



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 167 OF 2011**

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

**VERSUS**

**PORTING ACCESS KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**PATRICK MWEU MUSIMBA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff has filed the suit which claims damages for libel and slander for publishing words and statement averred to be defamatory of the Plaintiff on 26<sup>th</sup> April, 2011 and 28<sup>th</sup> April, 2011 to cite these two publications may be apposite.

***“Only eleven thousand people so far have successfully changed their networks out of at least forty three thousand who have attempted to do so. The clearing house in charge of the number portability process, Porting Access says that the majority of these subscribers are on Safaricom and the network is dragging its feet in releasing them. The firm’s Chairman Doctor Patrick Musimba spoke to NTV’s Larry Madowo on this afternoon’s Prime Live calling for regulatory intervention .....***

***And this actually amounts to for lack of better terms, you know, cyber terrorism and its actually goes against the law. And this is what is being experienced currently. So, for instance, out of forty three thousand people who have made requests, we have only passed through eleven thousand requests, are the once which have been effectively been ported .... The balance again, within that 48 hour period the operators didn’t do what they are supposed to do. Those ported are still not receiving total service, which as I have said to you goes against the law, you know the interconnect and numbering agreement.... [Where they deliberately delaying and in some instances even sabotaging people who want to leave the networks?] Yes. Yes. It comes as a shock, you know really, that world class companies and specifically, we know how, coz we have received, we have analyzed a lot of complaints and really, the bigger burden is lying with Vodafone Safaricom, when you find a lot, majority, may say ninety eight odd percent of the porting requests are being negated by them and they are actually at the forefront of refusing for these customers to go through ....”***

*“Now we are having a situation where all this is actually being escalated. And a lot of you know, consultations have already been taking place in terms of reconciliation to try and identify. But we have been very clear because we are the central house as to where the burden of the problem lies. And that is why we stated earlier. It actually lies with Vodafone Safaricom. That they are the ones who are not facilitating for these ports to go through. Because between the other operators if you look at the statistics, they are moving seamlessly. But if you are having an incidence where if you have left Safaricom, not only are you not getting all services, coz if you sent say for instance a text message from any other operator, it does not deliver except from the operator you move to ...”*

The Plaintiff also seeks prayer for injunction.

Along with the Plaintiff, the Plaintiff has filed a Notice of Motion premised under sections 1, 1A, 1B, 3, 3A, 63 (c) and (e) of Civil Procedure Act and Order 40 Rules 1, 2, 4 and 8 and Order 51 Rule 1 of Civil Procedure Rules, 2010.

An Interim Order dated 6<sup>th</sup> May, 2011 was issued restraining the Defendants from further publishing or causing to be published any words and statements accusing, linking or associating the Plaintiff with sabotaging Mobile Number Portability process or any words and statements similarly defamatory of the Plaintiff in the implementation of Mobile Number Portability process.

The said Notice of Motion is now heard interparte seeking similar order pending hearing and determination of the suit.

The application is supported by the grounds set out on the application, supporting affidavit of Stephen Chege sworn on 6<sup>th</sup> May, 2011 and supplementary affidavit sworn by Collins Ogotu on 26<sup>th</sup> May, 2011.

The Defendants have opposed the application and has filed three affidavits all sworn by Patrick Mwaui Musimba, namely: - replying affidavit sworn on unspecified date of 2011, further affidavit sworn on 30<sup>th</sup> May, 2011 and Supplementary affidavit sworn on 15<sup>th</sup> June, 2011 (the date when the application was fixed for hearing and was heard interparte). The last affidavit contained the Audit Report from Communication Commission of Kenya (May, 2011) on the implementation of Mobile Number Portability (hereinafter referred to as “MNP”). The Plaintiff’s counsel did not object to this affidavit which was filed without leave of the court and both counsel referred to and relied on this report.

The pleadings in the suit are closed, the Defendant having filed Defence and Counterclaim and the same having been responded by the Plaintiff.

Some facts leading to the application are undisputed and I shall state them before dealing with the issues raised before the court.

The Plaintiff is a public limited liability company incorporated in the country which runs the business of mobile phone operator having highest subscriber base in Kenya.

Together with other mobile service operators namely Airtel Network Kenya Ltd., Essar Telkom Kenya Ltd., Telkom Kenya Ltd., the Plaintiff entered into an agreement dated 17<sup>th</sup> December, 2010 with 1<sup>st</sup> Defendant entitled Mobile Number Portability Services Agreement (MNP Agreement). All the operators (mentioned hereinabove), by the said MNP Agreement, appointed the 1<sup>st</sup> Defendant to implement MNP Administration System and Central Number Database for Kenya and to provide some other services provided in the MNP Agreement.

In consideration of the services to be provided by the 1<sup>st</sup> Defendant the operators were to pay fees as stipulated in the Agreement.

The obligations of parties are stipulated:-

#### **OPERATORS’ OBLIGATION**

***The Operators will:***

- 5.1 Review their various interconnection agreements and revise the same to facilitate the implementation of the MNP Service;***
- 5.2 Direct any queries and issues regarding the MNP System and Services directly to Porting Access at [info@portingxs.co.ke](mailto:info@portingxs.co.ke);***
- 5.3 Make timely adjustments to their Systems as required for implementation of the MNP Service;***
- 5.4 Provide Porting Access with access to their respective Operator Short message Services Center (SMSC) for the end-to-end testing;***
- 5.5 Undertake the necessary testing on the Extensible Markup Language (XML) messages at the earliest moment;***
- 5.6 Make use of Porting Access support resources in a qualitative way;***
- 5.7 Participate actively in the Operator end to end test and be willing to exchange test Subscriber Identity Module (SIM) cards for doing live tests with test numbers; and***
- 5.8 Co-operate and work together with other operators according to this Agreement.***

#### **OBLIGATIONS OF PORTING ACCESS**

***Porting Access shall:***

- 6.1 Provide a test System for Operators to use manually or automatically;***
- 6.2 Provide technical documentation for interface purposes (web service);***
- 6.3 Provide the necessary support to the Operators for making connection available between the Operators' platform and MNP System;***
- 6.4 Deliver a production environment at the agreed going live date;***
- 6.5 Provide a local support team to work with the Operators to ensure MNP Go Live Date is achieved; and***

## **6.6 Provide necessary maintenance and support as set out in the Service Level Agreement (SLA)**

I have specified in detail the obligations as the Plaintiff has relied on the 1<sup>st</sup> obligation of the 1<sup>st</sup> Defendant to provide a test system for operators to use manually or automatically. I shall also make specific note of obligation number 5.3 of the Plaintiff namely **timely adjustment to their systems** as required for implementation of MNP services.

The first Defendant, after going through successfully the procurement process of tender by CCK, was awarded the licence for the provisions of MNP services in Kenya. Hence the agreement was entered into as specified hereinabove.

The 1<sup>st</sup> Defendant has agreed the impugned publications except the passage quoted in paragraph 5 (1) of the Defence.

***It is denied that the Defendants published or caused to be published the following words:***

***“Only eleven thousand people so far have successfully changed their networks out of at least four thousand three thousand people who have attempted to do so. The clearing house in charge of the number portability process, Porting Access says that the majority of these subscribers are on Safaricom and the network is dragging its feet in releasing them. The firm’s Chairman Doctor Patrick Musimba spoke to NTV’s Larry Madowo on this afternoon’s Prime Live calling for regulatory intervention ....”***

***“[Were they deliberately delaying and in some instances sabotaging people who want to leave the networks]?”***

It has defended the remaining publications by stating that the words were not defamatory, that so far as the words consist of statements of fact, they are true in substance and so far as they consist of expression of opinion, they are fair comment on a matter of public interest and the Defendants were justified to utter them.

In the Counter-claim, the Defendants have averred the allegations of words uttered by the Plaintiff which were defamatory of the 1<sup>st</sup> Defendant and claims similar prayers to those claimed in the Plaint. However, no interim orders are sought for.

The effective date i.e. ‘Go Live Date’ for the operation to the Agreement was agreed to be extended to 1<sup>st</sup> April, 2011, which was originally Scheduled for 31<sup>st</sup> December 2010. The Replying affidavit annexes several meetings held between the operators and the 1<sup>st</sup> Defendant.

I can state at this stage that the reliance by the 1<sup>st</sup> Defendant on the interconnection guidelines of 18<sup>th</sup> June, 1999 (PNM1) do not apply to this matter as they do not apply to the MNP System which is in the issue before the court. The document is effective for South Africa.

With the above introductory background, I shall now deal with the submissions made by both the learned counsel.

Mr. Havi, the learned counsel for the Plaintiff, stressed on the words ‘*cyber terrorism*’ ‘*sabotage*’ and ‘*against the law*’ uttered in the impugned publications and contended that these words are per se defamatory.

It was clarified that the averments made in paragraph 7 to 10 of the replying affidavit are based on a wrong guidelines annexed as PMM1. He submitted rightly that those guidelines are from the South Africa

Authority. I have also observed hereinabove that the contents of those guidelines are irrelevant. Thus I find that the averments that the Plaintiff has breached the guidelines from CCK are not substantiated.

I would also add that the Agreement between the parties, as is specified in earlier part of this Ruling, does allow the option of manual process which the Plaintiff had initially adopted and installed the same before other operators as indicated in meetings of February 2011. No objections to such installation were raised by other operators who had not put in place the system upto around February, 2011. The 1<sup>st</sup> Defendant also did not raise any objection. It was the Plaintiff which, on its own motion, stated in the meeting of 12<sup>th</sup> April, 2011 that the delays for seamless flow had also been experienced from other networks and further indicated that the reason, why the numbers were not deactivated on their platform and that the ported out numbers were unreachable from Safaricom network, was the installation and the implementation of a manual order process system and also due to the fact of breakdown in the system. The Plaintiff further stated that it has realized that the manual system was not sustainable and committed to have all necessary resources in place to resolve technical issues expeditiously.

In the special working group meeting on MNP held on 26<sup>th</sup> April, 2011, it was stated by the Plaintiff that *“clearing of backlog in progress – migration to the automated process ongoing with need to meet maximum 24 hours port process”*.

On 27<sup>th</sup> April, 2011 Technical team of all concerned parties met and it was recognized that ‘Awaiting SMS’ status on the Porting Access interface could be due to three reasons specified in the Report of the said meeting namely:-

***“The meeting recognized that the “Awaiting SMS” status on the Portal Access interface would have been due to any one of the following reasons:***

- 1. The subscriber did not send the SMS to 1501***
- 2. The text of the SMS was incorrect***
- 3. The SMS to 1501 was not delivered to Porting Access by the donor operator***

***The meeting however did not conclusively reconcile the porting data because of the following reasons***

- 1. Porting Access did not have the full dump of all porting authorization requests against which the reconciliation was supposed to have been done.***
- 2. Operators’ records presented only captured the SMS delivery segment from respective operator SMSCs towards Porting Access, without capturing potential failures before the SMSC.”***

After these observations, all the parties agreed as a way forward to have test/audit on the operators carried out including the plaintiff.

Then the 1<sup>st</sup> Defendant received copy of the letter dated 28<sup>th</sup> April, 2011 from Airtel addressed to Director General, CCK. It complained *inter alia* that it was inconceivable that a large operator like the Plaintiff was unable to fix network components within a period of one month to facilitate a seamless customer transfer while other smaller networks were able to offer such service.

It is also shown that there have been exchange of expressions in the media over the issue of MNP

amongst Airtel, Plaintiff, 1<sup>st</sup> Defendant and CCK upto 4<sup>th</sup> May, 2011.

My attention was drawn by Mr. Havi on a media publication of 14<sup>th</sup> April, 2011 wherein CCK has ruled out any sabotage among operators in implementation of MNP as had been reported in media.

It was also stressed that the issue of installation of automation process system was directed by CCK only when it made its Audit Report of May, 2011. (Annexure PMM 1 in Supplementary affidavit of 2<sup>nd</sup> Defendant sworn on 15<sup>th</sup> June, 2011). Further, it was reiterated that the Agreement gave option to operators to choose between manual and automated system. In the said report, it is also specified that the Plaintiff had installed and commissioned a fully automated system and that as at 13<sup>th</sup> May, 2011 all operators were required to queue 'SMS' destined to the CRDB in the event of a link failure between themselves and Porting Access.

Mr. Havi also asked the court to make a note that as at 26<sup>th</sup> April, 2011 the Plaintiff offered to have the test/audit of its system and posed a question could that offer be coming from a saboteur? (page 211 of the Plaintiff's bundle of documents). 1<sup>st</sup> Defendant thereafter published the impugned statement.

A Notice dated 29<sup>th</sup> April, 2011 was sent to the Defendant through the office of its advocate and the same was responded by M/s Kaplan & Stratton Advocate vide their letter dated 3<sup>rd</sup> May, 2011 asking the counsel to serve the summons of the intended suit to their offices.

A press statement of 5<sup>th</sup> May, 2011 from the 1<sup>st</sup> Defendant is also annexed on page 308 of the Bundle of documents from the Plaintiff which stated inter alia:-

***It is misleading for Safaricom to state that MNP was implemented after a single week of technical testing, Safaricom showed unwillingness to take part early as the MNP platform was ready from 17<sup>th</sup> December, 2010 which provided for 12 weeks of testing availability as agreed by all operators in the legal and technical working groups of which culminated to the signing ceremony open to all.***

***Safaricom in its own admission hold significant resources and need to sort out 'teething problems' especially when despite the technical agreement that ALL operators deploy AUTOMATED system, they have elected to deploy a manual one till date despite the fact that its partner Vodafone has significant experience in the rolling out MNP having participated actively in majority of the 62 countries worldwide that have implanted MNP successfully.***

***Consultations on MNP begun in 2004 and were license conditions as from 1998 in line with Communication Act.***

It was thus submitted that the adverse publication of the Plaintiff has continued on the part of the 1<sup>st</sup> defendant even after the demand letter.

In view of the aforesaid, it was submitted that the Plaintiff has satisfied the requirements of the order of Interim Injunction in this case of defamation.

It was admitted though that the court shall exercise its discretion to give such orders very sparingly in view of the Right of Freedom of Expression of Media.

The publications of the impugned passages were, however, infringing the Plaintiff's rights and reputation which need to be protected.

The Freedom of Expression as provided in Article 33 of the Constitution is not absolute and Article 33 (3) was relied upon, which stipulates:-

**“(3) In the exercise of the right to freedom of expression every person shall respect the rights and reputation of others.”**

He relied on the four requirements specified in Gately’s book of **Libel and Slander** on page 934, paragraph 272.

Lord Esher M.R. in **Coulson –vs- Coulson (1887) 3 TLR 846**, observed that the court will grant an interim injunction, when,

- (1) The statement is unarguably defamatory.
- (2) There are no grounds for concluding that the statement may be true.
- (3) There is no other defence which might succeed.
- (4) There is evidence of an intention to repeat or publish the defamatory statement

The three words emphasized hereinabove namely, ‘**cyber terrorism**’, ‘**unlawful act**’ and ‘**sabotage**’ were defamatory of the Plaintiff and the first ingredient of the criteria specified in **Gately’s Book (supra)** is thus fulfilled.

On this ground, it was brought to the court’s notice an e-mail message dated 3<sup>rd</sup> May, 2011 from the 1<sup>st</sup> Defendant’s Project Manager which *inter alia* stated that, “**even after several SMS tests, it was not clear as at that date why all text messages are not delivered to the Porting xs system**” and a new method of handling was suggested. (Page 279 of the Plaintiff’s bundle of documents).

It was then contended that as per the aforesaid facts, as well as looking at the letter dated 5<sup>th</sup> May, 2011 from CCK which specifically raised concern on the public announcements made by participating entities and wherein it was directed that all parties should channel any complaints to CCK in accordance with laid down procedures which would induce conducive environment, the Defence for justification or opinion by way of fair comment does not enure to the Defendant at this stage and, moreover, it was stressed that considering the facts before the court, the averred right to make fair comment in the public interest is doubtful.

Furthermore, principle of hearsay and repetition in the law of defamation was stressed and it was contended that the 1<sup>st</sup> Defendant relying only on the letter from Airtel dated 28<sup>th</sup> April, 2011 (Annexure PMM (2) of Replying affidavit) went out to the media and published the defamatory words. It is trite law that the repetition of rumour is a libel itself. The two cases were relied upon, namely:-

(1) **Lewis & Another –vs- Daily Telegraph Ltd. (1963) 2 ALL ER 151.**

In that case the passage of Blackburn J. in **Watkins –vs- Hall (1868) LR 3QB at 401** was cited wherein it was found *inter alia*:

**“If one repeats a rumor one adds one’s own authority to it, and implies that it is well founded, that is to say, it is true”**

(2)**Stern –vs- Piper** ALL ER (1996) Vol. 385 at 388 Wherein it was observed by Hirst L. J.

***“The Plaintiff relied on the well-established rule of the law of justification that “it is no defence to an action for defamation for the Defendant to prove that he was merely repeating what he had been told ----- I shall refer to this as ‘the repetition rule’”***

Mr. Ojiambo tried to distinguish the first authority (Lewis’ case) by stating that the point involved was that of an innuendo and the second case by observing that the 1<sup>st</sup> Defendant did not repeat and stressed on words of 2<sup>nd</sup> paragraph of publication in issue of 26<sup>th</sup> April, 2011 namely –

***“Those portal are still not receiving total services which as I said to you goes against the law. You know the interconnect and numbering agreement ----- (were they deliberating and in some instances even sabotaging people who want to leave the networks). Yes. Yes. It comes as a shock .....”***

Mr. Ojiambo thus suggested that the words “sabotaging” stated in bracketed sentence were from the Reporters and not from the 1<sup>st</sup> Defendant. He contended that it was not repetition but only acknowledgement. At this stage, however, I shall not make the final determination on the distinction between repetition and acknowledgment and the effect thereof as per the Law of Defamation. But I would definitely say that an acknowledgment might also be considered equivalent to giving authentication to what was suggested. I would not make any further observation on whether the word “Yes” from the 1<sup>st</sup> Defendant would mean approval or authentication or acknowledgement or repetition!!! One thing is very clear that by saying “Yes” to those suggestions the 1<sup>st</sup> Defendant has agreed to or has carried forward the suggestion. In other words responding to the suggestion posed by someone else in affirmative can be termed as an agreement. I cannot overlook the fact that this affirmation was expressed before the press and the Defendant was aware that it would be published!!!

The question will then arise, would the 1<sup>st</sup> Defendant in view of trite principle stated in ***Stern’s case*** (*supra*) be barred from raising the defence of justification?

In my view, as at this stage, I would like to state that the 1<sup>st</sup> Defendant will be unable to take shelter from the assertion that the question/suggestion was put forth from the Reporter and it simply said ‘Yes’. I thus, at this stage, find so.

Mr. Ojiambo further asserted that the parameters set by CCK have to be complied by all parties. The Plaintiff not having done so, the action is unlawful. I am not told what parameters set by CCK were not complied with. As at 12<sup>th</sup> April, 2011 CCK refuted any allegation of sabotage. It is only on 13<sup>th</sup> May, 2011 the CCK has directed Automated System and has stated in its report (annexed in Defendant’s last affidavit filed on 15<sup>th</sup> June, 2011) that the Plaintiff’s have put its house in order.

Apart from the acceptance by the Plaintiff itself as regards flaw in manual system and undertaking to rectify the system what other facts were in substance true? No specific answer is received by the court to that query.

Mr. Ojiambo further submitted whether there was a cyber terrorism is the issue, which was yet to be proved and thus a triable issue is raised. The strategies of CCK suggested in Strategic Plan 2008 – 2013 cannot be adopted as a statutory provision or even Administrative guidelines Clause 1.5. thereof stipulates that the operators and MNP Service providers shall, apart from the guidelines and process, enter into a commercial agreement. No specific licence conditions or guidelines are shown to have been flouted by the Plaintiff. One may even ponder, even if there is a non compliance by any operator, can that fact be publicly announced as cyber terrorism? It is definitely a very serious aspersion. Moreover, in view of clause 1.6 of the Strategic Plan, relied by the 1<sup>st</sup> Defendant, all the disputes from MNP service was directed to be settled as per Act and Regulation. The defendant has not done so but has chosen to publish

the issue in media.

I would also note that the issue between the parties arises from the commercial agreement.

With what is observed hereinbefore, the court is now left to consider whether the minutes of several meetings relied upon by the 1<sup>st</sup> Defendant would show that what is published is true in substance as regards inability of the Plaintiff to give ‘seamless flow’ to the messages sent upon switching over by the customer and if so, whether the 1<sup>st</sup> Defendant is entitled to make and publish fair comments in the public interest.

It is true that the Plaintiff itself has accepted that due to opting to implement the choice given to install manual process stipulated in the agreement the delay had occurred and that they were trying to rectify the problem by installing automated system. Mr. Ojiambo emphatically stressed on the above admission by the Plaintiff and contended that, if the above is true, the 1<sup>st</sup> Defendant had right to publish the issue in public interest.

But what about the utterance and publication of the words on which the Plaintiff has taken objection? Was the initial option of manual process not provided in the agreement or was it unlawful? Was the 1<sup>st</sup> Defendant within its Constitutional and legal rights to publish the words which are complained of, even if I may agree that at the time of publication by the 1<sup>st</sup> Defendant, the issue of offering “seamless flow” of SMS could be an issue of public interest.

The only factor which differentiates the Law of Defamation and the Civil Law while considering the issue of interlocutory injunction, is the Freedom of Speech granted under the Constitution. I would like to cite the first holding in the case of Cheserem –vs- Immediate Media Services (2000) 1 EA 371 (CCK)

***“Applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases because they bring out a conflict between private interest and public interest. Though the conditions applicable in granting interlocutory injunctions set out in *Giella v Cassman Brown and Co. Ltd.* [1973] EA 258 generally apply, in defamatory case those conditions operate in special circumstances. Over and above the test set out in *Giella’s case*, in defamation cases the court’s jurisdiction to grant an injunction is exercised with greatest caution so that an injunction is granted only in the clearest possible cases. The court must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that the verdict to the contrary would be set aside as perverse. *Francis P Lotodo v Star Publishers and another (UR) HCCC number 883 of 1998 adopted,*”***

Whether the facts before me have shown at this stage that the court has those special circumstances?

Our Constitution has now given all the parameters of the said right in Article 33. It gives every person the right of Freedom of Expression but in Article 33 (3) it also stipulated that in the exercise of the Right to Freedom of Expression every person shall respect the rights and reputation of others.

I shall have to consider primarily the said Constitutional provisions before considering and balancing the submissions from both sides, as well as the authorities cited before me.

Though it is true that the Plaintiff has had delays in putting its house in order due to late switch over to automated system, from the facts so far given, that issue has not been taken seriously by CCK. But I may ask, even when the Plaintiff was making effort to rectify its system, did the 1<sup>st</sup> Defendant at that stage have any reason for publishing the impugned statements? I specifically mention the meetings of stakeholders on 27<sup>th</sup> April, 2011.

I have given my observations hereinbefore on the facts of the case and need not repeat the same.

I must admit candidly that it is very difficult, in this case to preserve the delicate balance between the rights of both parties as stipulated in Article 33 of the Constitution.

It is further very complex to keep the proceedings at the interlocutory stage and the proceedings of final hearing distinct and separate with different applicable standards of evidence.

Without fail the court, as has been enjoined by the Constitution, has to tread on the balancing rod even at this stage. I have to note, however, that the Plaintiff, in this case had itself come forward before any issues raised by anyone involved to say that its initial option provided in the agreement could not be working properly and could be the cause of the delay in forwarding SMS!!! Could that act from the Plaintiff be termed as sabotage or cyber terrorism?

Without making any definite findings on the above matter, and basing my observations as per the requirements for the interlocutory injunction relied by both the counsel, I would be inclined to find that there is need for some restraints to be imposed against the Defendant.

Suffice it shall be, and I do order accordingly, that the Defendants shall be restrained from making or publishing any derogatory words or statements like sabotage or cyber terrorism of the Plaintiff in respect of MNP process pending hearing of this suit.

Costs of this application in the cause.

I may add that the parties, as encouraged, could have settled this matter out of court.

**Dated, signed and delivered** at Nairobi this 15<sup>th</sup> day of **July, 2011**

**K. H. RAWAL**

**JUDGE**

**15.07.2011**