



**Muoki & another v Safaricom PLC; Huawei Technologies (Kenya)
Company Ltd (Interested Party) (Civil Suit E407 of 2022)
[2023] KEHC 22039 (KLR) (Commercial and Tax) (4 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E407 OF 2022
JWW MONG'ARE, J
SEPTEMBER 4, 2023**

BETWEEN

BELUGA LIMITED 1ST PLAINTIFF

PETER NTHEI MUOKI 2ND PLAINTIFF

AND

SAFARICOM PLC DEFENDANT

AND

HUAWEI TECHNOLOGIES (KENYA) COMPANY LTD INTERESTED PARTY

RULING

1. On June 26, 2023, this Honourable Court, pursuant to an Application filed by the Plaintiff on May 24, 2023 issued the following orders:-
 1. That an order of production be and is hereby issued directing the Defendant and the Interested Party to produce before this honourable court under oath original or certified copies of the following:-
 - i. A letter from Safaricom PLC instructing Huawei Technologies (Kenya) Company Limited to propose a solution for Parent Child Control product functionality under Mpesaplatform.
 - ii. Proposal and/or write up for Mpesa-Parent Child Control product/functionality by Huawei Technologies (Kenya) Company Limited to Safaricom PLC dated September 22, 2020.



- iii. Application by Safaricom PLC to the Central Bank of Kenya seeking approval of Mpesa-Child Control product.
 - iv. Mpesa- Parent Child Control product/functionality approval from Central Bank of Kenya(CBK).
 - v. Original emails from Dennis Ndege Maari address dmaaria@safaricom.co.ke to Caroline Njagua, Peter Mativo, Mazhisheng(Mark) dated 2020.9.21 1508 hours.
 - vi. Original emails from Calimiao to Peter Mativo, Dennis Ndege Maari sent on 22 September 2020 1417 hours.
2. That the above-mentioned documents be produced by the defendant and the Interested Party within 14 days or such other times as the court may determine failure to which the Defendant's statement of defence and Amended Statement of Defence be struck out with costs.
 3. That costs of this Application be provided for.
2. Being aggrieved by the above orders of the court the Defendant on July 7, 2023 by a Certificate of Urgency filed a Notice of Motion Application brought under Section 1A, 1B, 3A, and 75 of the Civil Procedure Act, Order 42 Rule 6(1), Order 43(2) and (3) and Order 51 Rule 1 of the Civil Procedure Rules, Rule 77(4) and 41 of the Court of Appeal Rules, 2022 seeking the following orders:-
 1. Spent.
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 3. That the Defendant be granted leave appeal against the Order of the Court made on June 26, 2023 and the Notice of Appeal dated June 26, 2023 be deemed as duly filed.
 4. That pending the hearing and determination of the Defendant's intended appeal to the Court of Appeal, this Honourable Court be pleased to grant a stay of execution of the Order dated June 26, 2023 and the proceedings in the suit herein.
 5. That costs and incidental to this Application be awarded to the Defendant.
 3. The Application is supported on the grounds set on its face. The Application is opposed and the Plaintiffs filed a replying affidavit sworn by the 1st Plaintiff, Peter Nthei Muthoka on July 14, 2023. Both parties put in written submissions which I have carefully considered.
 4. Ostensibly, the Applicant seeks leave to appeal the above order of June 26, 2023. It is the Applicant's position that on June 26, 2023, when the court granted the said orders, the matter had not been set down for the hearing of the Application and that the said orders were granted without the Applicant being given an opportunity to respond the Plaintiffs' Application of May 24, 2023 that had sought the production of certain documents in the custody and control of the Defendant. The Applicant argues that the said documents being sought are neither relevant nor necessary for the determination of the suit. The Applicant argues that it has filed this Application for leave on account of the fact that under Section 75 of the Civil Procedure Act, there is no automatic right of appeal from the orders of the court issued under Order 14 Rule 7 of the Civil Procedure Rules. The Applicant further seeks to stay the proceedings in this matter as it pursues an appeal to overturn the order of this court and argues that without staying the said proceedings the appeal herein will be rendered nugatory.
 5. The Application is opposed and the Respondent has filed a replying affidavit sworn by the 1st Plaintiff, Peter Nthei Muthoka. The Respondent urges the court to dismiss the Application and allow the main



suit to proceed to full trial as scheduled. The Respondent further contends that the Application from which the orders sought to be impugned was filed on May 24, 2023 and served upon the Applicants promptly. That the Applicant did not file a response or grounds of opposition to the said Application and therefore the court, in allowing the Application unopposed did not commit any errors of the law or fact from which an appeal can lie. The Respondents argues that the documents sought are key and necessary in allowing them to canvass and present their case against the defendant and the interested party. Further, that in seeking to appeal the decision, the Applicants have not demonstrated what kind of loss they shall suffer if leave to appeal the ruling is not allowed. That the issues before the court relate to Intellectual property rights of the Plaintiff and the dispute herein arose in 2020 and the continued delay in settling the matter will greatly prejudice the Respondents. In any event, the Respondents argue, parties were encouraged by the court to try and negotiate the matter herein but the Respondents did not respond to their request when they sought to initiate the same. The Respondent further argue that the intended appeal is frivolous and an attempt to delay the matter further as the Defendant is not interested in having the matter finalized.

Analysis and Determination:-

6. I have carefully considered the Application herein and the documents filed in support and opposition to the same and I have identified two issues for determination, to wit:-
 - i. Whether the Defendant/Applicant is entitled to a grant of an order of leave to appeal the orders issued on June 26, 2023 and a stay of execution of the said orders.
 - ii. Whether the Defendant /Applicant is entitled for to a grant of an order for stay of proceedings pending the hearing of the intended appeal.
7. As to “Whether the Defendant/Applicant is entitled to a grant of an order for leave to appeal the orders issued on June 26, 2023 and a stay of execution of the said orders.” Under Section 75 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, and Order 43 of the [Civil Procedure Rules](#), an order issued by the court under Order 14 Rule 7 is not one of the orders of the court from which an automatic right of appeal ensues. The said Section 75 of the Act provides as follows:-
 1. “An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave was granted:-
 - i. An order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - ii. An order for on or award stated in the form of a special case;
 - iii. An order modifying or correcting an award;
 - iv. An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - v. An order filing or refusing to file an award in an arbitration without the intervention of the court;
 - vi. An order under Section 64;
 - vii. An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree



viii. Any other order made under rules from which an appeal is expressly allowed.”

8. The order of this court allowing the production of the documents sought by the Plaintiff in their Application of May 24, 2023 was issued under Order 14 Rule 7 of the Civil Procedure Rules. It is not an order for which an automatic right of appeal emanates as set out under Order 43 of the Civil Procedure Rules.
9. Leave to file an appeal therefore must be first had and obtained from the court before an appeal can be filed. A party seeking leave must demonstrate to the court that it has an arguable appeal which merit serious judicial consideration.
10. I have considered the arguments by the Applicants and the grounds of the intended appeal as detailed in the supporting affidavit of Daniel Ndaba sworn on July 7, 2023. I note the argument put forward that although the Defendant had all along intended to oppose the Application by the Plaintiff but as at the time the matter came up in court, they were yet to file a response to the same and hence the court allowing the Application unopposed denied them the chance to do so. The rival argument by the Plaintiff is that the Application filed on May 24, 2023 had been served on the Defendant who chose not to respond to the same. They had opportunity upon being served to file their response. They chose not to do so.
11. A further consideration of the Defendant annexures reveals the proposed affidavit in response thereto which according to the defendant was filed on June 26, 2023, after the court had issued its orders allowing the Application. In the said affidavit, the Defendant argue that the documents sought to be produced will not aid the Plaintiff's case. They opine that these documents are not only irrelevant but also unnecessary.
12. In urging the court to allow the Application for leave pending appeal, the Defendant/Applicant referred the court to the decision in the case of *Sango Bay Estates Ltd Vs Dresdner Bank AG* (1971) EA 17 where the court held as follows:-

“the court will only refuse leave if satisfied that the Applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the Applicant why leave is refused. The court can grant the Application even if it is not so satisfied that the appeal has no prospects of success. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success....there must however always be a ground of appeal which merits serious judicial considerations.”
13. Flowing from the above decision, I have considered the grounds upon which the Applicant seeks to appeal the orders of this court. Of note is the argument that the documents being sought to be produced as per the court order are not relevant and will not add value to the Plaintiff's case. The Plaintiff however, argues that these documents are crucial to their case and that they are in the custody of the Defendant and hence the order for production. In my view, the Plaintiff is the only one who in advancing their case has the authority to determine the relevance or otherwise of any documents or evidential material they wish to rely on.
14. Further, the Applicant in seeking leave to appeal the orders of the court, argues that it was ready to oppose the Application by the Plaintiffs. From the record herein, I note that the Application was filed and served upon the Defendant and the Interested Party on May 24, 2023. The Defendant only filed



their replying affidavit after this court made its orders allowing the Plaintiffs Application. As at the time of the orders of this court, there was no grounds of opposition or replying affidavit on the court record and no good reasons advanced as to why the Defendant had not file its response if it wished the Application. The sum total of my findings is that I am not persuaded that the Applicant has an arguable appeal with grounds that merit serious judicial consideration. I find and hold that the Applicant is not deserving of the leave sought to file an appeal against the order of this court of June 26, 2023.

15. The second limb of the Application seeks a stay of execution of the orders of June 26, 2023 and a subsequent stay of proceedings pending the hearing and determination of the intended appeal. In view of the courts finding that leave to appeal is not warranted, I will therefore not seek to determine the other two issues of stay of execution of the orders and stay of proceedings as sought by the Applicant. Since this court has already directed that parties prepare for the hearing of the main suit on October 31, 2023 as earlier ordered, the same shall proceed as scheduled.
16. In conclusion, I find and hold that the Application by the Defendant has no merit and is hereby dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2023.

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Odoyo for the Plaintiff.

Ms. Cheptoo holding brief for Ms. Opiyo for the Defendant.

Mr. Rutere for the interested Party.

Sylvia- Court Assistant

