



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 196 OF 2011**

**LAISER COMMUNICATIONS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**WIRSOFT AGENCIES LIMITED.....2<sup>ND</sup> PLAINTIFF**

**AYOON COMMUNICATIONS LIMITED.....3<sup>RD</sup> PLAINTIFF**

**EMERALD LIMITED .....4<sup>TH</sup> PLAINTIFF**

**TAICOM LIMITED .....5<sup>TH</sup> PLAINTIFF**

**SASHAMONEY LIMITED.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SAFARICOM LIMITED.....DEFENDANT**

**R U L I N G**

The six Plaintiffs in this matter filed this cause on 26<sup>th</sup> May 2011.

1. The Plaintiffs' claim against Safaricom Limited (Safaricom), the Defendant, relates to their business relationship prior to the filing of this case.

2. All the Plaintiffs were registered as dealers with Safaricom in accordance with the standard form dealer agreement. This involved the Plaintiffs in dealing with Safaricom services and products via promotion and distribution of Safaricom products and services. The Plaintiffs were also registered as Mobile Money Mpesa agents with Safaricom through Mpesa agency agreement.

3. The Plaintiffs, by this action, pleaded that they each ensured they complied with the numerous terms and conditions in Safaricom standard dealer agreement. That in so doing each of the Plaintiffs conducted their businesses in connection with Safaricom products and services and applied due diligence in giving services to Safaricom customers.

4. It is not denied by the parties that on or about 20<sup>th</sup> July 2011 Safaricom terminated the Plaintiff's dealer agreement on the allegation that the Plaintiffs had allowed an alleged fraudster to obtain Safaricom cash desk receipts for "ghost" payments.

5. The Plaintiffs' by this claim seek Judgment for the following:

*(a) A declaration that the Plaintiffs were not contractually, legally or equitably liable for the alleged ghost payments of Abdifatah Ali Alio, and are entitled not to be suspended, terminated, declined renewal, penalized or victimized in any manner howsoever on account of any loss of funds by the Defendant due to the said alleged ghost payments.*

*(b) The Honourable Court be pleased to grant an order of permanent injunction restraining the Defendant, whether by itself or its servants or agents or otherwise, from doing the following acts or any of them, namely from initiating, continuing, engaging in or permitting any action to freeze, suspend, terminate, decline renewal, penalize or victimize the Plaintiffs in any manner howsoever on the Plaintiff's Dealer and/or Mpesa agency agreements, or to directly or otherwise charge or impose any financial or other liability on the Plaintiffs in respect of the alleged ghost payments of Abdifatah Ali Alio.*

6. The above are the only prayers that the Plaintiff seek judgment upon. It is in that background that the Plaintiff approached this Court with a Notice of Motion application dated 29<sup>th</sup> November 2018. By that application the Plaintiffs seeks discovery and disclosure of documents the Plaintiffs allege they are in possession of Safaricom.

### **DISCUSSION AND DETERMINATION**

7. The relevance of making an order for discovery was discussed in the case **KENYA COMMERCIAL BANK OF KENYA LIMITED V KENYA PIPELINE COMPANY LIMITED [2014] eKLR** where the Court stated:

*“The objective of discovery has been captured in Halsbury’s Laws of England Vol. 13 Paragraph 1 which states as follows:-*

*“The function of discovery of documents is to provide the parties with the relevant documentary material before trial so as to assist them in appraising the strength and weakness of their relevant cases, and thus provide the basis for the fair disposal of the proceedings before it or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary evidence material to support or rebut the case made against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”*

8. At this point it is important to set out what the Plaintiffs seek discovery/disclosure of.

9. The Plaintiffs prior to filing the application served upon Safaricom a Notice to Produce Documents. It is what is set out in that Notice that the Plaintiffs seek discovery/disclosure. For better understanding of the application I will reproduce that Notice to Produce Documents as follows:

1. *“The monthly statement of;*

*a. Residual income made for Safaricom and commissions earned in respect of the said residual income by the above mentioned Plaintiffs for the period particularized under paragraph 2 below.*

*b. Line connections made for Safaricom and commissions earned in respect of the said connections by the above mentioned Plaintiffs for the period particularized under paragraph 2 below.*

*c. Airtime cards sales’ targets set for and commissions earned in respect of the said targets by the above mentioned Plaintiffs for the period particularized under paragraph 2 below.*

*d. Phone and/or handsets sales and commissions earned in respect of the said sales by the above mentioned Plaintiffs for the period particularized under paragraph 2 below.*

*e. Line replacements made and commissions earned in respect of the said line replacements by the above mentioned Plaintiffs for the period particularized under paragraph 2 below.*

*f. Airtime Margin commissions earned by the above mentioned Plaintiffs for the period particularized under paragraph 2 below.*

*g. M-pesa registrations and transactions made the commissions earned in respect of the said registrations and transactions by the above mentioned Plaintiffs for the period particularized under paragraph 2 below.*

2. *The above documents are in respect to the following periods of time;*

*(a) Laiser Communications Limited (Code: D-L014) – between 1<sup>st</sup> July 2009 and 20<sup>th</sup> July 2011.*

*(b) Wirsoft Agencies Limited (Code: D-W009) – between 1<sup>st</sup> July 2009 and 20<sup>th</sup> July 2011.*

*(c) Emerald Limited (Code: D-E058) – between 1<sup>st</sup> April 2010 and 20<sup>th</sup> July 2011.*

*(d) Ayoon Communications Limited (Code: D-A085) – between 1<sup>st</sup> February 2009 and 20<sup>th</sup> July 2011.*

*(e) Taicom Limited (Code: D-T032) – between 1<sup>st</sup> July 2009 and 20<sup>th</sup> July 2011.*

*(f) Sashamoney Limited (Code: D-S123) – between 1<sup>st</sup> December 2010 and 20<sup>th</sup> July 2011.”*

10. The Plaintiffs additionally, by their application, sought discovery/disclosure of monthly reconciliation statement for each Plaintiff for each period particularized in paragraph 2 of the above Notice.

11. The Plaintiffs’ application is supported by the affidavits of Abdullahi Shariff, a Director of the 1<sup>st</sup> Plaintiff, and of Shukri Salat Yusuf, Director of the 6<sup>th</sup> Plaintiff.

12. Sheriff by his affidavit stated that several of Safaricom employee were implicated in the alleged fraud of Abdifatah Ali Alio and were criminally charged. That the monthly reconciliation statements of the Plaintiffs' business, with Safaricom, are in the sole custody of Safaricom and the Plaintiffs can only access those statements through the dealer portal which Safaricom shut down when the Plaintiffs' dealership was terminated, in May 2011.
13. Sheriff further stated that when his dealership was terminated he was unable to pay his rent, for the business premises, which led to his eviction by the Landlord and he consequently lost his documents, of his business dealings with Safaricom, that he had downloaded. That those documents are required by a business valuer to enable that valuer to make an expert report, in the form of valuation, on the Plaintiffs' business. That those documents are crucial to the fair and just determination of the matter before Court and that the Plaintiff has no other means of obtaining those documents.
14. Yussuf by his affidavit deponed that his documents were taken by the Police (CID) officers who were investigating the alleged fraud.
15. The application is opposed by Safaricom through the replying affidavit of Daniel Ndaba, its Senior Manager Litigation. By the affidavit, after confirming that the Plaintiffs did enter into dealer agreement, with Safaricom, the deponent stated that under the dealership agreement the Plaintiffs had a responsibility to prepare and maintain true accurate and upto date records of the transaction involving the products and services of the Plaintiffs performance of their business with Safaricom. That the Plaintiffs were obligated by Clause 10.3 of the dealership agreement to keep and maintain accurate and complete books and record of accounts relating to the conduct of dealership. Further that under Clause 10.4 it was the Plaintiffs responsibility to maintain all business records and accounts at the minimum, in compliance with the provisions of the applicable revenue laws of Kenya, that is 5 years.
16. The deponent further stated that it is clear from the Plaintiffs' application that the documents the Plaintiffs seek are documents which are ordinarily in the Plaintiffs own custody and possession as they relate to Plaintiff's income in selling Safaricom products. For that reason the deponent stated that it was not correct to say those documents were in the sole possession of Safaricom.
17. Finally the deponent stated that Safaricom has its own document retention policy which determines how long it retains documents. Further that the document retention system depends on the system Safaricom has in use and that in 2016 Safaricom changed its system and therefore the documents sought by the Plaintiff are now not available in Safaricom system.
18. I have considered the parties affidavit, submissions and the Plaintiff's authorities.
19. The authorities cited by the Plaintiff indeed confirm that pre-trial discovery is central to litigation and that such discovery should be limited solely to matters in contention.
20. I have, above in this ruling, reproduced the prayers the Plaintiff seeks. None of those prayers seeks for an order that the Safaricom be ordered to compensate the Plaintiffs in view of the termination of the dealership. Yet when one looks at the Notice to Produce Documents, reproduced above, the discovery thereof is directed at the profit the Plaintiffs were making, if any, in carrying out their business. The Plaintiffs failed, in seeking discovery, to set out how the documents would assist in their claim or more importantly its relevance to their claim for declaration and injunction.
21. The above finding is made in the light that the Plaintiff had possession of those documents. In respect of the 1<sup>st</sup> Plaintiff he stated, although not substantiated, that he was evicted by his landlord and thereby lost his documents. In respect to the 6<sup>th</sup> Plaintiff, and I believe also with respect to the other Plaintiffs, the claim is that their documents were taken by Police who were prosecuting the fraudster. Those Plaintiffs failed to inform the Court they had not sought the return of their documents by the Police.
22. It ought also to be appreciated that ours is an adversarial system. What the Plaintiff seeks from Safaricom is for Safaricom to produce documents which may lead it to incriminate itself. Essentially the Plaintiff wish to have Safaricom build their case for them. In my view the Court cannot order a party to produce documents that would lead to it incriminating itself. That would be unjust.
23. Safaricom has shown by its document retention policy that the longest documents, other than those permanently retained, is retained is 7 years. Safaricom states, and it is not contradicted before me that because of passage of time the Plaintiffs' documents are no longer in their system.
24. The Plaintiffs have themselves to blame. They filed this case in May 2011. They even proceeded with case management conference on 17<sup>th</sup> April 2018 and the case was certified ready for trial. The Plaintiffs then waited until 30<sup>th</sup> November 2018 to file the present application for discovery. That inordinate delay and, in the light of Safaricom statement that the documents are no longer available, is reason enough to deny the Plaintiffs the prayer sought.
25. The Plaintiffs by their application had sought that if Safaricom defaulted to produce their document ordered by the Court the Court do order the striking out of the defence.
26. It is worthy to note what the Court of Appeal stated with regard to striking out pleadings in default of compliance with an order of discovery. This is in the case:

**OMAR SHARRIF T/A KEMCO AUTO V FREIGHT FORWARDERS LIMITED & ANOTHER [2008] eKLR** where the Court of Appeal stated:

*“That position in law is also well stated in the case of Eastern Radio Service Vs Tiny Tots (1967) EALR 392 to which we were referred by Ms Amarshi. Sir Charles Newhold, then President of the Court of Appeal for East Africa, states at page 395 of that*

report as follows:

**“It is not, I think, in dispute that a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the Court. Nor is it, I think, in dispute that willful means intentional as opposed to accidental.”**

And Sir Clement De Lestang, V.P. stated in that case:

**“The authorities show, and there is no dispute about it, that a Court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it is satisfied that the Plaintiff is avoiding a fair discovery or is guilty of willful default.”**

27. The Plaintiffs’ learned advocate did argue that the Plaintiffs are entitled to the documents they seek by virtue of Article 35(1) (b) of the Constitution. The Court in the case **Kenya Commercial Bank Ltd V Kenya Pipeline (Supra)** dealt with that Article in respect to discovery. The Court’s determination on that Article, which I wholly endorse, was:

*“Article 35 (1) (b) of the Constitution of Kenya, 2010, under which the Defendant based its Application, provides as follows:-*

***“Every citizen has the right to access to information held by another person and required for exercise or protection of any right or fundamental freedom...”***

***In the mind of this Court, the right to access of information envisaged under the said Article relates to the protection or exercise of any right or fundamental freedom contemplated under Chapter 4 Part 2 of the Constitution of Kenya, 2010. The matter before this Court is a commercial one. In the absence of any proof that the Defendant’s right or fundamental freedoms would be infringed upon by failure to access the information it seeks from the Plaintiff...”***

28. In the end I find no merit in the Plaintiffs’ application and accordingly the Notice of Motion dated 29<sup>th</sup> November 2018 is dismissed with costs to the Defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>TH</sup> day of MAY, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFFS

..... FOR THE DEFENDANT