



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 466 OF 2016

TRANSCEND MEDIA GROUP LIMITED.....PLAINTIFF

VERSUS

SAFARICOM LIMITED.....1ST DEFENDANT

BOB COLLMORE.....2ND DEFENDANT

SYLVIA MULINGE.....3RD DEFENDANT

FLORA OMUHAKA MANGALA.....4TH DEFENDANT

EMILY TOO.....5TH DEFENDANT

FLORA BAIYA.....6TH DEFENDANT

JANICE KEMOLI.....7TH DEFENDANT

THOMAS OMANGA.....8TH DEFENDANT

TIMLA TIENG.....9TH DEFENDANT

SARACEN MEDIA KENYA LIMITED.....10TH DEFENDANT

FIELDSTONE HELMS LIMITED.....11TH DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 26th September 2017, brought under the provisions of Article 50 of the Constitution of Kenya, Section 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya; Order 40, Rule 10 and 51, Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of the law.

2. The Applicants are seeking for orders as here below reproduced:-

(a) Spent

(b) Spent

(c) *The Plaintiff and/or its employees, agents, assigns, servants and/or any other persons having apparent control thereof be compelled to forthwith provide full access to and permit the Plaintiff and/or its appointed forensic to access, inspect, copy, reproduce or otherwise preserve information and data saved on the Macbook Pro and the iMac desktop computers referred to and the subject of the Forensic Report dated 2nd March 2017 from East Africa Data Handlers under the supervision of this Honourable Court as deemed necessary for the purpose of obtaining full information and evidence.*

(d) The Honourable court be pleased to issue such other orders as it may deem in the interest of justice;

(e) The costs of this application be provided for.

3. The Application has been filed by the 8th, 9th and 11th Defendants (herein “the Applicants”) and supported by the grounds on the face of it and an Affidavit dated 26th September 2017, sworn by Thomas Omanga, the 8th Applicant and a director of the 11th Applicant’s company.

4. He deposed that on or about 11th November 2017, the Plaintiff (herein “the Respondent”) filed a notice of motion Application dated 17th November 2016, seeking for various orders including injunctive orders against the Applicants and an order that they be compelled to avail various computers and communication devices for a forensic examiner. Subsequently, on or about 7th December 2017, the Application was opposed vide a Replying affidavit sworn by the 8th Applicant and filed on his own and on behalf of the 9th and 11th Applicant.

5. On 12th June 2017, the Respondent filed a further Affidavit and a list of documents in response to the Replying affidavit and enclosed a letter dated 2nd May 2017, from East Africa Data Handlers together with a copy of a voluminous Forensic Report dated 2nd March 2017 from East Africa Data Handlers. That the plaintiff has in its further affidavit made “scurrilous and entirely unfounded but nonetheless serious allegations of fraud” against the Applicants, purportedly relying on the Forensic Report which is purported to be the output of a forensic examination of three computers, alleged to have been utilized by the Applicants and one Christine Muchendu, while under the employment of the Respondent.

6. The Applicants aver that upon a detailed perusal of the aforementioned Forensic Report it has become apparent to the Report and the conclusions purported to be reached therein are founded on data and information that has been fabricated, manipulated and/or fraudulently obtained by the Respondent and/or its agents. Furthermore, it is apparent from the contents of the Report that the date and information referred to therein includes; materials and documents that were created months after Applicants left the employment of the Respondent in April 2016 and could therefore not conceivably have been produced on the aforementioned machines prior to April 2016.

7. That on or about 8th June 2016, the Chairman of the Respondent, one Michael Njeru, together with its other employees, armed police and persons claiming to be officers of; the Kenya Copyright Board, purportedly acting on the authority of; the Chief Magistrate’s Court order granted by; Hon. E.K. Usui (Ms.) Senior Principal Magistrate on 6th June 2016; in CMCC No. 3644 of 2016- *Transcend Media Group Limited vs Saracen Media Group Limited & 2 Others*, conducted what was purported to be a raid on the premises occupied by the 11th Applicant’s employees and forcefully compelled the 10th and 11th Applicant’s employees to hand over desktop and laptop computers, other electronic devices and various other items belonging to the 10th and 11th Applicants and/or their employees, together with passwords to the aforesaid computers and devices which devices contained inter alia; works created by the 10th and 11th Applicants and/or their employees.

8. The Applicants aver that, the Kenya Copyright Board did not carry out its mandate as provided in the Court order issued by which was limited solely to supervision of the preservation of any devices and records seized but irregularly elected to forward the same Cyber Crime Department of the Criminal Investigation Directorate, for an unwarranted investigation that lacked any transparency or legal foundation and had not been authorized by any Court.

9. The Applicant argues that, in view of the entirety of the foregoing, and the patent irregularities apparent in the Respondent’s conduct to date, they are apprehensive that the Honourable Court is being presented with a fabricated and falsified account clothed in the purported Forensic Report. That notwithstanding the serious conclusions in the report, neither the Honourable Court nor the Applicants has had access to the computers which remain in the custody of the Respondent.

10. It was argued that although the Honourable Court granted the Applicants leave to file a supplementary affidavit in response to the Respondent’s further affidavit filed on 12th June 2017, given the foregoing, it has however become apparent that to effectively and definitely respond to misleading allegations made by the Respondent, the Applicants and/or their appointed Forensic examiners be allowed to conduct an independent forensic examination of the aforementioned computers.

11. Further and in particular, it is in the manifest interest of justice and fairness that the Applicants be granted access to the Hewlett Packard Laptop, the Macbook Pro and the iMac desktop, so as to provide the Honourable court with the evidence that it requires to make a fair determination on the issues before it.

12. However, the Application was opposed by the Respondent vide a Replying affidavit dated 9th October 2017, sworn by Lai Muthoka, a director of the Respondent’s company. He deposed that, on 6th June 2016, Hon. E.K. Usui issued an Anton Pillar order in the case; *Milimani CMCC No. 3644 of 2016; Transcend Media Group vs Thomas Omanga & Others*; which allowed the Respondent to seize the infringing works, data and computers with the supervision of officials from the Kenya Copyright Board Enforcement office.

Consequently, on 8th June 2016, the Respondent’s directors and officials from the Kenya Copyright Board went to the 10th Applicant’s office where the 11th Applicant office is situated and the officials of the Kenya Copyright Board seized the computers and laptops from the 8th and 9th Applicants who were former employees of the Respondent.

13. That by consent of the parties, and in the presence of the firms of; M/S Muriu Munga & Company Advocates & Ogola Mujera Advocates, who are on record for the 8th, 9th, 10th and 11th Applicant, it was agreed that a forensic examination be carried out so as to give effect to the Anton Pillar orders and establish whether there was copyright infringement by the Defendants. That the forensic examination was conducted by the Directorate of Criminal Investigations Office on the computers seized from the 10th Applicant’s offices, pursuant to directions given by Hon. R. Ng’etich, in Chief Magistrate Court Milimani No. 3644 of 2016 and a Forensic Report dated 16th October 2016.

14. That on or about November 2016, the Respondent submitted three of its computers in particular, one Hewlett Packard (HP) laptop, one Macbook pro laptop and one iMac desktop, which were being used by the 8th and 9th Applicants and one Christine Muchendu, while still in employment of the Respondent company to East Africa Data Handlers to carry out a forensic analysis and an Forensic Report dated 2nd March 2017 was forwarded vide a letter dated 2nd May 2017.

15. The Respondent averred that the three (3) computers were returned to it and are currently being used as tools of trade by the company and there is no basis in law for the Respondent to submit them the custody of the Court. That the Applicants have not controverted the trove of emails filed in Court and if the same were not true, they would have filed documents to prove that fact.

16. The Respondent averred that the 8th Applicant formatted and deleted all the files that were stored in the Company Macbook pro laptop which was then issued to him prior to his resignation without proper notice and had hoped to delete all traces of his fraudulent collusion with the 1st Applicant and its employees as well as the unlawful partnership with the 10th Applicant.

17. That, the 8th, 9th and 10th Applicants are on a fishing expedition and have not laid any basis to warrant the Court to order the subject equipment be held in its custody. Further, the Forensic analysis Report dated 2nd March 2017, is an expert Report and at this stage of the proceedings, the Applicants have not right to the evidence being produced by the expert witness; as provided for in Order 3 Rule 2(c) of the Civil Procedure Rules. Further the orders sought are not available at an interlocutory stage. The Applicants will have an opportunity to challenge the evidence presented by the Respondent's expert witness at the hearing of the case.

18. Finally, the Respondent argued that the Forensic Report was filed in court on 16th June 2017, and that the instant Application has been filed late in the day and is an attempt to delay the hearing and determination of the Respondent's notice of motion application dated 17th November 2017.

19. However, the Applicants filed a supplementary affidavit dated 24th October 2017, sworn by Thomas Omanga, the 8th Applicant and averred that the purported forensic examination was unauthorized and no consent or approval was given by the Applicants Advocate in CMCC 3644 of 2016- *Transcend Media Group Limited vs Saracen Media Group Limited & 2 Others* to the purported forensic investigation.

20. The Applicants reiterated that it is essential that access to the computers be granted to allow for the conduct of a forensic examination and it is only through the conduct of such an examination and the issuance of a forensic examiner's report that the Applicants may adequately respond to the allegations of fact and statements of opinion that the Respondent is seeking to find its application on.

21. The Applicants argued that it will be manifestly unfair and prejudicial to them for the Respondent to seek to rely on an opinion formed on the basis of underlying facts, being the information and the data computers while the factual basis for such an opinion remains inaccessible and inscrutable. That the Respondent has not demonstrated any prejudice or loss that it stands to suffer should the orders sought in the notice of motion be granted as prayed. Finally, that the Application was filed timeously upon consideration of the contents of the Respondent's Forensic report filed in Court on 17th June 2017.

22. The Parties disposed of the application by filing submissions and highlighting the same. The Applicants submitted that Order 40 Rule 10 of the Civil Procedure Rules, gives the Honourable court the discretion to make an order for the detention, preservation, or inspection of any property, as to which any question may arise to authorize any observation to be made which may seem necessary or expedient for the purpose of obtaining full information or evidence.

23. The Applicant rebutted the averments that the orders they are seeking for cannot be granted at an interlocutory stage and submitted that it is the Respondent in the motion application dated 17th November 2016, that is seeking for drastic and invasive orders on the basis of its own Forensic Report and it would be of no utility to the Applicants to be able to contravene the Respondent's forensic examination Report after a determination on which its basis has already been made by the Honourable Court.

24. It was submitted that it is a foundational principle of natural justice reflected in; Article 50 of the Constitution of Kenya, that a fair hearing be afforded to all parties to a dispute, and that Section 3A of the Civil Procedure Act (Cap 2) Laws of Kenya, gives Court the inherent jurisdiction to make such orders as may be necessary for the ends of justice. Thus it will be contrary to these principles to permit a one sided narrative to be presented unchallenged where the opportunity exists for the full facts and evidence of a matter to be presented to the Court.

25. Further it is a well-established principle that expert evidence, such as that tendered by the Respondent in support of its notice of motion application dated 17th November 2016, may only be properly rebutted by way of other expert opinions. The cases of; *Ali Mohamed Sunkar vs Diamond Trust Bank (K) Ltd (2011) eKLR*, and *John G. Kamuyu & Another vs Safari M. Park Motors (2013) eKLR*, were relied on. Further reliance was placed on the case of; *Stephen Kinini Wang'undu vs The Ark Limited (2016) eKLR*, where it was held that an expert report is only as good as the assumptions on which it is based.

26. The Respondent on its part submitted that, Order 2 Rule 3 (c) of the Civil Procedure Rules, provides that all suits filed shall be accompanied by written statements signed by the witnesses excluding expert witnesses, and that Section 106 B of the evidence Act, provides for the admissibility of electronic records. That the admissibility, relevance and probative value of the forensic report dated 2nd March 2016, shall be dealt with by the Court during the trial of the case.

27. It was submitted that the Applicants have not challenged the Forensic Report issued by the Directorate of Criminal Investigations dated 16th October 2016, whereas the Forensic Report dated 2nd March 2017 was only supplemental thereto. Further, the 1st to the 7th and the 10th Defendants have not controverted the authenticity of the email correspondence in the two Forensic Reports dated 16th October 2016 and 2nd March 2017 and therefore the instant Application is unmeritorious, an abuse of the Court process and should be dismissed with costs.

28. The Respondent referred the court to Halsbury's Law of England Volume 17 Fourth Edition where it is stated that:

“Questions relating to the admissibility of evidence are questions of law and must be determined by the Judge. If such questions depend upon the determination of some preliminary questions of fact, the judge may decide that question by hearing any necessary evidence upon it. This is so even though the decision of the preliminary question involves the determination by the judge of the same fact which jury has ultimately to decide, but he may ask the jury to determine that fact.”

29. Further reference was made to the case of; Law Society of Kenya vs Faith Waigwa & 8 Others (2015) eKLR, where the Court dealt with the rationale of cross-examination of witnesses; being to bring out desirable facts to modify or clarify or to establish the cross-examiner's case and to impeach the credit worthiness of a witness.

30. That in the case of; Antony Francis Wareham t/a AF Wareham & 2 Others vs Kenya Post Office Savings Bank (2004) eKLR it was held that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings.

31. The Respondent submitted that the Applicants have not established a prima facie case as defined in the case of; Mrao Limited vs. First American Bank Limited [2003] KLR 125 to restrain the Respondent from using the three (3) computers. That the three (3) computers are not the subject matter of the suit and therefore the Court ought not to issue an order for preservation, detention or inspection.

32. At conclusion of the arguments by the parties, I have considered the same alongside the documents and the submissions filed and I find that, the key issue to determine is whether the Applicant has met the criteria for grant of the orders sought. The Applicants initially sought for a total of six (6) prayers. Basically prayer (1) was spent at the presentation of the application. Prayer (2), and (3) were sought for pending the hearing and determination of the application and were not granted ex parte, consequently, they are spent and therefore the only substantive prayers for determination are prayers (4), (5) and (6).

33. In that regard I note that the application has been brought under the provisions of Order 40, rule 10 of the Civil Procedure Rules 2010, which provides that:-

“10(1) The court may, on the application of any party to a suit, and on such terms as it thinks fit;

a) Make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein; or

b) For all or any of the purposes of aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; or

c) For all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.”

34. However, before I deal with the issues herein, I wish to make it clear that I have considered the Application in the back drop of two issues; first and foremost, the subject matter of this Application and the Respondent's notice of motion Application dated 17th November 2016, are founded on the Anton Pillar order issued on 6th June 2016, by the Hon. E.K. Usui, in Milimani CMCC No. 3644 of 2016 - Transcend Media Group Limited vs Saracen Media Group Limited & 2 Others That order alleged allowed the Respondent to seize the infringing works, data and computers under the supervision of officials from the Kenya Copyright Enforcement office. Unfortunately it is not clear whether the matter in the Chief Magistrate's Court, is still active or has been concluded. I could only gather from the Affidavit sworn by the 8th Applicant in response to the Respondent's Application herein that the matter is yet to be heard and determined.

35. Secondly, the Respondent's Application referred to herein and the Affidavit sworn by the 8th running into 68 paragraphs in response thereto and the annexures from pages 1 to 51, reveals clearly that the averments in that Replying affidavit and the averments in the Affidavit in support of the subject application, relate to the same facts in all respect. The questions that flows from these two issues are: whether, this application can be determined independent of the Respondent's Application, and if so, whether the hearing of same will have any effect to the subsequent hearing of the Respondent application, or whether, it will be in the interest of justice to hear the Respondent's Application and determine all the issues raised both in that Application and the Replying Affidavit Thereto and cover the concern in this Application.

36. As already stated, the only substantive prayer is remaining in this Application is prayer (4), where the Applicants (though the prayer reads “the Plaintiff”/ Respondent), are seeking to be allowed to have access, copy, reproduce or otherwise preserve information and data saved on the subject computers for the purpose of obtaining full information and evidence. The Respondent's reply to the Application is that, it will be relying on the impugned Report dated 2nd March 2017 as part of its evidence at the trial. However, the case is yet to be heard and the parties are yet to undertake compliance with the provisions of Order 11 of the Civil Procedure Rules which deals comprehensively with pre-trial directions and conferences.

37. Indeed Rule 3(1) thereof, that deals with case conference and states that, with a view to furthering expeditious disposal of cases and case management, the Court shall within thirty (30) days after the close of pleadings convene a Case Conference, in which it shall (a) consider compliance with Order 3 Rule 2 and Order 7 Rule 5.

38. Further Rule 3(2) states that in addition to any other general power, the Court may at the case conference;_

(a) Deal with any interlocutory applications or create a suitable timetable for their expeditious disposal;

(b) Order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogatories which may be appropriate to the case.

39. Similarly, Rule 5(1) provides that with a view to providing an opportunity for settlement in every suit to which Order 11 applies, the Court shall within sixty (60) days of the case conference in the case of a fast track case, and ninety (90) days in the case of multi-track case, convene a settlement conference and Rule 5(2) (d) stipulates that; each party shall at least seven days before the date appointed for the settlement conference prepare and exchange a settlement conference brief which should include; expert reports and the relevant portions of documents relied upon.

40. Therefore even if the Applicants are not granted the prayer sought for they still have an opportunity to address the issue of evidence relied on in the impugned Report at the pre-trial stage and in the same vein the Applicants can still establish the necessity of the orders sought for by canvassing the same through the Affidavit in response to the Respondent's Application. This position is informed by the fact that the Respondent too is seeking under prayers (4) and (6) of the Application dated 17th November 2016, for similar orders of access to information held by the Applicants.

41. In that regard, I make the following orders:-

(a) The final decision in the Application herein shall be stayed pending the hearing and determination of the Respondent's Application dated 17th November 2016;

(b) The parties shall thus file the necessary responses if that has not been done and file their respective submissions on the subject Application within the timelines to be set;

(c) Upon compliance and highlighting of the submissions, the court shall render its decision on the issues raised in the two Applications;

(d) Even then, having considered the nature of this matter and the issues raised in the various affidavits filed, the Court is of the opinion that it will serve the interest of justice for the parties to close the pleadings and comply with Order 11 of the Civil Procedure Rules, for the expeditious disposal of the matter in compliance with the overriding objectives under Section 1A and 1B of the Civil Procedure Act;

(e) The costs of the application shall be determined after the final orders are made.

42. It is so ordered.

Dated, delivered and signed in an open court this 9th day of July 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Issa for the Plaintiff/Respondent

Mr. Ngatia Wambugu for Ms. Ngondo for the 1st and 7th Defendants

Mr. Muhindi for the 8th, 9th and 11th Defendants/Applicants

Mr. Otieno for Mr. Kenneth Wison for the 10th Defendant

Dennis -----Court Assistant