REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. E008 OF 2020

BOB NICHOLAS WANGA..... PETITIONER

VERSUS

SAFARICOM LIMITED..... RESPONDENT

RULING

The application dated 17th December 2020 was lodged by the Petitioner, **BOB NICHOLAS WANGA**, seeking the following Orders;

> ***"1. THAT pending the hearing and determination of this application, the honourable court order the respondent to issue the petitioner with his Data interface log for cell phone number [….].***
>
> ***This right is granted by Article 35 (1) (b) of the Constitution.***
>
> ***2. THAT the Honourable Court protect my privacy immediately as provided for in Article 31 (c) and 31 (d) from third parties who have been granted unlawful access of my private information by the respondent.***
>
> ***3. THAT the court compels Google to audit my email address: bobmorphat@gmail.com and Yahoo address bobmorphat@yahoo.com to determine the extent of third party sharing of my private and clients information between 1st November, 2020 and 7th December, 2020 and appropriate fines be imposed on them according to the law on sharing private information to third parties OR/AND the respondent to be penalized for negligence in allowing unlawful sharing of my private and clients information. During the said period I was unable to access my accounts.***
>
> ***4. THAT the honourable Court protect my reputation with the capital markets, trading brokers, other associates and the public at large as granted by Article 35 (2) of the Constitution of Kenya against any untrue information.***
>
> ***5. THAT this Honourable Court be pleased to issue such further or other order(s) as it may deem just and expedient for the ends of justice.***
>
> ***6. THAT the costs of this suit be provided for."***

1. It was the Petitioner's case that he had visited the offices of the Respondent, **SAFARICOM LIMITED**, numerous times, where he requested for the data interface log of his cell phone number **[….]**. However, the Respondent had failed to provide the information sought.

2. The Petitioner's visits to the Respondent's branch at the *"Tuff Mall"*, Kisumu, were complimented with emails and registered mail which were directed at the Respondent's Head Quarters at Waiyaki Way, Nairobi. However, the mail failed to elicit any response from the Respondent.

3. According to the Petitioner, he;

> ***"…… requires the data interface log because he has good reasons to believe that his privacy has been interfered with."***

4. It is his belief that if the data interface log was provided by the Respondent, it would show that the Respondent, on or about 10th November, 2020, unlawfully shared the Petitioner's passwords to third parties.

5. By a Replying Affidavit sworn by **DANIEL MWENJA NDABA**, the Respondent, **SAFARICOM LIMITED** stated that the Petitioner would first have to prove that the mobile phone number **[….]** was registered to him, before he could be granted access to the data interface

logs for that number.

6. As far as the Petitioner was concerned, he had made available sufficient evidence to prove that he was the registered owner of the mobile phone number **[….]**.

7. The evidence was in the form of affidavits, to which were annexed various print-outs.

8. However, the Respondent pointed out that the application before me was not supported by any affidavit.

9. It is indeed correct that the application was not filed together with an affidavit which was to support it.

10. However, the Petitioner filed a "*Supplementary Supporting Affidavit*." Considering that there was no Supporting Affidavit, in the first instance, it was a misnomer to describe that affidavit as a supplementary supporting affidavit.

11. In my considered view, the misdescription of the affidavit was not, of itself fatal. I so hold because the so called supplementary supporting affidavit would still constitute the evidence upon which the application was grounded.

Accordingly, the filing of that affidavit fulfilled the requirements of **Order 51 Rule 4** of the **Civil Procedure Rules**.

Contents of Affidavit

12. In the case of **ADAM & 6 OTHERS Vs ALEXANDER & 2 OTHERS HCCC NO. 81 OF 1993**, Kuloba J. held as follows;

> ***"Affidavits must deal only with facts which the deponents can prove of their own knowledge. …… An affidavit is not a platform for disemination of philosophical ideals, for exposition of ideals, the propagation of opinions, dogmatic assertions, heightened counsel and soothsaying prophecy."***

13. In a nutshell, Affidavits are to be confined to facts only.

14. In this case, the Petitioner's affidavits are full of arguments, opinions and analysis on issues of law.

15. When faced with affidavits of that kind, the Court of Appeal had the following to say, in the case of **PATTNI Vs ALI & OTHERS [2005] 1 E.A 339**;

> ***"To my mind, parties and counsel ought not to turn affidavits, which is evidence and which ought to be restricted to factual matters, to submissions on points of law. Where a party relies on both facts and law, facts ought to be contained in an affidavit, while legal issues ought to be in grounds of opposition. Submissions on points of law which are disguised as factual averments contained in affidavits, unless sworn by legal experts deposing to matters relating to their knowledge of the law, run the risk of being struck out."***

16. Paragraph 1 of the supplementary supporting affidavit contains only 2 statements of fact, as follows;

> ***"THAT I have been a duly registered Mpesa user (Cell phone no. ….]) ……..."; and "I have heard the cell phone number ….] under the respondent since 2003 thereabout and of course I have never been disconnected from M-Pesa services ……."***

17. The other contents of that paragraph are either argumentative or consists of the Petitioner's opinions.

18. Paragraphs 2 and 3 of the supplementary supporting affidavit contain only opinions and arguments on issues of law.

19. Similarly, paragraphs 4 and 5 of the supplementary supporting affidavit is full of the Petitioner's interpretation and opinions on issues of law.

20. When the Petitioner states (at paragraph 5) that;

> ***"…… it's sad for the Kenyan nation and the legal fraternity, for the respondent's learned Senior Manager- Litigation to bury his head in the sand and to urge the court to strike out the petition on account of technicalities ….."***;

that is not and cannot be **EVIDENCE** upon which the Petitioner's application was grounded.

21. That assertion is a direct attack upon the Respondent's Senior Manager – Litigation.

22. The said assertion cannot advance the Petitioner's case in any manner whatsoever. It is a totally uncalled for Remark, which could only vex the person about whom it refers to.

23. At paragraph 6 of his affidavit the Petitioner said;

"THAT even to the most unobservant dullard, they know that the dormain Gmail is not hosted and controlled by the respondent."

24. A dullard is a slow or a stupid person. It is indeed offensive to allude to the Respondent's Senior Manager – Litigation or to any other person in such a derogatory manner. It does not advance the Petitioner's case.

25. It is my considered opinion that even the dull and ignorant are entitled to their rights. A party only advances his case by putting forward factual evidence and appropriate legal submissions. If the facts and the law are not in your favour, it matters not how stupid your opponent in the case is.

Exhibits

26. The Petitioner annexed various documents to his supplementary supporting affidavit. However, none of the said annextures were commissioned, as is required pursuant to **Rule 9** of the **Oaths and Statutory Declarations Rules**. The said rule provides as follows;

"All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification."

27. The Petitioner deems the failure to comply with **Rule 9** as a minor technical infraction, which ought not to stand in the way of substantive justice.

28. At all times it must be borne in mind that an affidavit which was being relied upon by a party in a case, is evidence. Therefore, the deponent is the witness.

29. In most circumstances, witnesses are not advocates, or where they were advocates, they would not usually be testifying in their professional capacity.

30. But even when the witness was an advocate, he would ordinarily go through the process of being sworn, before he could proceed to testify.

31. The process of being sworn is not simply a matter of procedure: it talks to the efficacy of the evidence tendered.

32. Similarly, when the evidence is tendered through an affidavit, the deponent must take an oath before a Commissioner for Oaths. Secondly, if there are Annextures to the affidavit, the same Commissioner for Oaths is required to securely seal such exhibits.

33. In the case of **FRANCIS A. MBALANYA Vs CECILIA N. WAEMA ELC CASE NO. 21 OF 2016** (at Machakos), Angote J. held as follows;

"15. It is trite in law that an Affidavit and the annexetures attached to it constitute evidence. Indeed, where a person seeks to prove a fact by way of Affidavit, he is obligated to exhibit any document on his Affidavit.

16. However, before such a document can be received in evidence by the court, the law requires that such a document be sealed by the Commissioner for Oaths.

17. The law that requires the sealing and marking of annexetures with serial letters is in mandatory terms, and must be complied with."

34. In this case, the documents annexed to the Petitioner's affidavit were not sealed by the Commissioner for Oaths.

35. Therefore, I find that there are no exhibits before the court, from which the court could verify the Petitioner's assertions.

36. But, it is equally true that the Respondent did not deny the Petitioner's assertion that the Respondent had duly registered him as the Mpesa user of the mobile phone number **[….]**.

37. I hold the considered view that the particulars of the subscriber who has been registered by the Respondent, as the user of the mobile phone number **[….]** is a matter of fact, that is within the knowledge and control of the Respondent.

38. If it is incorrect that the Petitioner is not the registered user of that mobile phone line, the Respondent would state so, affirmatively.

39. But if the Petitioner has been the registered user of that phone line, for the last 10 years, (or for any other duration); and if the Respondent had now blocked him from accessing his said line, the Respondent may well have something to answer to.

Prima facie case

40. The Petitioner was seeking an order to compel the Respondent to provide him with his data interface log for his cell phone number **[….]**. That relief is sought both in the application before me and in the Petition.

41. It is a mandatory injunction, seeking to compel the Respondent to take the specified action.

42. The Respondent submitted that the genesis of all the Petitioner's problems was the unauthorized access to his Gmail account. Therefore, because the Respondent finds it inconceivable how the data interface log would have anything to do with the operation of the Gmail account, it was not clear what the data interface log was intended to achieve.

43. Whereas it may not be discernible to the Respondent how the data interface log would prove whether or not the Petitioner's Gmail account was accessed unlawfully, I find that the prayer for the orders to compel the Respondent to produce the said data interface log is clear.

44. I therefore find that this is a case in which the Petitioner has demonstrated a clear case of entitlement to demand from the Respondent, the data interface log for his phone number **[….]**.

45. The said log shall be made available to the Petitioner within 10 days of this Order. And the log shall be for the period between 1st November 2020 and 7th December 2020.

46. In making this Order, I am fully alive to the fact that the Respondent is the custodian of the particulars of the registration of the mobile phone number in issue.

47. In my considered view, the production of the required information cannot prejudice the Respondent or any other person, because the information is basically factual, and it relates to the Petitioner's mobile phone number.

48. Meanwhile, as regards the prayer for the protection of the Petitioner's privacy from third parties

> *"who have been granted unlawful access"*

to the Petitioner's private information; I find that the prayer is so imprecise that it was incapable of enforcement.

49. The Petitioner had not made out a case of any particular third party, to whom the Respondent had granted unlawful access.

50. On the issue pertaining to Google, the court declines to issue an order to compel it to audit the Petitioner's account. My said decision is founded upon the fact that Google is not a party to these proceedings, and therefore the Court is unable to ascertain whether or not Google may have legitimate reasons for objecting to an order compelling it to carry out the audit sought.

51. Indeed, the prayer for audit appears to be a means through which the Petitioner was seeking information that could be useful in helping him in trying to prove the alleged negligence attributable to the Respondent. In effect, the Petitioner appears to be conceding that he may not be having sufficient evidence to prove the assertions which he had made against the Respondent.

52. I further find that although the Petitioner was suggesting that this court ought to penalize the Respondent for some alleged negligence in allowing the unlawful sharing of his private information, the Petitioner had not cited any particulars of the alleged negligence. Therefore, the Respondent would not be in a position to answer to the alleged negligence.

53. In any event, when the Petitioner introduces assertions of negligence, I find that that might be an indication that the Petitioner's claims are not necessarily of a constitutional nature.

54. As regards prayer **(4)**, I note that it is anchored on **Article 35 (2)** of the **Constitution** of the **Republic of Kenya**. The said Article stipulates as follows;

> ***"Every person has the right to the correction or deletion of untrue or misleading information that affects the person."***

55. The Petitioner asked the court to protect his reputation with the Capital Markets, Trading Brokers, Other Associates, and the Public at large.

56. I find that the said prayer (for protection of reputation) has not been shown to have any nexus with **Article 35 (2)** of the **Constitution**, as the Petitioner has not demonstrated that any untrue or misleading information has been reported by any of the persons against whom he wishes to be protected.

57. If the Petitioner wished to obtain orders against any of the persons cited in the prayer, he would have, first, enjoined them to the case, and secondly he would have had to prove that that particular party had given out a report which contained untrue or misleading information concerning him.

58. In any event, the Petitioner has failed to demonstrate any nexus between the Respondent and any of the persons or entities whom he believes has untrue or misleading information which affects him.

59. In conclusion, the application is dismissed, save for the order directing the Respondent to provide the Petitioner with the Data interface log for the mobile phone number **[….]** within the next 10 days.

60. As the application has been largely dismissed, the Petitioner shall pay to the Respondent the costs thereof. I hold the considered opinion that that order on costs serves the interests of justice because;

(a) the costs ordinarily follow the event; and

(b) if the Petitioner were to eventually succeed in the Petition, he may well be awarded costs. But for now, five of his prayers were rejected.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE