



REPUBLIC OF KENYA



Transcend Media Group Limited v Safaricom Limited & 9 others (Commercial Case 014 of 2022) [2025] KEHC 64 (KLR) (Commercial and Tax) (3 January 2025) (Ruling)

Neutral citation: [2025] KEHC 64 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 014 OF 2022
A MABEYA, J
JANUARY 3, 2025**

BETWEEN

TRANSCEND MEDIA GROUP LIMITED PLAINTIFF

AND

SAFARICOM LIMITED 1ST DEFENDANT
SYLVIA MULINGE 2ND DEFENDANT
FLORA OMUHAKA MANGALA 3RD DEFENDANT
EMILY TOO 4TH DEFENDANT
FLORA BAIYA 5TH DEFENDANT
JANICE KEMOLI 6TH DEFENDANT
THOMAS OMANGA 7TH DEFENDANT
TIMLA TIENG 8TH DEFENDANT
SARACEN MEDIA KENYA LIMITED 9TH DEFENDANT
FIELDSTONE HELMS LIMITED 10TH DEFENDANT

RULING

1. This ruling determines the application dated 15/3/2024. The same was brought under Articles 31 and 50(2) & (4) of *the Constitution* of Kenya 2010, section 1A, 1B,3,3A of the *Civil Procedure Act*, Order 2 rule 15(1)(c), Order 51 rule 1 of the Civil Procedure Rules.
2. The application sought the striking out and consequent expungement from record of the following documents; the draft KPMG report dated 18/2/2016 which the plaintiff intends to produce as



- PEXh35, the Forensic Report by the Directorate of Criminal Investigations dated 13/10/2016 (PEXh18), the report from Kekobo dated 19/10/2016 (PEXh 19 & 92) and PEXh54 which is the plaintiff's summary of analysis of deck allegedly showing the plaintiff's concept as compared to the Blaze as executed by the 1st defendant's agent.
3. That consequently, the following paragraphs of the amended plaint dated 8/12/2022 be expunged, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 51, 55, 56, 58, 59, 60, 61(iv)(v) and (vi), 64 and paragraphs 20, 21, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 39, 53, 54, 58(iv)(v) and (vi), 61 and paragraphs 11 and 12 of the further witness statement dated 26/1/2023 be struck out.
 4. The application was premised on the grounds set out on the face of the Motion and the supporting affidavit of Daniel Ndaba sworn on 15/3/2024. It was contended that the draft KPMG report (PEXh35) in support of the allegations of breach of 1st defendant's procurement regulations was a private privileged and confidential document obtained by the plaintiff illegally.
 5. That the plaintiff had not obtained the consent of the 1st defendant's officials named in the said report or maker of the document to produce it. That the plaintiff had not disclosed the witness it intended to call to produce and testify on the contents of the said document and the said document was a draft and not the final report. It was the defendant's position that whereas it had a valid defence with respect to the document, the existence of the report would convolute the trial by causing objections which in turn will prolong the trial.
 6. It was further contended that, in the ruling dated 6/6/2016, the plaintiff obtained Anton pillar orders to enter the 7th and 9th defendants' premises to preserve, seize, collect and keep machines, data, documents or storage materials relating to the plaintiff's copyright rights under supervision of KECOBO. However, the said orders did not grant the plaintiff leave to collect electronic documents subjected to extraction and examination of the data.
 7. Additionally, that the plaintiff and KECOBO officers submitted the computers, laptops and computer accessories to DCI and a forensic report dated 13/10/2016 was issued. That the plaintiff intends to produce the said report as exhibit 18. That the access of the information that was contained in the computers, machines and other gadgets and analysis of the data therein was not sanctioned by the Court and as such, the contents of the DCI report was a breach to the defendant's privacy and the evidence therefore inadmissible.
 8. It was further contended that the plaintiff did not seek consent of the 2nd to 6th defendant to access private business information contained in the emails extracted from the confiscated electronic gadgets. That the plaintiff had not disclosed the witness from DCI who will produce the report for purposes of cross examination thus making the 1st to 6th defendant unable to prepare for the hearing. That Kekobo relied on the DCI report to make its own report. That the plaintiff's analysis produced as an exhibit is an analysis of the DCI report which was made without the authority of Court.
 9. That under Article 50 of *the Constitution*, evidence obtained in a manner that violates fundamental freedom in the bill of rights shall be excluded if the admission would render the trial unfair. That a determination on admissibility at this stage would narrow down the issues for determination and save judicial time.
 10. The plaintiff opposed the application vide a replying affidavit dated sworn on 18/3/2024 by Lai Muthoka. It was contended that the application was a waste of time since the prayer for expungement of the forensic report had already been ventilated in an application made in CMCC NO 3644 OF 2016. That the said application had sought to strike out the plaintiff's supplementary affidavit and annexures



thereto which included the forensic report dated 13/10/2016. That the application was dismissed in a ruling dated 17/6/2019 by Hon. P. Gesora.

11. It was further contended that the present application was an abuse of the court process since the defendants have had the forensic reports in their possession since 22/11/2016. That when the matter came up for case conference before the deputy registrar, the defendants did not object to the documents filed by the plaintiff. That the application was filed over 7 years since the defendants were served with the plaintiff's bundle. According to the plaintiff, the delay was inordinate, unjustifiable and unconscionable.
12. It was the plaintiff's contention that upon grant of the Anton pillar orders, the plaintiff's directors and officials from KEKOB0 proceeded to the 9th and 10th defendant's office where the computers and laptops owned by the plaintiff and used by Thomas Omanga and Timla Tieng the 7th and 8th defendant were seized. That a forensic examination was conducted by the DCI Cybercrime Department and a forensic report dated 13/10/2016 compiled.
13. It was contended that the purpose of the Anton Pillar orders was to seize the computers for extraction of evidence. That in a ruling dated 27/1/2023, this Court addressed itself on the orders issued in Milimani CMCC NO 3644 of 2016 and stated that the advocates in the matter had consented to a forensic examination. That the forensic report by the DCI dated 13/10/2016 was sanctioned by the Court and the information contained in the report could not be termed to have been illegally obtained evidence. That the 1st to 6th defendant would have time to challenge the contents of the forensic report during cross examination of the forensic examiner who will produce the report.
14. The 7th defendant filed a replying affidavit dated 19/3/2024 sworn by Thomas Omanga. It was in support of the application. He stated that the forensic report dated 13/10/2016 and Kecobo report dated 19/10/2016 were unlawfully and irregularly obtained via a misuse of the court orders issued in CMCC 3644. That pursuant to the court orders, the plaintiff was supposed to preserve, seize, collect and keep machines document relating to the its copyright. That the computers were seized by the plaintiff did not contain materials relating to the plaintiff's copyright.
15. That the defendants had not been given an opportunity to understand the terms of reference of any enquiry or respond to any allegations or evidence. That the plaintiff had not identified and named the authors of the report by the DCI and Kecobo and it seemed that the plaintiff was intent on producing them. That the plaintiff and the DCI acted in contravention of the principles of natural justice by infringing on the 7th, 8th and 10th defendant's right to a fair administrative action.
16. Parties canvassed the application by way of written submissions which I have considered.
17. The applicant submitted that the application was not res-judicata since in CMCC 3644 of 2016, the 9th defendant sought to strike out Lai Muthoka's supplementary affidavit. That the suit in the lower court was primarily for obtaining anton pillar orders. On whether the exhibits should be expunged from the record, it was submitted that pursuant to the anton pillar orders the plaintiff was only limited to infringement of copyright documents.
18. The 1st to 6th defendant submitted that none of the documents were legally obtained evidence and therefore the trial would be rendered unfair. Counsel submitted that exhibit 35 which is the KPMG report dated 18/2/2016, was a private and confidential document authored by KPMG and addressed to the 1st defendant. The maker of the document had not been disclosed and neither had the 1st defendant or KPMG given consent.



19. Further, it was submitted that the forensic report by the DCI was prepared pursuant to the orders issued on 6/6/2016. That the 1st to 6th defendant were not parties to the suit. That however, upon examination of the pleadings, it was clear that the orders for inspection of the computers was not granted. That the plaintiff did not seek for an order of inspection and the order only permitted the defendant to enter into its premises and collect electronic devices. Counsel further submitted that there were no orders authorizing the plaintiffs to extract information. It was the 1st to 6th defendant's submissions that the defendants would be prejudiced if the plaintiff calls witnesses that were not disclosed.
20. On its part, it was submitted for the plaintiff that the application for expungement was resjudicata since the same had been the subject for litigation by a court of competent jurisdiction. That the application had been determined in Milimani CMCC No 3644 of 2016 Transcend Media Group v Saracen Media Limited & 2 others in a ruling dated 17/6/2019. That in the said suit, the court stated that the purpose for the seizure was to prepare a report that would be crucial to the case.
21. That on 27/1/2023, the Court observed that the advocates for the parties had consented to a forensic examination being carried out to give effect to the anton pillar orders. It was the plaintiff's submission that the application was brought after an inordinate delay and during the case conference the defendants did not object on the documents in the plaintiff's bundle.
22. That the admissibility and the probative value of the documentary evidence should be dealt with at the hearing of the suit and not through an interlocutory application. That in any event, the disputed documents were obtained in a procedural, legal and proper manner.
18. I have carefully considered the contestations by the parties in their respective averments and submissions. The primary issue for determination is whether the applicant has met the threshold for the grant of the orders sought.
19. The applicant seeks orders to expunge several reports from the record, including the KPMG report dated 18/2/2016 (PEXh 35), the Directorate of Criminal Investigations (DCI) report dated 13/10/2016 (PEXh 18) and the KECOBO report dated 19/10/2016 (PEXh 19 and 92) alongside PEXh 54. Additionally, the applicant seeks the expungement of specific paragraphs from the plaintiff's amended plaint dated 8/12/2022 as well as portions of the plaintiff's witness statement.
20. The applicant's primary argument is that in its orders dated 6/6/2016, the court granted Anton Piller orders permitting the plaintiff to enter the premises of the defendants for the purpose of preserving, seizing and securing machines. That these orders did not authorize the plaintiff to collect electronic gadgets, access the data contained therein or extract such data. Specifically, the applicant argued that the DCI's report (Exhibit 18) was prepared based on information unlawfully retrieved from computers. It was further contended that the court had not sanctioned access to the data stored within the computers and gadgets.
21. In response, the plaintiff submitted that the application for expungement was res judicata, as the issue had already been conclusively addressed by Hon. P.N. Gesora in a ruling dated 17/6/2019. That the application was filed after an inordinate delay of seven years, noting that the issue was not raised earlier during the case conference or at any subsequent mentions before the Court. Furthermore, that the evidence in question was obtained in a procedural, legal and proper manner, as it had been sanctioned by the court through proceedings conducted on 23/6/2016.
22. Having analyzed the submissions and reviewed the record, it is clear that the applicant's concerns center around the scope of the Anton Piller orders issued on 6/6/2016 and the propriety of accessing and



using data retrieved from the gadgets in question. On the other hand, the plaintiff argues on procedural compliance and points to prior rulings that allegedly settled the matter.

23. It is not in dispute that on 6/6/2016, the court below granted Anton Piller orders to the effect that: -
- “2. That there be a temporary injunction for Anton Piller orders allowing the applicant to enter the premises of the respondents/defendants to preserve, seize, collect and keep machines, data(sic), documents or storage materials relating to the plaintiff’s copyrights under the supervision of the Kenya Copyright Board enforcement Officers pending the Interpartes hearing on 17/6/2016 before Hon Ngetich (CM)”
18. In *Montana (K) Ltd vs Anthony Maina Kara & 2 others (2006) eKLR*, in granting Anton Piller Orders ex parte, the court stated: -
- “... The purpose for which an Anton Piller order is issued is to ensure that material evidence necessary to prove the plaintiff’s case is preserved. The reason why that order is made ex parte is to ensure the Defendant does not destroy the material evidence on being aware of the suit for the order to achieve the purpose for the plaintiff would be targeted to the labels, bottles and other materials including invoices and sale receipts which the Plaintiff will find in the Defendant’s premises. ...”
18. An Anton Piller order is granted to ensure the preservation of evidence that the plaintiff seeks to rely on and to prevent a defendant from tampering with such evidence.
19. The present application is founded on the contention that the Anton Piller orders issued did not grant the plaintiff or the Directorate of Criminal Investigations (DCI) or KECOBO, for that matter, the authority to examine the contents of the gadgets retrieved from the defendants. It is on this basis that the defendants have sought the expungement of documents derived from such examination, which are currently included in the plaintiff’s bundle of documents.
20. The hearing of the matter has not yet commenced. The application was brought allegedly to save judicial time. As I understand it, objection to documents for either their admissibility or relevance should be raised at the pre-trial stage. Order 11 of the Civil Procedure Rules is so elaborate on pre-trials that instances such as the present one should not arise.
21. My view is that, at that stage, a party who wishes to object to the production or reliance of a document by the opposite party at the trial should raise such objections with reasons. At that stage, the objection should be noted by the case manager and if the parties so wish, at the case conference, the matter may be raised before the Judge before the Judge gives a Certificate of Compliance. The Judge may, at that stage give directions on whether to deal with such objection and rule on it or the same be taken at the trial at the time of production.
22. The above procedure was not followed and this Court has to contend with the issue before it now as raised.
23. Firstly, the Court observes that the objection is being raised about 7 years since the documents were filed and served upon the defendants. It was raised when the matter had been set for trial and dates fixed. It can be said to have been an after-thought.
24. Secondly, the issues being raised should have been raised at the trial when the witness was to produce the documents. However, the same has been raised now. The Court has to deal with it and give directions.



25. There are elaborate provisions on admissibility and relevance of documentary evidence set out in the *Evidence Act*, Cap 80 Laws of Kenya. Those are the ones that guide the Court in admitting or rejecting any evidence. The parties decided not to refer the Court to any of them, though the applicants relied on Articles 47 and 50 of *the Constitution* of Kenya on fair administrative action and fair trial.
26. I have agonized on the issues raised. It is clear that the defendants are litigating by instalments. This Court expressly stated in its ruling of 27/1/2023 that the seizure of the gadgets the subject of the suit was properly procured through a court order, that the forensic examination had been agreed to by the parties in order to give effect to the Anton Pillar orders and establish whether there was copyright infringement by the defendants.
27. The Court further observed in that ruling that, the issue of admissibility and challenge to the contents of the report was best suited at the trial during the cross-examination of the plaintiff's witnesses. It is unfortunate that the applicants ignored that advise and chose to raise the issue by way of this application. The simple answer is that, the report was lawfully undertaken, the defendants having agreed to the same as found out in the ruling of this Court of 27/1/12023. It is at the heart of the Anton Pillar orders as well as the plaintiff's case. They should wait to test it at the trial in the normal manner under the rules of evidence.
28. As regards the other reports, the same they suffer the same fate, let them be raised at the trial.
29. In light of the foregoing, I find no sufficient basis to grant the orders sought at this stage. The application to expunge the documents from the plaintiff's bundle and to strike out certain paragraphs of the plaint is hereby dismissed. The matter shall proceed to hearing. The application dated 15/3/2024 is hereby dismissed with costs to the plaintiff.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE

