or cogent purpose that cross-examination shall serve to the merits of either the instant application or the main suit.

5. That cross-examination on affidavits is a discretionary power conferred upon the court by provisions of Order 19 rule 2 and not given as a matter of right.

6. That consequently, the Defendant ought to sufficiently persuade this honourable court that there is good reason for the purpose of cross-examination; HE HAS NOT.

7. That the Defendant has not laid proper legal foundation to justify leave to cross-examine the deponent.

8. That ultimately, the Defendant has not made any application before this court seeking leave to cross-examine as required at law.”

8. I have considered the notice of cross-examination, the grounds of opposition and the submissions made by the respective counsel for the parties.

9. Order 19 rule 2 Civil Procedure Rules gives the court the power to allow the cross-examination of a deponent on the contents of an affidavit. Order 19 rule 2(1) Civil Procedure Rules provides as follows:

**“Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.”**

10. The order for cross-examination is not mandatory. The court retains the discretion whether to allow or not to allow the cross-examination. The discretion must be exercised judiciously upon demonstration of sufficient grounds in reference to the contents of the affidavit in question. To allow cross-examination on the contents of an affidavit, the Court must be satisfied that the cross-examination is necessary in the interest of justice(See for example **Invesco Assurance Co. Ltd v Commissioner of Insurance & others [2016] eKLR; Republic v Minister of Roads Exparte Vipingo Ridge Ltd & another [2015] eKLR** and **Kenya Deposit Insurance Corporation v Hassan Ahmed Hafedi Zubeidi & 5 others [2017] eKLR**)

11. Going back to the case at hand, the affidavit sworn by Daniel Ndaba on 3<sup>rd</sup> June, 2016 refers to the interim orders herein which it states the Defendant has breached. In its salient features, the affidavit alleged that the Defendant published in his blog <http://cnyakundi.com> a defamatory article against the Plaintiff, its staff and other members of public. The copy of the blog post is annexed to the affidavit. The annexure is a six page document headed:

**“Back when this website wasn’t big, we wrote about safaricom call content staff’s rare disorder”** The post contains a caption as follows: **“Safaricom CEO Bob Collymore. The biggest crook and most corrupt man as per now”**

12. A juxtaposition of the contents of the said affidavit with the Notice to cross-examine reveals, in this courts view, that the affidavit in question does not contain any of the matters sought to be cross-examined on. The said affidavit does not mention the stated KPMG Forensic Audit Report, CCTV project between Safaricom and the Government of Kenya, transmission of Election Results for the year 2013 General Elections in Kenya, protest call on Vodafone held in London May 2016 or refunds made to the subscribers on Safaricom network specifically relating to **“Cheza Games”** and the reasons for the same which matters the Defendant intends to cross-examine on.

13. The blog post in question is alleged to have been written by the Defendant. The Plaintiff’s submission is that the entire article is defamatory. In a suit of defamation, it is the Defendant’s duty to demonstrate the truth of the publication complained about. The Plaintiff’s burden is to demonstrate that the words would be understood by a reasonable man as being defamatory (See for example **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR** and **Miguna Miguna v Standard Group Ltd & 4 others [2017] eKLR**).

14. In conclusion, the five items listed in the Notice to cross- examine have not been demonstrated as relevant to the application at hand. Consequently, I find no merits in the Notice to cross-examine and dismiss the same with costs.

**Dated, signed and delivered in Nairobi this 30<sup>th</sup> day of April, 2020**

**B. THURANIRA JADEN**

**JUDGE**