



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 247 OF 2019

BENEDICT KABUGI NDUNG’U.....PETITIONER

VERSUS

SAFARICOM PLC.....RESPONDENT

RULING

1. This ruling addresses two applications. In the first application dated 21st June, 2019 which is brought pursuant to rules 7(c), 8, 4(2)(ii) & (iii), and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter simply referred to as the Mutunga Rules) and Section 4 of the Consumer Protection Act, the Petitioner, Benedict Kabugi Ndungu, seeks the following orders:-

A) THAT the Honourable Court be so pleased as to allow the Petitioner herein to advertise a Notice of Institution of this Petition in a local daily newspaper to all persons on whose behalf or whose benefit the Petition has been instituted calling them to apply to be made a party in this Petition.

B) THAT the Honourable Court be so pleased as to issue a mandatory injunction as against the Inspector General of National Police Service and the Director of the Department of Criminal Investigations, requiring the production before this court of the data of the 11,500,000 (Eleven Million, Five Hundred Thousand) estimated Safaricom subscribers confiscated on the 17th June, 2019.

C) THAT the Honourable Court be so pleased as to direct that the data produced by the Inspector General, National Police Service pursuant to prayer 2 above be deemed confidential and only accessible to the parties to this Petition.

D) THAT the costs of this application be in the cause.

2. The application which is supported by the grounds on its face and an affidavit sworn by the Petitioner on the date of the application is based on the grounds that the Petitioner who is a Safaricom subscriber occasionally used his mobile phone number to gamble. The Petitioner alleges that on 18th May, 2019 he was approached by an individual who indicated to him that he had data on at least 11,500,000 Safaricom subscribers specifically on betting trends. The Petitioner confirmed that the information was indeed correct and on 7th June, 2019 he assisted the police in arresting the said individual and his accomplice. The Petitioner avers that a criminal matter was filed in court with the Respondent, Safaricom PLC, being named as the complainant and the two arrested individuals who are the employees of the Respondent being the accused persons.

3. The Petitioner herein claims that the Respondent has taken no steps to inform the affected subscribers of the breach despite this being its duty to do so. He states that the affected subscribers have a right to be informed of the illegal access of their data, and should be granted the opportunity to be joined to this petition as it has been filed on their behalf.

4. The Petitioner asserts that the production of the requested data would be of paramount importance and help in the determination of the issues before the Court. Nevertheless, he urges the Court to deem the information confidential and the same be only accessible to the parties in the petition.

5. The Respondent opposed the application through a replying affidavit sworn by Daniel M. Ndaba on 8th July, 2019 in which it is deposed that the Petitioner had filed another suit being **Nairobi Judicial Review Miscellaneous Civil Application No. 198 of 2019, Benedict Kabugi Ndung’u v The Chief Magistrates Court & 3 others** over the same subject matter but the suit was subsequently withdrawn by the Petitioner by a notice of withdrawal filed on 24th June, 2019, which notice was adopted in open court on 3rd July, 2019. Further, that the Petitioner filed another suit on 25th June, 2019 being **Nairobi Judicial Review Miscellaneous Civil Application No. 204 of 2019, Benedict**

Kabugi Ndung'u v the Chief Magistrates Court & others over the same subject matter and wherein the Respondent is an Interested Party and the suit was slated for hearing on 15th October, 2019.

6. The Respondent avers that the Petitioner's present application does not provide any evidence to support the allegations, and therefore the application is speculative. It is further asserted that the Petitioner has failed to provide legal justification or basis to warrant the grant of the prayer to advertise the petition or to warrant prosecution of this matter as a class action suit or representative suit.

7. The Respondent further alleges that the current application is an abuse of the court process due to the multiplicity of suits filed concerning the same subject matter. Moreover, it is asserted that the reliefs sought by the Petitioner may cause a breach of Article 31 of the Constitution and Section 27A(3) of the Kenya Information and Communications Act, 1998. The Respondent therefore prays that the Petitioner's application be dismissed for lack of merit.

8. The second application was brought by the Respondent by way of a notice of motion dated 9th September, 2019 and supported by an affidavit sworn by Daniel M. Ndaba on 9th September, 2019. Through the application brought under rules 3 (3), (4), (5) & (8) and 19 of the Mutunga Rules, the Respondent prays for the following orders:-

a) This application be certified urgent and service be dispensed with in the first instance.

b) The application be fixed for hearing on 23rd October 2019 and in any event, in priority to any other application filed in the Petition.

c) The Petition dated 21st June 2019 be struck out for being founded on an illegality and for being an abuse of the court process.

d) In the alternative and without prejudice to prayer (3) above, there be a stay of these proceedings pending the hearing and determination of Nairobi Chief Magistrate Court Criminal Case No. 979 of 2019; R -v- Benedict Kabugi Ndungu.

e) The costs of this application and of the struck out Petition be awarded to the Respondent.

9. The Respondent's case is that although the petition seeks compensation based on alleged violation of the Petitioner's right to privacy, the truth of the matter is that his knowledge and possession of the data in question was a result of criminal activities that he fully participated in or was an accessory to. It is the Respondent's case that as a result of the said criminal activities, the Petitioner has been charged with the offence of demanding money by menaces contrary to Section 302 of the Penal Code, Cap. 63 in **Nairobi Chief Magistrates Court Criminal Case No. 979 of 2019, R v Benedict Kabugi Ndungu**.

10. The Respondent avers that there is overwhelming evidence by witnesses proving that the Petitioner actively participated in the perpetration of the criminal offence that led to his possession or sighting of the data. Further, that the Petitioner in an attempt to stay the criminal case has filed **Nairobi High Court Judicial Review Application No. 204 of 2019, Benedict Kabugi Ndungu v Chief Magistrate's Court Nairobi & others**, and that no orders have been issued to stay the criminal case.

11. The Respondent avers that the Petitioner should not be allowed to prosecute a petition through which he seeks to benefit from his own illegal and criminal conduct until the criminal case is concluded. The Respondent contends that unless the petition is stayed, the Petitioner will continue to use it as a means to interfere with his prosecution in the criminal case.

12. The Petitioner opposed the Respondent's application through a replying affidavit sworn on 22nd October 2019, in which he deposes that the affidavit sworn by Daniel M. Ndaba in support of the application contains speculative and unverified averments, and is fatally defective and bad in law as it offends the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 (CPR). The Petitioner alleges that the Respondent is guilty of distortion, non-disclosure, and concealment of material facts relating to the existence and pendency of **Nairobi High Court Civil Suit No. 194 of 2019, Safaricom PLC v Simon Billy Kinuthia, Brian Wamatu Njoroge & Benedict Kabugi Ndungu**. It is alleged that in the above civil suit the Respondent has distorted certain material facts in order to circumvent the proceedings in the instant petition.

13. The Petitioner asserts that the petition herein cannot be deemed an abuse of the process of the court by the mere existence of the criminal case against him as the substance or issues in the current petition are patently different from those in the criminal case and cannot possibly be litigated under the same cause. Further, that the parties in the two suits are different.

14. The Petitioner denies any criminal conduct and maintains that the allegations against him have not been proven before the trial court. He asserts that the Respondent's application has been brought in bad faith and is an abuse of the process of the court.

15. The Petitioner filed written submissions dated 4th March, 2020. On his prayer for the publication of the petition and invitation of interested parties to join the same, the Petitioner submits that this petition is a representative suit brought on behalf of and for the benefit of millions of Safaricom subscribers who use their lines for gambling. It is asserted that the Petitioner has a mandatory obligation under Order 1 Rule 8 of the CPR to give notice of institution of the suit to all persons who have the same interest in the proceedings. Reliance is placed on the decision in case of **Rose Florence Wanjiru v Standard Chartered Bank of Kenya Limited & 2 others [2014] eKLR** where Gikonyo, J postulated on the mandatory nature of Order 1 Rule 8 of the CPR. The Petitioner contends that the Court is also mandated by Rule 9(1) of the Mutunga Rules to direct that a notice of institution of the petition be published.

16. As to whether the Respondent has met the threshold for striking out his petition, the Petitioner asserts that the Mutunga Rules relied on

by the Respondent in its application have no provision for striking out pleadings. It is submitted that the provisions of the Rules relied on by the Respondent all tilt in favour of the Petitioner being afforded a fair hearing on the merits of his petition. Furthermore, the Court is urged to keep in mind the overriding objective of promoting access to justice. The Petitioner cites the case of **Gerald Iha Thoya v Chiriba Daniel Chai & another [2018] eKLR** where it was held that the striking out of pleadings should only occur if they are defective.

17. It is further submitted that the Respondent cannot benefit from the Court's discretion where there has been willful concealment and non-disclosure of material facts namely that the Petitioner informed the Respondent of the irregular and unlawful disclosure of subscriber data; and the existence and pendency of **Nairobi High Court Civil Suit No. 194 of 2019 Safaricom PLC v Simon Billy Kinuthia, Brian Wamatu Njoroge & Benedict Kabugi Ndungu**. It is further alleged that the Respondent has distorted material facts in the above referenced civil suit. The Petitioner contends that the Court risks embarrassment and disrepute should it grant the orders sought by the Respondent based on contradictory averments.

18. On the Respondent's alternative prayer for stay of the petition pending the hearing and determination of **Nairobi Chief Magistrates Court Criminal Case No. 979 of 2019R v Benedict Kabugi Ndungu**, it is submitted that the Respondent has failed to meet the threshold for stay of the instant proceedings. The Petitioner submits that the threshold for stay of proceedings is high as it impinges on a party's rights to access justice and to be heard without delay. The Petitioner additionally asserts that the mere existence of the criminal case against him does not render the instant petition an abuse of the court process on grounds that the issues are different; that the issues before this Court and those under the criminal case cannot be litigated under the same cause; that the parties in the current petition and the criminal suit are not the same; and that the reliefs sought in the instant petition are not those sought in the criminal case.

19. The Petitioner asserts that the Respondent has prosecuted him, and delivered a guilty verdict in disregard to his right to a fair hearing under Article 50(2) of the Constitution. He urges that the allegations against him in the criminal case must be proven beyond reasonable doubt. The Petitioner urges the Court to exercise the powers conferred under Rule 3(8) of the Mutunga Rules to issue an order dismissing the Respondent's prayer for stay of these proceedings.

20. The Respondent filed submissions dated 17th February, 2020 and submits in response to the Petitioner's application that the first prayer is framed in a purely speculative manner and hence cannot succeed. The Respondent cites the decision in **Civil Appeal No. 292 of 2001, Yiapas Ole Seese & 4 others v Sakita Ole Narok and 2 others**, and urges the Court to find that the Petitioner has not disclosed any person on whose behalf he has filed the present petition and to whom notice should be given. The Respondent additionally contends that the Petitioner's second prayer seeks orders against persons who are not parties before this Court and the prayer should therefore fail.

21. In support of its own application, the Respondent submits that the same has merit on the ground that the basis of the Petitioner's claim and cause of action is data which was obtained irregularly resulting in a criminal action. The Court is urged to adopt the holding in **Civil Appeal No. 67 of 2014, Kenya Pipeline Co. Limited v Glencore Energy (UK) Limited** that the Constitution does not protect rights which are acquired through a violation of the law.

22. The Respondent contends that the Petitioner has expressly disclosed that he obtained the subject data from individuals who stole or irregularly obtained the same from the Respondent. The Respondent submits that the Petitioner's admission that the subject data was obtained from the Respondent and refusal to name the persons who gave the data to him breaches Section 27 of the Kenya Information and Communication Act, 1998.

23. The Court is further urged to adopt the holding in **E&LR Cause No. 604 of 2015, Dock Workers Union v Kenya Ports Authority** that no person should benefit from their own act of wrongdoing. The Respondent consequently prays that the petition be struck out with costs.

24. Upon a perusal of the applications, the responses thereto and the submissions in support of the same, it emerges that the issue for the determination of the Court is whether both, any or none of the applications should be allowed.

25. The Respondent claims that the Petitioner has instituted several suits being **Nairobi Judicial Review Miscellaneous Civil Application No. 198 of 2019, Benedict Kabugi Ndung'u v The Chief Magistrates Court & 3 others** (which was subsequently withdrawn), and **Nairobi Judicial Review Miscellaneous Civil Application No. 204 of 2019, Benedict Kabugi Ndung'u v The Chief Magistrates Court & others** in pursuance of issues similar to those placed before this Court through this petition.

26. On the matter of the withdrawal of **JR Misc. Civil Application No. 198 of 2019**, Order 25 Rule 1 of the CPR explicitly provides that:-

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

[Emphasis added]

27. In light of the above provision, where a party withdraws a suit or part thereof, such withdrawal shall not hinder the party from instituting fresh proceedings on the same subject matter. Therefore there is no multiplicity of suits based on the withdrawn petition. It is also noted that a withdrawn suit cannot be the basis for accusing a party of filing a multiplicity of suits since the law allows for withdrawal and re-filing of a claim.

28. On the matter of *res sub judice*, Section 6 of the Civil Procedure Act, Cap. 21 (CPA) states as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of

them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

29. I have perused the application of the Petitioner in **JR Misc. Civil Application No. 204 of 2019** which is among the annexures to the Respondent’s replying affidavit dated 8th July, 2019 and note that although both applications stem from the same events, it is evident that they raise wholly different issues. It is apparent that the judicial review application seeks to quash the Petitioner’s criminal trial. On the other hand, the Petitioner is seeking wholly different orders in the petition before this Court.

30. Although there is no *res sub judice* in respect of the judicial review application and this petition, I find that there exists a nexus between the instant matter and **Nairobi Chief Magistrates Court Criminal Case No. 979 of 2019, R v Benedict Kabugi Ndungu**. Having read the Petitioner’s replying affidavit dated 22nd October, 2019, and his submissions dated 4th March, 2020, it is clear that the Petitioner has raised certain issues that should be raised before the Court trying the criminal matter. It appears the Petitioner is building a defence for the criminal case through these proceedings.

31. In paragraph 9 of the replying affidavit he raises the argument that:-

“THAT contrary to the fabricated and empty averment by the Respondent/Applicant I was never an accessory to nor a participant in the purported criminal activities leading to irregular and unlawful disclosure of subscriber data held by the Respondent/Applicant.”

32. In paragraph 13 of the replying affidavit and paragraph 32(a) of his submissions, he states that:-

“The Respondent/Applicant has failed to disclose that I am the person who informed it of the irregular and unlawful disclosure of subscriber data.”

33. The Petitioner has raised issues that should form part of his defence and which allude to his innocence. It would, therefore, be difficult for this Court to adjudicate on this matter fairly as the same would have an impact on the criminal case which was filed prior to this petition.

34. In the case of **Republic v Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & another [2002] eKLR**, the Court cited with approval the holding in **H. C. Misc. Appl. 839 and 1088/99 Vincent Kibiego Saina v Attorney-General** that:-

“So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice. No one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth.”

35. The opposite can be said in light of the Petitioner’s petition. It is evident the Petitioner has attempted to raise a defence in this petition by denying his involvement in the criminal activity that he has been accused of. This points to his attempt to use this civil case to help advance his defence in his criminal case, as any decision made by this Court will have a direct impact on the criminal case against him. The Petitioner herein cannot use a civil case for ulterior motives as the same would be an abuse of the process of the court. Any decision made in this petition will be binding upon the magistrate’s court and such decision may work against or in favour of the Petitioner.

36. This Court has an overriding objective as laid out in sections 1A and 1B of the CPA to ensure that it facilitates the just and proportionate resolution of disputes. Although the petition herein can be termed an abuse of the court process for seeking a defence to the criminal case facing the Petitioner, I will not apply a heavy hand by striking out this petition. Let it await the determination of the criminal trial and the Petitioner can proceed with it in the manner he deems fit after the conclusion of the criminal case. In arriving at this position, I am conscious of the fact that the presumption of innocence is an integral part of the due process in criminal cases. The criminal proceedings against the Petitioner have not been concluded and therefore he is still presumed innocent until the prosecution proves otherwise. The alternative prayer in the Respondent’s application is therefore allowed so that this petition is stayed pending the hearing and determination of **Nairobi Chief Magistrates Court Criminal Case No. 979 of 2019, R v Benedict Kabugi Ndungu**.

37. Having allowed the Respondent’s application, it follows that the Petitioner’s application should be stayed awaiting the outcome of criminal trial. In case the Petitioner’s application succeeds at this stage, third parties will be invited to join proceedings which have already been frozen by an order of this Court. The Petitioner’s application dated 21st June, 2019 is therefore put in abeyance. Therefore, the Petitioner’s application and the petition shall be stayed in accordance with Section 6 of the CPA until the criminal case against him is heard and determined.

38. In summary therefore, the Petitioner’s application dated 21st June, 2019 is stayed pending his trial in **Nairobi Chief Magistrates Court Criminal Case No. 979 of 2019, R v Benedict Kabugi Ndungu**. On the other hand, the Respondent’s application dated 9th September, 2019 succeeds so that these proceedings are stayed pending the hearing and determination of the Petitioner’s aforesaid criminal case. The costs for the Respondent’s application shall abide the outcome of this petition.

Dated, signed and delivered at Nairobi through video conferencing/email this 30th day of July, 2020.

W. Korir,

Judge

of

the

High

Court