



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 517 OF 2016**

**LYDIA JOY KAIMURI.....1<sup>ST</sup> PLAINTIFF**

**CAROLYNE WANJIRU NDIBA.....2<sup>ND</sup> PLAINTIFF**

**JOAN WAIRIMU GITHUKU.....3<sup>RD</sup> PLAINTIFF**

**MARY WANJIRU KIARIE.....4<sup>TH</sup> PLAINTIFF**

**PEACE MUULU.....5<sup>TH</sup> PLAINTIFF**

**JOYCE WANGU NDUATI.....6<sup>TH</sup> PLAINTIFF**

**ELIZABETH NYAMBERE MAINA.....7<sup>TH</sup> PLAINTIFF**

**JECKONIA OYOO ONDURU.....8<sup>TH</sup> PLAINTIFF**

**PAUL MUTHIKE MWANI.....9<sup>TH</sup> PLAINTIFF**

**MONICAH WANJIKU KIBAYU.....10<sup>TH</sup> PLAINTIFF**

**JAMES MAINA KARANJA.....11<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

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

**RULING**

1. On 21<sup>st</sup> December 2016 eleven Plaintiffs filed its case against **Safaricom Limited (Safaricom)**.
2. The Plaintiffs are Kenyan musicians whose songs are ring back tones sales in Skiza platform. The Plaintiffs allege, by this claim, that in December 2016 Safaricom created royalty licensing regime for music at its Skiza portal, which the Plaintiffs state was in violation of the provisions of the Copyright Act which indicates how collective management royalty should be handled. It is for that reason the Plaintiffs prayed, amongst other prayers, that Safaricom be restrained from making any Skiza royalty payment belonging to the Plaintiffs to CSPS.
3. The Plaintiffs filed an interlocutory application, dated 20<sup>th</sup> December 2016 seeking interlocutory *injucito* to restrain Safaricom from making those payments.
4. That application did not proceed for hearing because it was adjourned from time to time, at the behest of the Plaintiffs. It was adjourned because Safaricom intimated it was desirous of making payments to the Plaintiffs but it required to know, from the Plaintiffs, which one of them was to be paid and for what songs. From December 2016 to September 2018 and up to date the matter was adjourned for that very reason but the Plaintiffs failed to provide the list of payees.
5. Safaricom has filed an application, which is the subject of this ruling, by Notice of Motion dated 5<sup>th</sup> April 2019. By that application Safaricom seek dismissal of this suit for want of summons.

6. It is not denied that the Plaintiffs did not file summons in this matter. This is contrary to Order 5 Rule 3 of the Civil Procedure Rules [the Rules.] that Rule provides:

***“Every summons shall be accompanied by a copy of the plaint.”***

7. There is no doubt that Order 5 of the Rules lays the burden on the Plaintiff to prepare the summons which should accompany the plaint. This is what was stated in the case **NATHAN LOYD NDUNGU THEMIS INVESTMENT LIMITED & 6 OTHERS [2018] eKLR** viz:

***““Order 5 Rule 1 (3) of the Rules requires every summons to be accompanied by a plaint. The converse is that no plaint can be filed without summons. Rule 1 (5) of that Order 5 lays the responsibility on the Plaintiff or his advocate to prepare the summons.”***

8. The 6<sup>th</sup> Plaintiff (who is the only one opposing the application) submitted that it was her advocate who failed to prepare the summons to accompany the plaint.

9. I would respond by saying that the Rules require summons be filed. The Rule uses the word ‘shall’ – see Order 5 Rule of the Rules. This is what the Court in the case **JAMES MUKURIA NJOROGE V JOSEPH MURAYA & 2 OTHERS [2019] eKLR** thus:

***“Whereas it is the duty of the Plaintiff to file summons together with the plaint while instituting suit, the issuance and signing of summons is the duty of the Court, which also directs the Defendant to appear within the time specified therein.”***

10. There is no doubt that the Plaintiffs failed to abide by Order 5 Rule 3 of the Rules.

11. Order 5 Rule 1(6) further provides that summons should be served within 30days of notification or issue. Failing that the suit abates. That Rule is in the following terms:

***“Every summons, except where the Court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.”***

12. Since the summons were not filed with the Plaintiff as required under Order 5 Rule 1(3) of the Rules and because service of such summons was not done within 30 days set in Order 5 Rule 1(6) of the Rules this suit abated within 30 days of its filing, that is on or about 21<sup>st</sup> January 2017. What then remains, for this Court to do, is for this suit to be declared to have abated. It is for that reason the application succeeds with costs. Safaricom will also be awarded costs of the suit.

13. In the end this suit is hereby struck out for having abated. The costs of the Notice of Motion dated 5<sup>th</sup> April 2019 and the costs of this suit are awarded to Safaricom against the Plaintiffs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2019.**

**MARY KASANGO**

**JUDGE**

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

Sophie..... COURT ASSISTANT

.....FOR 1<sup>st</sup>-5<sup>TH</sup> & 7<sup>th</sup>-11<sup>th</sup> PLAINTIFFS

..... FOR THE 6<sup>TH</sup> PLAINTIFF

..... FOR DEFENDANT