



**Adan v Safaricom Limited & 2 others (Civil Miscellaneous Application E813 of 2022) [2024] KEHC 3167 (KLR) (Civ) (2 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL MISCELLANEOUS APPLICATION E813 OF 2022**

**AN ONGERI, J**

**APRIL 2, 2024**

**BETWEEN**

**ABDIAZIZ ALI ADAN ..... APPLICANT**

**AND**

**SAFARICOM LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**LIBERTY AFRICA TECHNOLOGIES LTD ..... 2<sup>ND</sup> RESPONDENT**

**HALAN SLIME AGENCIES LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. There are two applications dated 15/12/2022 and 15/3/2023 respectively coming for consideration in this ruling.
2. The application dated 15/12/2022 is seeking the following orders;
  - i. Spent.
  - ii. An order do issue directing the 1<sup>st</sup> Respondent to provide a certified complete schedule of total downloads of the Applicant's songs on it's Skiza Tunes ring back tone platform and revenue generated from the said songs for the period between 1<sup>st</sup> December 2014 to 1 5<sup>th</sup> December 2022.
  - iii. Suit No. CMCC No. 4845 of 2013 be transferred from the Chief Magistrate's Court, Nairobi, to this Honourable superior Court for directions, hearing and final determination on merits due to pecuniary jurisdiction.
  - iv. Judgement on Admission be entered against the interested party to the Defendant for 51 songs and revenue allocation at the current cost per download being Kshs I per download.



- v. An order do issue against the 1<sup>st</sup> Interested Party and in favour of the Applicant directing the 1<sup>st</sup> Interested Party make direct payments to the 1<sup>st</sup> Applicant of revenue from the 1<sup>st</sup> Applicant's Songs on the 1<sup>st</sup> Interested Party Skiza Tunes ringback tone platform subject to tax and revenue share deductions pending hearing and determination of the suit on merits.
  - vi. Costs of this application be provided for.
3. The application dated 15/12/2022 is based upon the following grounds;
- i. That the matter herein is presently before the Chief Magistrate Court Milimani Commercial Court Civil Suit No.4845 of 2013 — *Liberty Afrika Technologies Limited v Abdiaziz Ali Adan Others*.
  - ii. The dispute before the subordinate court relates to proprietary rights/beneficial interest/contractual obligations in relation to the Applicant's Songs on the 1<sup>st</sup> Respondent's Skiza Tunes ringback tone platform and revenue from the Songs.
  - iii. The Respondents are benefiting from revenue generated from the Applicant's Songs on the 1<sup>st</sup> Respondent's Skiza Tunes ringback tone platform whereas the Applicant who has proprietary rights/beneficial interest over the songs is not able to verify/quantify the revenue generated from his Songs for purposes of verifying the revenue shared.
  - iv. The Applicant was entitled to Kshs.9,571,365.39 from January 2013 to November 2014 with a sum of Kshs.7,781,191.00 paid to the Applicant by the 1<sup>st</sup> Respondent in November 2014.
  - v. The Chief magistrate court had issued an order for disclosure of the total downloads due to the Applicant at a pre-determined ration of Kshs 0.275 per download on 25<sup>th</sup> November 2013.
  - vi. The 1<sup>st</sup> Respondent provided the downloads and admitted 38 songs belonged to the Applicant and the 13 contested songs that allegedly belonged to the Somali Embassy have since been denied by the embassy making a total of 51 as belonging to the Applicant.
  - vii. The Current cost per download is Kshs I and the assessed downloads for the year: 2013 – Kshs.8,642,206.00, 2014- Kshs.4,014,089.00 (Total Inclusive of VAT was 14,681,304.00) out of which the Applicant was entitled to Kshs.9,571,365.00.
  - viii. Based on the above calculation the average revenue for the period between January 2013 to November 2014 at a cost of Kshs 0.275 was Kshs.9,571,365.00 being 34,804,963.6 downloads for the 22 months being an average of 1,582,043.77 downloads per month.
  - ix. From November 2014 to date an estimate based on past downloads gives roughly 9 years at 1,582,043.77 downloads per month being 18,984,516 downloads per year for the entire period gives 180,000,000 downloads which translates to Kshs.49,500,000/= as per Kshs 0.275 per download.
  - x. However the 1<sup>st</sup> Respondent increased the price to Kshs I as the final sum due to the Applicant this translates to Kshs.180,000,000/= (being a shilling to a shilling) as sums due the Applicant.
  - xi. The certified complete schedule of total downloads will give accurate sums due and payable to the Applicant which sums conservatively estimated to be more than Kshs.1,000,000,000/=.
  - xii. The Current Assessment of the Downloads and revenue share is likely to supersede the Pecuniary Jurisdiction of the Chief Magistrate court and is thus necessary to make relevant Applications before the High Court under Section 18.



- xiii. It is in the interests of justice that this suit be heard in the High Court.
4. The 2<sup>nd</sup> application dated 15/3/2023 is seeking the following orders;
- i. That this application be dismissed as it amounts to abuse of the court process intended to scuttle the just, efficient and expeditious determination of CMCC No. 4845 OF 2013: *Liberty Afrika Technologies v Abiaziz Ali Adan*.
  - ii. That the costs of this Application and of the suit be borne by the Applicant, AbdiAziz Ali Adam

### **Grounds**

- i. That the instant miscellaneous application lacks merit, is frivolous and amounts to an appeal against the ruling by Hon. Justice H. M. Nyaga delivered on 19<sup>th</sup> August, 2022 in CMCC No. 4845 OF 2013: *Liberty Afrika Technologies v Abiaziz Ali Adan*.
- ii. That the application is an abuse of the court process intended to scuttle the just, efficient and expeditious determination of CMCC No. 4845 of 2013: *Liberty Afrika Technologies v Abiaziz Ali Adan*.
- iii. That the applicant is a vexatious litigant and is on a forum shopping for a suitable Court that he wants his matter to be heard and determined which should not be countenanced by this court.
- iv. That CMCC No. 4845 OF 2013: *Liberty Afrika Technologies v Abiaziz Ali Adan* was filed in 2013 and the matter has never been set down for hearing due to the Applicant's conduct of filing a multiplicity of applications in court.
- v. That Hon. Justice H. M. Nyaga in the ruling delivered on 19<sup>th</sup> August, 2022 stated that the Applicant ought to prosecute the issue of payment during the trial and not seek interim orders or the same.
- vi. That the Chief Magistrate's Court has the requisite pecuniary jurisdiction to hear and determine the dispute as the first instance court as the 1 Respondent disputes the alleged estimate of money due to the Applicant.
- vii. That the Applicant has not been candid about the payments he has received on the matter in issue before the lower court as there is no money due to the Applicant.
- viii. That there must be a genuine and valid justification for every transfer of a suit hence the suit cannot be transferred at the convenience or mere say so of the Applicant or simply because the Respondents may not suffer prejudice by reason of such transfer.
- ix. That the only remedy available to a party who is dissatisfied with an order made by a court is either to seek review or appeal
- x. That there is absolutely no justification in law in having the suit transferred to this Honourable Court.
- xi. That this application is grossly misconceived, bad in law, incompetent and fatally defective in so far as it seeks to set aside a valid, lawful and substantive court orders through a Miscellaneous Application.
- xii. That the 2<sup>nd</sup> Respondent continues to be vexed and prejudiced by the existence of the suit with no end in sight and prays that litigation be brought to an end..



- xiii. That it is in the interest of justice that this miscellaneous application should be dismissed with costs to be borne by the Applicant.
5. The application dated 15/12/2022 was opposed by the replying affidavit sworn by Daniel Mwenja Ndaba, legal counsel of the 1<sup>st</sup> respondent dated 5/5/2023. In it he deponed that there are pending proceedings between the parties filed in the Chief Magistrates Civil Case No. 4845 of 2013. That unless the said suit is transferred this court has no jurisdiction to issue any orders on matters in issue in the other proceedings.
  6. He deponed that the applicant filed an application in CMCC 4845 of 2013 dated 27/4/2021 which was dismissed by a ruling of Hon. Heston Nyaga as he then was on 19/8/2022. The applicant instead of appealing is now seeking similar orders which he was denied.
  7. He averred that the issue of downloads and payment has been subject of various rulings in CMCC 4845 of 2013 and ought to be dealt with in the said proceedings. The court is bound by the principles of res judicata in dealing with the same issues.
  8. The application dated 15/12/2022 was further opposed by the replying affidavit of Sidney Ngunyi Wachira sworn on 15/3/2023. In it he deponed that the instant application lacks merit and amounts to an appeal against the ruling of Hon. H.M. Nyaga delivered in 19/8/2022 in CMCC No. 4845 of 2013. He indicated that the applicant is a vexatious litigant and is forum shopping for a suitable court.
  9. He deponed that the Chief Magistrates Court has the requisite pecuniary jurisdiction to hear and determine the dispute. That there must be a genuine and valid justification for every transfer of suit hence this suit cannot be transferred at the convenience of the applicant or simply because the respondents may not suffer prejudice by reason of such transfer.
  10. The applicant submitted that in Nairobi HCC Milimani Law Courts Civil Division Civil Appeal No 34 Of 2015 *Halan Salime Agencies Limited Versus Abdiaziz Adan Liberty Africa Technologies Ltd & Safaricom Limited* the court ruled that

“When a proper basis is laid this court can discharge and vary its own orders, it can also order a transfer of a suit filed in the lower court to itself for hearing and determination. The court can also order payment of monies by a party to a proceeding to another if the legal basis is shown. Therefore in a proper application this court has jurisdiction to grant the prayers sought by the 1st respondent”
  11. The applicant submitted that the 1st respondent herein agreed in a meeting held on 9/10/2014 to pay the applicant a sum of Kshs. 9,038,368.39 which sum covered between the period of January 2013 and 10/11/2014. Nine years down the line however the applicant has not received any payments as agreed and settled in the aforementioned meeting.
  12. Furthermore, it is clear that the total downloads of the applicant’s tuned have increased as the 1st respondent has increased subscribers and revised the revenue share due to the applicant at 70%. This has changed the revenue due to the applicant which is now more than 100 Million. This supersedes the pecuniary jurisdiction of the Chief magistrates court and it is thus necessary to have the suit transferred to the High Court.
  13. The applicant further submitted that in both pleadings and correspondences the 1st respondent has admitted that 52 songs belong to the applicant which comprise of 38 belonging to the applicant and 14 that the Somali Embassy has confirmed belong to the applicant too fact has not been denied to



- date. The songs are currently allocated a revenue share of Kshs 1per download from Kshs 0.275 per down load.
14. The 1<sup>st</sup> respondents submitted that this application offends the overriding objective of attaining the efficient disposal of the business of the court and the timely proceedings in court at a cost affordable by the respective parties.
  15. That the Applicant has since 2013 failed to prosecute his counterclaim in CMCC No. 4845 of 2013 and yet now after more than nine years, he seeks to transfer the suit to the High Court for alleged proliferated damages from 2014.
  16. The 1<sup>st</sup> respondent contended that by the Ruling of 19/8/2022, the Court determined that the sums claimed by the Applicant had been paid to him and that he had acknowledged payment and that no further amounts were due to him. the 1<sup>st</sup> respondent argued that if it is as claimed by the Applicant that the lower court does not have pecuniary jurisdiction over the matter, the suit cannot be transferred since the general powers of the court to transfer suits under section 18 of the *Civil Procedure Act* cannot be exercised in a matter where the suit was filed in a court without jurisdiction.
  17. The 2<sup>nd</sup> respondent submitted that the Chief Magistrate's Court has the requisite pecuniary jurisdiction to hear and determine the dispute as the first instance court as the 2nd Respondent disputes the alleged estimate of money due to the Applicant.
  18. That there must be a genuine and valid justification for every transfer of a suit hence the suit cannot be transferred at the convenience or mere say so of the Applicant or simply because the Respondents may not suffer prejudice by reason of such transfer.
  19. It was the 2<sup>nd</sup> respondent's argument that the 2<sup>nd</sup> respondents claim in the lower court falls within the pecuniary jurisdiction of the court since the orders sought therein were for a declaration that the Applicant was not legally or equitably liable for the alleged sum of Ksh. 6,930,000 as the 2<sup>nd</sup> Respondent had fully settled all sums owed the Applicant.
  20. That the 2<sup>nd</sup> Respondent also sought a grant of permanent injunction against the Applicant from engaging in or permitting any action to freeze, suspend, terminate or decline renewal to the Plaintiff by any third parties, in any manner howsoever on the digital content distributed by the 2nd Respondent or otherwise sabotage the 2<sup>nd</sup> Respondent's business on account of the illegal and non-contractual demand for payment.
  21. The issues for determination in the two opposing applications dated 15/12/2022 and 15/3/2023 are as follows;
    - i. Whether an Order should issue directing the 1<sup>st</sup> Respondent to provide a certified complete schedule of total downloads of the Applicant's songs on it's Skiza Tunes ringback tone platform and revenue generated from the said songs for the period between 1<sup>st</sup> December 2014 to 1 5<sup>th</sup> December 2022.
    - ii. Whether Judgement on Admission be entered against the interested party to the Defendant for 51 songs and revenue allocation at the current cost per download being Kshs I per download.
    - iii. Whether an order should issue against the 1<sup>st</sup> Interested Party and in favour of the Applicant directing the 1<sup>st</sup> Interested Party make direct payments to the 1<sup>st</sup> Applicant of revenue from the 1<sup>st</sup> Applicant's Songs on the 1<sup>st</sup> Interested Party Skiza Tunes ringback tone platform subject to tax and revenue share deductions pending hearing and determination of the suit on merits.
    - iv. Whether this application is res judicata.



- v. Whether CMCC No. 4845 of 2013 should be transferred to the High Court.
22. On the issues (i), (ii) and (iii) above, I find that the same cannot be granted by this since they are pending determination in the Trial court and no appeal has been preferred against the decision of the Trial court.
23. On the issue as to whether this application is res judicata, the applicant did not deny that the same prayers were sought before Hon. Nyaga and they were rejected and in the circumstances, I find that the same is res judicata and the applicant should have filed an appeal instead of seeking similar orders in this application.
24. The application dated 15/12/2022 is seeking to reverse the decisions of the Trial court by seeking the transfer of the case instead of filing an appeal.
25. The governing provision on the issue of transfer is Section 18 of the Civil Procedure Act which states as follows-
- “(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
- a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- b) Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
- i. Try or dispose of the same; or
- ii. Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- iii. Retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”
26. I find that the application dated 15/12/2022 is res judicata and the same is incompetent as it is seeking to review orders which have been determination before the Trial without filing an appeal.
27. If indeed 1st respondent herein agreed in a meeting held on 9/10/2014 to pay the applicant a sum of KShs. 9,038,368.39 which sum covered between the period of January 2013 and 10/11/2014, then the applicant is at liberty to proceed with execution. I find that the applicant can raise the said issue before the Trial court.
28. The applicant did not deny that there is non-disclosure of material facts concerning this matter. I find that the dated 15/12/2022 is an abuse of the court process.
29. I dismiss the application dated 15/12/2022 and I allow the one dated 15/3/2023 with no orders.
30. Each party to bear its own costs of both applications.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
2<sup>ND</sup> DAY OF APRIL, 2024.**

.....

**A. N. ONGER**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

..... For the 3<sup>rd</sup> Respondent

