Safaricom Plc v East African Data Handlers Limited (Commercial Case E127 of 2019) [2025] KEHC 9996 (KLR) (Commercial and Tax) (4 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9996 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E127 OF 2019

RC RUTTO, J

JULY 4, 2025

BETWEEN

SAFARICOM PLC .... PLAINTIFF

AND

EAST AFRICAN DATA HANDLERS LIMITED .... DEFENDANT

RULING

1. Before this Court for determination is a Notice of Motion dated 15th October 2024, in which the Applicant seeks leave to amend its Defence to include a counterclaim, as outlined in the annexed Draft Amended Defence and Counterclaim. The Applicant also prays that the said draft be deemed as duly filed and served.

2. The grounds in support of the application are set out in the affidavit sworn by George Njoroge. He states that the intended counterclaim is based on facts already pleaded in the existing pleadings and witness statements filed on 4th December 2019 and 14th January 2020. The deponent further stated that to facilitate the filing of the counterclaim, the Applicant requested certain documents and data believed to be in the possession of the Plaintiff. However, the Plaintiff allegedly declined to provide the requested materials, prompting the Applicant to reconstruct the necessary data from its internal systems and records.

3. The deponent asserts that the proposed counterclaim arises from the same cause of action namely, the alleged unlawful termination of the aggregator contract and does not introduce any new cause of action. It is further contended that allowing the amendment will not prejudice the Plaintiff in any way.

4. The application is opposed by the Respondent through a Replying Affidavit sworn on 30th October 2024 by Daniel Ndaba. In summary, the Respondent states that the Applicant had previously filed an application dated 6th August 2021, seeking orders to compel the Respondent to produce certain

documents. That application was dismissed by the Court on 14th September 2022. The Respondent argues that the current application has been brought four years after the suit commenced, without any satisfactory explanation for the delay in filing the counterclaim.

5. He further contends that the Applicant has failed to act on the advisory opinion expressed in the Court's ruling of 14th September 2022, and is now misleading the Court by alleging that the Respondent declined to provide documents despite the Court having already ruled that discovery was closed. Additionally, the Respondent challenges the Applicant's claims for costs and damages—amounting to approximately Kshs.60,000,000 in costs, Kshs.7,549,866.78 in operational expenses, Kshs.80,000,000 in special damages, and Kshs.20,000,000 in losses arguing that these figures are unsupported by credible documentation and would result in undue prejudice to the Respondent.

6. In compliance with the Court's directions, both parties filed their written submissions. The Applicant's submissions are dated 31st October 2024, while the Respondents are dated 30th October 2024.

Applicant's Submissions

7. In its written submissions, the Applicant began by outlining a brief factual background of the case. It asserted that, at the time of filing the present application, the Respondent had not filed any response, and therefore the application ought to be deemed unopposed.

8. The Applicant argued that the proposed counterclaim arises from the same original cause of action namely, the alleged unlawful and unilateral termination of the aggregator contract. Addressing the question of whether leave to amend the Defence should be granted, the Applicant relied on Rule 18 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms)* and Order 8 Rule 3 of the *Civil Procedure Rules*. It emphasized that the main suit remains pending and that the hearing has not yet commenced. On this basis, the Applicant submitted that the Court has the inherent power to allow the amendment sought.

9. The Applicant further contended that it has a reasonable cause of action, supported by several emails annexed to the application, which it claims demonstrate the existence of a valid agreement between the parties with binding contractual obligations. It argued that the Plaintiff breached Clause 4.1 of the agreement by allegedly permitting third parties to access the backend of the platform, resulting in unauthorized reversals and the siphoning of funds. As a consequence, the Applicant claims to have suffered losses amounting to Kshs.20,000,000/= paid to agents due to the unauthorized access, incurred operational costs of Kshs.67,549,866/= in setting up the GoPesa platform, and lost revenue shares estimated at Kshs.80,000,000/=.

10. While relying on the case of *Mwangi wa Iria v Ethics and Anti Corruption Commission & 3 others* [2018] eKLR and the *Institute for Social Accountability & Another v Parliament of Kenya & 2 others* HCCP No. 71 of 2013 [2014] eKLR, the Applicant submitted that the proposed amendment would not prejudice the Respondent, as the issues raised in the counterclaim do not introduce any new or contradictory facts. It argued that the emails annexed to the application demonstrate that the Respondent was already aware of the matters raised in the counterclaim, and therefore, the amendment does not amount to an ambush.

11. The Applicant further contended that amending the Defence is essential for the just and efficient resolution of the real issues in dispute between the parties particularly with respect to liability and the quantification of damages. In conclusion, the Applicant urged the Court to grant the application in order to avoid a multiplicity of suits and to ensure that all related issues are determined within the same proceedings.

Respondent's submissions

12. The Respondent commenced its submissions by reiterating the contents of its Replying Affidavit and confirming that it relies entirely on the averments contained therein.

13. Citing the case of *A.S Sheikh Transporters Limited & Another v Barclays Bank of Kenya Limited & 3 Others* (Civil Case No. 335 of 2011) [2013] KEHC 4097 (KLR), the Respondent argued that the proposed counterclaim is without merit and does not warrant the Court's consideration. It maintained that the Applicant failed to fulfill its obligations under the Mpesa Aggregator Agreement and, despite being given an opportunity to substantiate its alleged losses, did not provide any credible evidence. The Respondent stated that the application is a strategic attempt to evade its contractual responsibilities and described it as a fishing expedition, contrary to the established rules of evidence. In conclusion, the Respondent submitted that the reliefs sought are res judicata, having already been conclusively determined in the Court's Ruling of 14th September 2022, and urged the Court to dismiss the application with costs.

Analysis and Determination

14. I have considered the rival affidavits by parties and submissions made in respect of the motion and it is my view that the following issues are for determination:

Whether the Applicant should be granted leave to amend its defence to include a counterclaim

15. The Respondent argues that the present application is barred by the doctrine of res judicata, relying on the Court's Ruling delivered on 14th September 2022.

16. Upon careful review of that Ruling, it is evident that the application determined therein dated 6th October 2021 sought orders compelling the Respondent to produce various documents and data. The Applicant's justification at the time was that on 23rd July 2021 it had been granted leave to amend its Defence and include a counterclaim, but was unable to do so without access to additional information allegedly in the Plaintiff/Respondent's possession. The Court, however, found that the Respondent had substantially complied with its discovery obligations and dismissed the application as an unjustified fishing expedition.

17. It is clear that the nature and substance of the application dated 6th October 2021 differ from those of the present application. The former sought discovery orders, while the current application seeks leave to amend the Defence and file a counterclaim. As such, the two applications are distinct in both form and substance. Therefore, the present application cannot be said to be res judicata to the application dated 6th October 2021 which was dismissed by the Court on 14th September 2022.

18. However, a more pertinent question arises: is the present application barred by the doctrine of res judicata in light of the Court's earlier orders issued on 23rd July 2021? On that date, the Court had already granted the Applicant leave to amend its Defence and include a counterclaim, with a 21-day timeline for compliance. The Applicant failed to act within that period and instead filed the discovery application, which was later dismissed.

19. Section 7 of the *Civil Procedure Act* provides that: "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties... and has been heard and finally decided by such court." For the doctrine of res judicata to apply, the following elements must be satisfied: there must have been a previous determination by a competent court; the matter in issue must be directly and substantially the same;

the parties must be the same or litigating under the same title; the issue must have been heard and finally determined; the issue must have been raised or ought to have been raised in the earlier proceedings.

20. In this case, the orders now sought to wit; leave to amend the Defence and file a counterclaim were already granted by this Court on 23rd July 2021. The Applicant failed to comply within the stipulated time and did not seek an extension or reinstatement of the earlier leave. Instead, it pursued a separate application for further discovery, which was conclusively determined. Nearly four years later, the Applicant has returned to Court seeking the same relief previously granted but not acted upon. This amounts to a repetition of an issue already decided, and falls squarely within the scope of res judicata as provided under Section 7 of the *Civil Procedure Act*. The proper course would have been to seek enlargement of time or reinstatement of the earlier leave neither of which has been done.

21. In light of the foregoing, the Court finds that the present application is barred by the doctrine of res judicata. The issue of amending the Defence and filing a counterclaim was conclusively determined by the Court in its orders of 23rd July 2021. Accordingly, the application is dismissed with costs to the plaintiff/respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 4TH DAY OF JULY, 2025

RHODA RUTTO

JUDGE

In the presence of;

....Plaintiff

....Defendant