



DYER & BLAIR BANK LTD.....PLAINTIFF/RESPONDENT

- VERSUS -

EQUITY BANK LTD.....DEFENDANT/2ND RESPONDENT

THOMAS KABAKI WAMAE.....THIRD PARTY/3RDRESPONDENT

R U L I N G

1. By a **Notice of Motion** application dated **21st May 2012** and brought pursuant to **Sections 22 (b) and 23** of the **Civil Procedure Act** and the relevant provisions of the **Kenya Information and Communication Act, Cap 411 A, Article 35 (1) and 50 (1)** of the **Constitution**, the Defendant sought the following substantive orders:-

1. That the court be pleased to issue witness summons against Mr. Joseph Mwaura Kamau compelling the said person to attend and testify at the hearing of **HCCC No. 26 of 2009** scheduled for **27th June 2012** or any other date.

2. That this court be pleased to issue witness summons against the Chief Executive Officer, Safaricom Limited, compelling the said person to attend and testify at the hearing of **HCCC No. 26 of 2009** scheduled for the **27th June 2012**, or any other date and to tender in evidence the SMS Transcripts and Call Records for the **12th and 13th May 2008**, as well as proof of ownership of mobile phone number **0722-670320** and **0722-681929**.

2. The application is based on the grounds set out therein and was supported by affidavit of **JOYCE MUNENE** dated **21st May 2012**.

3. Briefly, the history of the application is that the Plaintiff herein instituted a suit - this suit - against the Defendant alleging that an unauthorized/negligent payment totaling **Kshs.26,250,250.00** had been effected from the Plaintiff's account number [**particulars withheld**] by the Defendant and/or its agents, officers, servants and lawful assigns on or about the **13th of May 2008**. The premise of the Defendant's case is that the alleged unauthorized transfer of funds was indeed properly authorized by the **3rd party/2nd Respondent** herein who was a Director and Signatory to the account with the Defendant Bank at all material times, and in accordance with the signing mandate in the Plaintiff's account opening forms and subsequent signing mandates. Further the Defendant alleges that the said authorization was obtained by Mr. Joseph Mwaura Kamau, the then Operatives Manager – Equity Bank Limited Prestige Branch, who made calls and sent short text messages services (SMS) to mobile phone numbers availed by the Plaintiff during the account opening.

The Safaricom Limited being the service provider with whom the said mobile phone numbers were registered and are also the proprietors and custodians of the system through which the calls were made and text messages sent out, ought to avail and tender in evidence the transcripts of the said text messages and call records to verify that indeed these correspondences were made between the Defendant Bank's employees and the **3rd party** for and on behalf of the Plaintiff.

4. The application which is an *ex-parte* process, was certified urgent by this court and granted as prayed.
5. While the order of the application was complied with and Mr. Joseph Mwaura Kamau duly testified in court on **27th June 2012**, Safaricom Limited challenged **Order Number 2** and vide a Notice of Motion application dated **25th June 2012**, sought, *inter-a-alia* the following orders:-
 1. That the court be pleased to issue an order that the Applicant be joined to these proceedings as an Interested Party in so far only as this court's orders of **22nd May 2012** and consequential orders thereof affect the Applicant.
 2. That there be a temporary stay of execution of the order dated **22nd May 2012** pending *inter-partes* hearing and determination of this application.
 3. That the court be pleased to review and set aside its order dated **22nd May 2012** summoning the Applicant's Chief Executive Officer to attend court on **27th June 2012** to produce the records and details of text messages and/or all communication between telephone numbers **0722-670320** and **0722-681928** on **12th** and **13th May 2008**.
 4. That the affidavit accompanying this application is sufficient and satisfactory for purposes of **Section 22 (a)** of the **Civil Procedure Act**.
 5. That in the alternative and without prejudice to the foregoing the Applicant be allowed to adduce any proof required by way of sworn evidence by an officer of the Applicant Company conversant with the Applicant's communication systems.
 6. That costs of this application be borne by the Defendant.
6. This, then, is the application before the court. Mr. Simiyu for the Interested Party/Applicant submitted that due to system constraints the Applicant does not keep the transcript of text messages or maintain call records and communications between its subscribers and/or users of its network after a period of 90 days. He submitted further that even if the required information were in the system, the Applicant is not allowed by law to release telephone or subscriber records. He cited **Article 31 (d)** of the **Constitution** in support of that submission. He further submitted that if the court found that the Interested Party is compellable then it must be demonstrated that the Interested party was privy to the wrongs that the person whose telephone numbers are subject to these proceedings are alleged to have committed. In support thereof he cited the authorities of **JOHN & OTHERS – VS – EXPRESS NEWSPAPERS PLC & OTHERS, COURT OF APPEAL, CIVIL DIVISION ALL ENGLAND LAW REPORTS 2000 257**. He also cited **ASHWORTH HOSPITAL AUTHORITY – VS – MGN LTD**.
7. In reply, Mr. Lico for the Applicant/Defendant dismissed, and in my view, rightly so, the above authorities as having no bearing in the present matter. Those authorities address disclosure of information in relation to journalistic sources. In my view those authorities were submitted with the sole purpose of misleading this court. Mr. Lico further dismissed, again rightly so in my view, the submission that for the Interested Party to disclose the required information the Interested Party must be shown to have been privy to the alleged wrong doing.
8. This leaves me with the submission that to order the disclosure would be against the law.

Mr. Lico submitted that the rights established under **Article 31 (d)** are limited by **Article 24 (3)** of the **Constitution**.

Article 31 (d) states:-

“Every person has the right to privacy, which includes the right not to have -

the privacy of their communications infringed.”

Article 24 (3) states:-

“The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.”

9. My understanding of **Article 24** generally is that it deals with limitations of rights where such limitation is justifiable. Under Article 24 (3) the emphasis is on justification. Mr. Lico submitted that in the matter before the court the requirement for justification has been met. I entirely agree that the matter before the court is peculiar enough to warrant the limitation of the rights under **Article 31 (d)**, and that the Interested Party is not protected under the Constitution in regard to the Defendant’s application. However, I am more concerned with the Interested Party’s submission that it does not keep records due to alleged system’s constraints, and that the messages are automatically deleted after **90 days**. As observed by Mr. Lico these are submissions from the bar with absolutely no support. The interested Party has made absolutely no attempt to explain these system constraints. However, I have got it loud and clear that the information required by the Defendant/Applicant is simply not available. In my view, this is a compelling case to issue the orders required by the Applicant. But court orders are not given in vain. There is a purpose to be achieved by a court order. If the achievement of that purpose is remote or impossible a court order cannot issue. The Interested Party says that the information is simply not there. It is now upon the Defendant/Applicant to show me that the said information is actually available.

10. In the circumstances, I make the following orders:-

a) The Applicant be and is hereby joined to these proceedings as an Interested Party for the purposes of this court’s orders of **22nd May 2012**.

b) So that parties are given further opportunity to submit on the issue, the Interested Party is hereby allowed to adduce any proof required by way of sworn evidence by an officer of the Interested party Company conversant with the Interested Party’s Communications Systems in terms of prayer **number 7** of the Interested Party’s application.

c) Parties to bear own costs.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 19TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA

JUDGE
PRESENT:

Mbaluto H/B for Kirimi for the Plaintiff/Respondent

Anam H/B for Lico for the Defendant/1st Respondent

Mbaluto for the Third Party/2nd Respondent

Weteba H/B for Simiyu for Proposed Interested Party

Teresia – Court Clerk