



REPUBLIC OF KENYA



KENYA LAW

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**Nderitu v Safaricom PLC & 2 others (Commercial Case E470 of 2023)
[2024] KEHC 14284 (KLR) (Commercial and Tax) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E470 OF 2023
AA VISRAM, J
NOVEMBER 14, 2024**

BETWEEN

WILFRED NGUNJIRI NDERITU PLAINTIFF

AND

SAFARICOM PLC 1ST DEFENDANT

THE STANDARD GROUP PLC 2ND DEFENDANT

THE COMMUNICATIONS AUTHORITY OF KENYA 3RD DEFENDANT

RULING

1. I have considered the Notice of Preliminary Objection by the 1st and 2nd Defendant dated 19th October, 2023 (the “Preliminary Objection”) together with the rival submissions of the parties, and the applicable law.
2. The crux of the Preliminary Objection is that:-
 - a) the suit offends the doctrine of exhaustion of statutory remedies and that the jurisdiction of the Honourable Court has been wrongly and prematurely invoked;
 - b) the suit contravenes the provisions of Order 1, rule 8 and Order 1, rule 13 of the Civil Procedure Rules; and
 - c) the suit is barred by limitation of actions pursuant to the provisions of section 4 of the Limitations of Actions Act.
3. As regards the first issue, the Applicants submitted that the claims presented by the Plaintiff substantially relate to wrongful subscription to a premium rate service by the Defendants. Prescribed



legal redress mechanisms exist in law established under various statutes for the handling of the claims and disputes of the nature presented by the Plaintiff. By way of example:-

- i. The claims relating to alleged wrongful subscription of the Plaintiff to a premium rate service falls under the purview of disputes to be referred to the regulator pursuant to the provisions of Rule 4 of the Information and Communications (Dispute Resolutions) Regulations with an appellate mechanism under Section 102A of the [Kenya Information and Communications Act](#);
 - ii. The allegations on infringement of consumer rights falls under the dispute resolution mechanism set out under Rule 7(2) and 9 of the Kenya Information and Communications (Consumer protection) Regulations;
 - iii. The allegations on abuse of dominance falls under the dispute resolution forum set out under Section 31 and 71 of the Competition Authority Act;
 - iv. The allegations relating to breach of the Plaintiff's personal data falls under the dispute resolution mechanism set out under Section 56 of the Data Protection Act; and
 - v. The allegation on denial of access to information is to be addressed by forums set out under Section 8 and 14 of the [Access to Information Act](#).
4. The Applicant submitted that the jurisdiction of this Honourable Court has been prematurely and wrongfully invoked, because the Plaintiff has not exhausted the existing statutory dispute resolution processes prior to approaching the court.
 5. The 1st Defendant submitted that the doctrine of exhaustion serves the purpose of postponing judicial consideration to ensure that a party is first of all, diligent in protection of his own interests within the dispute resolution mechanism provided outside Courts.
 6. He contended that courts have repeatedly reiterated that where there is a clear procedure for redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure must be strictly followed. He submitted that since the Plaintiff bypassed the dispute resolution forums as demonstrated above, the suit is ripe for striking out.
 7. The first Defendant relied on numerous authorities in support of its argument relating to the doctrine of exhaustion including R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR; Kweri v Beehive Media Limited; Capwel Industries Limited (Interested Party) (Constitutional Petition E321 of 2021) [2023] KEHC 2684 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment); Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR.
 8. As regards the second issue, Counsel submitted that Section 4 (1) (a) of the Limitations of Actions Act provides that suits founded on contract should be instituted within 6 years. He submitted that the said contractual claims were already statute barred by 25th September, 2023, when the suit was filed. In his view, the Plaintiff admitted that the cause of action arose on 24th September, 2017, which was over six years from the date the suit was commenced.
 9. He relied on the decision of the court in Martha Karwirwa Anthony v Barclays Bank of Kenya Ltd [2019] eKLR, where the Court cited with approval the decision in Iga Vs Makerere University [1972] EA 65 which held that:-

“A Plaint which is barred by limitation is a Plaint “barred by law”. Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court



“shall reject” his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought.”

4. As regards the third issue, Counsel argued that the suit is fatally incompetent for having been instituted in favour of other Safaricom subscribers without their written authority. Counsel urged the court that an action brought on behalf or in favour of other people in the absence of a written authority to institute and plead the case on their behalf renders the suit fatally incompetent, ripe for striking out.
5. Counsel pointed out that Order 1, rule 8 of the Civil Procedure Rules which is couched in mandatory terms requires the Plaintiff to issue notice to all parties whose benefit the representative suit has been commenced. Further, Order 1, rule 13 provides that where Plaintiffs are more than one, any of them may authorize one of them to appear, plead or act for them in the proceedings. This was not done.
6. The 1st Defendant further contended that no notice was issued to all the affected persons who might be beneficiaries of the suit. He submitted that there is no written authority by the other Safaricom users authorizing the Plaintiff to institute the suit and plead the case on their behalf. Further, no authority to plead has been produced in compliance with the provisions of Order 1, rule 13 of the Civil Procedure Rules and consequently, this suit must fail.
7. In support of the above argument, the Applicant relied on the decision of the court in Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others [2015] eKLR; Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR.
8. In further support of the Preliminary Objection, the 3rd Defendant submitted, in summary, that the jurisdiction of this court has been invoked as the High Court in the Commercial and Tax division. He contended that this court ought not be invited to consider a constitutional petition. He contended that the court ought to interrogate the commercial dispute between the parties and not deliberate on constitutional matters.
9. Counsel pointed out that Paragraph 10 of Plaintiff sets out the debt alleged. He contended there is a commercial relationship between the Plaintiff and the 1st Defendant. In his view, the Plaintiff was not within the statutory period of limitation, which lapsed in the year 2023, and the claim is therefore time barred. Counsel contended that no innovation in pleading may resuscitate a matter that is statute barred as intended by the Plaintiff.
10. Counsel contended that the statutory tribunals are the appropriate bodies to hear and determine the issues relating to the various breaches contended by the Plaintiff. Further, that there will be no prejudice if the Plaintiff is referred to the specialized tribunals created to interrogate the issues raised by the Plaintiff.
11. In further support of the Preliminary Objection, the 2nd Defendant filed submissions to the same effect as the submission above. The same form part of the record and need not be reiterated here.
12. In opposition to the Preliminary Objection, the Plaintiff/ Respondent submitted that the doctrine of exhaustion cannot override *the Constitution*. Senior Counsel relied on Article 22 of *the Constitution* citing the enforcement of the Bill of Rights under *the Constitution*, and alleged that the suit was based on his fundamental rights and freedoms. He contended that under the said Article of *the Constitution*,



notice requirements to other litigants for whom the Plaintiff may act for, or in the interest of, are not required.

13. The Plaintiff further submitted that the present suit seeks specific constitutional remedies contemplated in Article 10 and Article 232 of *the Constitution*. Further, the Plaintiff was seeking declarations relating to the consumer protection as guaranteed in Article 46 of *the Constitution*. He contended that the court ought not turn its back on litigants who have suffered violation without recourse available.
14. Additionally, the Plaintiff invited this court to make a declaration that various sections of the regulations referred to by the Applicant, which required dispute resolution in accordance with the statutory mechanism in the first instance, are unconstitutional.
15. As regards the issue of limitation, the Plaintiff contended that time began to run after the mistake was discovered, which was after the year 2017 and not before. He was of the view that the claim was not statute barred, and was filed within the appropriate timelines.
16. Having considered the above, the law relating to the doctrine of exhaustion was set out in the seminal case of Speaker of National Assembly v Karume [1992] KLR 21, where the court stated as follows:-

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

4. In Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others [2015] eKLR, the Court of Appeal stated that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”(emphasis mine)

4. However, noting the above, I am also cognizant that there exist certain exceptions to the above principles. Namely, in R v Independent Electoral and Boundaries Commission (IEBC) & others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the exceptions in the following terms:-

“As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.” (emphasis mine)



4. Guided by the law set out above, I wish to state from the outset, that the matter was filed in the Commercial and Tax Division and not the Constitutional and Human Rights Division. The nature of some of the prayers sought by the Plaintiff, such as the prayers seeking declarations to declare various sections of regulations in the Kenya Information and Communication Act; the Kenya Information and Communications Consumer Protection Regulations; and other various sections or regulations fall within the purview of the Constitutional Court, and not the present court.
5. While I agree with Counsel that the High Court does have jurisdiction to interrogate constitutional matters, there is a reason why the High Court is divided into specific divisions, and parties are expected to file disputes in the appropriate division. One among several reasons is to ensure efficacy and specialization in the court process. The divisions are also created pursuant to the High Court Organization and Administration Act and the specific work and purpose of each division is therefore grounded in statute.
6. In my view, this court is not the appropriate avenue to ventilate what appears to be primarily constitutional considerations or deliberations. Similarly, I do not think a litigant may commence litigation by way of filing a plaint under the civil process and then rely on the constitutional procedural rules applicable to Article 22 of *the Constitution* rather than the Civil Procedure Rules which govern the civil process. To allow the same would create confusion as to the appropriate procedure and applicable rules in the litigation at hand.
7. Further, it is not lost on me that in the present dispute, there exists, not one, but five different prescribed statutory legal redress mechanisms in law for the handling of the claims and disputes of the nature presented by the Plaintiff. Therefore, guided by the law above, I am of the view that considering the number of appeal mechanisms available to the Plaintiff, this court ought not depart from the rule that the strict procedure must be followed and ought not make an exception.
8. The Plaintiff has not provided compelling reasons to show that all the statutory mechanisms available to it are inadequate; and I am persuaded that this court ought to postpone judicial making considerations and allow for the statutory dispute resolution mechanism to take their course in the first instance. I find that there is no prejudice in referring the matter to the appropriate tribunals created under the appropriate statutes to hear the various disputes, and find that sufficient recourse is available to the Plaintiff under the statutory framework.
9. Having stated the above, I do not think it is appropriate for this court to determine if the suit is time barred. The appropriate tribunals ought to be at liberty to consider the various issues raised in the first instance, and in accordance with their mandate without prejudice or encroachment by this court.
10. Accordingly, I find and hold that the Preliminary Objection is with merit and the same succeeds. The order of the court is as follows:-
 - a. The Amended Plaint dated 26th September, 2023, is hereby struck out with costs.
 - b. The Plaintiff is at liberty to pursue his claim in the appropriate statutory tribunals, and in accordance with the relevant laws.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 14TH DAY OF NOVEMBER 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;



.....For the Plaintiff
.....For the 1st Defendant
.....For the 2nd Defendant
.....For the 3rd Defendant

