



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO.228 OF 2016

SAFARICOM LIMITED.....PLAINTIFF/APPLICANT

VERSUS

TRANSCEND MEDIA GROUP.....DEFENDANT/RESPONDENT

RULING

1. The Tender process and outcome, and implementation of what is now popularly known as The Blaze Brand Promotion has led to a fall out between Safaricom Limited (Safaricom) and Transcend Media Group Limited (Transcend).

2. In the wake of that fallout a dispute has arisen between the two and has culminated in the commencement of this suit by Safaricom on 15th June 2013. Together with the Complaint is a Notice of Motion of the same day in which Safaricom seeks the following substantive Orders:-

4.The Defendant whether acting by its directors, officers, servants, agents or otherwise howsoever be and is hereby restrained from further publishing or causing to be published any words attributing corruption and illegality on the part of the Plaintiff in respect to its tender processes, and in particular, the tender for the contract for the implementation of the BLAZE brand promotion, pending the hearing and determination of this suit.

5. The Defendant whether acting by its directors, officers, servants, agents or otherwise howsoever be and is hereby restrained from interfering with the implementation of the contract between Saracen Media Limited and the Plaintiff in respect to the BLAZE brand promotion, pending the hearing and determination of this suit.

3. The rival positions taken by the parties herein are set out in the Affidavit of Daniel Ndaba for Safaricom and Lai Muthoka for Transcend.

4. In his Affidavit of 15th June, 2016, Mr. Ndaba reminds the Court that Safaricom is the leading mobile phone operator in Kenya with over 25,200,000 subscribers. That on or about 20th August, 2014, Safaricom developed a Youth Segment Strategy targeting subscribers in the age bracket of 18 to 24 years. Following some research carried out on 13,000 sample consumers, Safaricom conceptualized the brand for promotion of the Youth Segment Strategy in the name of Blaze. This would be before 25th January 2016.

5. It is contended by Safaricom that for purposes of identifying suitable Advertising Agents for Partnership in the implementation of The Blaze Brand, Safaricom invited 8 prequalified Advertising Agencies through a request for Quotation. The request for Quotation forwarded, amongst other documents, the following:-

- a. A market analysis for the intended partner in the implementation of the BLAZE brand;
- b. Terms of Reference for the intended partnership in the implementation of the BLAZE brand;
- c. Pitch Document for the BLAZE brand;
- d. Agency Brief detailing 15 deliverables expected of the advertising agencies in the implementation of the BLAZE brand; and,
- e. Non-Disclosure Agreement to be executed by the advertising agencies.
- f. One of the Agencies who received the invitation was Transcend.

6. That Transcend and the 5 other prequalified Advertising Agencies submitted their bids and upon evaluation, Saracen Media Limited (Saracen) emerged the successful bidder. Thereupon, Safaricom executed a 2 year contract with Saracen commencing on 1st April, 2016 and terminating on 31st March, 2018 for the implementation of The Blaze Brand at an annual retainer of Kshs.104,367,168/=. The Court is told that the Blaze Brand has been launched with considerable reception.

7. A complaint by Safaricom is that Transcend has published Injurious Falsehoods about Safaricom to Safaricom shareholders, business Associates and the Public in an attempt to induce and procure the unlawful termination of the contract between it and Saracen. Safaricom alleges that in the publications Transcend accuses it of corruption and illegality in the tendering process. Instances of the publication are given.

8. That on or about 18th April 2016, Transcend wrote and published a letter to Vodafone Group Service Limited concerning Safaricom's business and in particular the implementation of the partnership between it and Saracen.

9. Again, on or about 27th May, 2016, Transcend wrote and published a Notice in the Daily Nation concerning Safaricom's business and in particular the implementation of the Blaze Brand Promotion. Mr. Ndaba sets out why Safaricom views the publication as false and malicious. The Court must return to the later.

10. It is Safaricom's case that Transcend has deployed unlawful means to injure Safaricom in the implementation of The Blaze Brand Promotion by seeking to import material and information used for the promotion, infringing Safaricom's copyright for works developed in respect to the Blaze Brand promotion and coercing Safaricom to terminate its contract with Saracen and transfer business in respect thereof to Transcend.

11. It is Safaricom's case, as well, that Transcend has in breach of Trust and Confidence reposed to it by Safaricom during the bidding process, used confidential material, including the developed works for the implementation of The Blaze Brand Promotion to register the following copyrights:-

- (i) Kenya Speaks Safaricom
- (ii) Communication Strategy
- (iii) Youth Assets

(iv) Digital Tribe and Shangwe Sato.

12. In an Affidavit sworn by Lai Muthoka on 30th June, 2016, Transcend gives its perspective of things. Of the letter to Vodafone Group Services Limited, Transcend contends that it was a complaint on the Tender process and interference with its staff. That at any rate, the complaint is a letter to a Company which owns Safaricom and for “all intends (sic) and proposes (sic) cannot amount to publication to a 3rd party”.

13. Regarding its Notice in the Daily Nation, Transcend states that it was to clarify and give correct facts on the Tendering process following misrepresentation in the media and a barrage of Twitter comments maligning its name. The Media reports which Transcend contends were countenanced by Safaricom include:-

i) A publication in The Business Today of 20th May 2016.

ii) An article appearing in The Daily Nation of 8th May 2016.

iii) A publication in the Business Today of 27th May, 2016.

14. In respect to the registered copyrights, Muthoka avers that on 25th May, 2016 Transcend lodged a complaint with The County Criminal Investigation Officer and on 2nd June 2010, with The Kenya Copyright Board on theft of its copyright by its former employee in collusion with Safaricom. In addition, Transcend has filed suit against Saracen together with one Thomas Omanga and Fieldstone Helms Limited at Millimani CMC No.3644 of 2016(hereafter the Copyright suit) for breach of Copyright under Section 37 of The Copyright Act.

15. Mr. Muthoka’s chronology and purport of The Tender Process, not surprisingly, differs from that given by Safaricom. That upon invitation by Safaricom, Transcend submitted documents on 12th February 2016 pitching for a Tender dubbed ‘**Request for Proposal (REP)for 2nd Agency for the Safaricom. ATI/3TL creative and Digital Services**’. That what Safaricom required was an Agency which could circulate its Brand in a manner that could win over the Youth Market Segment.

16. The Agencies shortlisted in the final stages of the pitch were Brainwave Communication, Saracen Media (in collaboration with 5ive Limited and Bean Limited) and Transcend. In the pitch process Transcend was represented by its Creative Director, one Thomas Omanga. This is of significance to Transcend’s contentions.

17. It is alleged that on 29th March, 2016, Mr. Omanga, whilst still in the employment of Transcend held a meeting with Sylvia Mulinge (Safaricom Director for Consumer Business) ostensibly negotiating and disclosing Transcend intellectual property in his private capacity.

18. On 15th April, 2016, Safaricom through Flora Mungai and Emily Too, informed Transcend that its bid was unsuccessful. But this was after some key employees of Transcend, and who were instrumental in the bid, had resigned.

These are:-

i) Timla Tieng – Senior Act. Director (resigned on 5th April, 2016)

ii) Christine Muchendu - (Acting Manager (resigned on 13th April, 2016)

iii) Brian Oyugi – creative Designer resigned on 14th April, 2016).

19. Later Transcend learnt that Saracen was commissioned to work alongside a company called

Fieldstone Helms Limited (Fieldstone) in the Implementation of The Blaze Brand and not Sive Limited and Bean Limited who were members of its consortium at the bidding. Transcend also pointed out that in the Agreement entered between Safaricom and Saracen some of its former employees being Thomas Omanga, Christine Muchendu, Timla Tieng and Brian Oyugi are listed as part of Saracen's team.

20. It is on the basis of what it sees as outright procedural malpractices and irregularities that Transcend started to question the entire process.

21. Although some facts are contested, that is the backdrop against which the Application I now turn to consider was filed. In its very nature, one limb of the Application seeks to curtail Transcend from expressing itself on certain matters. In a sense Safaricom is seeking a Court Sanctioned Censorship to restrain Transcend from;

“Publishing or causing to be published any words attributing corruption and illegality on the part of the Plaintiff in respect to its Tender Process, and in particular, the Tender for the Contract for the Implementation of The Blaze Brand Promotion, pending the hearing and determination of this suit”.

22. At once there is tension between what Safaricom seeks and Transcend's Freedom of Expression enshrined in Article 33(1) of the Constitution:-

“Every person has the right to freedom of expression, which includes-

- a) Freedom to seek, receive or impart information or ideas;
- b) Freedom of artistic creativity; and
- c) Academic freedom and freedom of scientific research.

23. That said, and as pointed out by Mr. Havi for Safaricom, Freedom of Expression is not without bounds. Indeed the Freedom has an internal content-based restriction in Sub Articles (2) and (3) and more relevant to the matter at hand, Sub Article (3) reads:-

‘In the exercise of the right of freedom of expression, every person shall respect the rights and reputation of others’.

24. So as to ease this tension, the Courts have applied certain Principles when considering Applications which seek to fetter a Defendant's right to expression or speech. And although applied in Defamation cases, the Principles are as relevant in actions founded on Malicious Falsehoods. Onyancha J. in **Star Publication Limited & Another Vs. Ahmednasir Adullahi & 5 others [2015]eKLR** held:-

“In the case of Media Council of Kenya vs. Eric Orina [2013] eKLR I asserted that the above cited principles in the GIELLA case, are applied in a special way in defamation cases. The said principles are applied with the greatest caution so that the injunction sought is granted only in the clearest of cases. The Court has to be satisfied that the words or matters complained of are clearly libelous and that they are so manifestly defamatory, that any verdict to the contrary would likely be set aside as perverse. I therein extracted the following reasons which should apply to this defamation case, why, inter alia, the court should apply the GIELLA case principles with caution:-

- a) That free speech should not without strict proof of its violating individual rights, be fettered.*
- b) That the right of free speech is one which is for public interest by dint of human rights as protected by our Constitution and therefore one which individuals should have and should exercise without impediments, even if such impediments is by court injunction such as the one sought herein, at this interim state of suit.*
- c) That even where there is clear evidence that publication or repeated publication of a libel is*

likely to cause injury to an individual, protection of the right to free speech would persuade the court to deny restraint thereof even at the risk of such injury occurring anticipation that the individual injury, will be compensated by ordinary or aggravated damages or both.

d) That otherwise the publication of the injurious material will be justified because it may be true and should be published in public interest or as fair or true comment”.

A similar position was taken in Cheserem Vs. Intermediate Media Services [200] 2 EA 371 (CCK) where the Court held:-

“An interlocutory injunction is temporary and only subsists until the determination of the main suit. In defamation, the question of injunction is treated in a special way although the conditions applicable in granting an injunction as set out in the Giella Vs. Cassman Brown & Co. Ltd [1973] EA 358 generally apply... In defamation cases, those principles apply together with special law relating to the grant of injunctions in defamation cases where the court’s jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in clearest possible cases. The court must be satisfied that the words complained of are libelous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside perverse... The reason for so treating grant of injunction in defamation cases is that the action for defamation bring out conflict between private interests and public interest, more so in cases where the country’s constitution has provisions to protect fundamental rights and freedom of the individual, including the protection of the freedom of expression”.

25. That may not be different from the position taken by Courts in England. In O’Hare & Browne Civil Litigation, 15th Edition, Sweet & Maxwell at page 432 paragraph 27-012, the learned authors noted that:-

“where a claimant seeks an injunction to restrain defamation or malicious falsehood two basic right conflict: the claimant’s right to protection from unlawful injury to his reputation and the defendant’s right to freedom of speech. For many years now the courts have resolved this conflict by holding that if the defendant bona fide intends to state a defence of justification or fair comment on a matter of public interest the claimant cannot obtain an interim injunction however strong his case unless it is clear that no defence will succeed at trial....The Severity of this rule against the claimants does not infringe their rights....Instead the claimant is left to claim remedies at the trial only i.e damages and a final injunction”.

26. I agree. But I dare add that the modification to the first Principle in GIELLA VS. CASSMAN BROWN & CO.LTD may well amount to a departure. While GIELLA requires an Applicant to demonstrate a Prima facie case with probability of success, in actions for Defamation or Malicious Falsehoods the onus imposed on the Applicant is to demonstrate that the case is more likely than not to succeed. That the case has good prospects of success. The Claimant’s case must be sufficiently clear and strong.

27. Paragraphs 17-20 of the Plaintiff sets out Safaricom’s cause of Action in Malicious Falsehood. The essentials of an action for Malicious falsehood are that the Defendant has:-

- i) Published about the Plaintiff words which are false.
- ii) They were published maliciously.
- iii) The Defendant has suffered Pecuniary Damage or is exempted from alleging or proving Special Damages by the provisions of Section 5(1) of the Defamation Act Cap 36 Laws of Kenya.

Section 5(1) of The Defamation Act provides:-

“In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage—

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

28. The burden of proof of each of the three elements of the Action in Malicious Falsehood lies with the Plaintiff. This is unlike Defamation where, for instance, Falsity is presumed. In PETER CRUDDAS VS. JONATHAN CALVERT (2) HEIDI BLAKE (3) TIMES NEWSPAPERS LTD [2013] EWHC 2298 (QB) Tugendhat J. held:-

“I recall that in libel the burden of proving the truth lies on the Defendant, whereas in Malicious Falsehood the burden of proving falsity lies on the Claimant”.

This burden of proof will turn out to be critical on assessing whether or not Safaricom has demonstrated a clear case of Malicious Falsehood.

29. The charge by Safaricom is that the Malicious Falsehood is contained in two publications. A letter of 18th April, 2016 by Transcend to Vodafone Group Services Limited and the notice in the Daily Nation of 27th May, 2016 necessarily these two publications will be reproduced at an appropriate point of this Decision.

30. Transcend denies that the publications are false or malicious and pleads the Defences of;

i) Fair and true comment,

ii) Right of Reply and justification.

iii) Publication made in good faith, without malice and in the public interest.

31. The stage was the set for Safaricom to prove the Trio elements of the Tort by way of Affidavit evidence.

32. Of the letter to Vodafone Group Limited, Transcend took a position that the same did not amount to a publication to a 3rd party because it was a complaint to a company that owned Safaricom. This Defence was set up in paragraph 10 of Transcend's Statement of Defence. It is nonetheless not argued by Transcend that Vodafone and Safaricom are not separate legal entities. But whether or not the two are so connected that for purposes of the Tort, Vodafone should not be presumed to be a third party is a matter that this Court would rather not answer at this stage as the court need not resolve that issue so as to decide the Application before it. For now this Court takes the position that Vodafone is a third party.

33. The publications that have vexed Safaricom shall be produced in their entirety. Portions of those publications have been highlighted by Safaricom as Malicious and False. In reproducing them the Court retains the highlights by Safaricom. This is the letter of 18th April, 2016:-

Nick Vidovich

Group Legal Director – Litigation

Vodafone Group Services Limited

Dear Sir,

RE: COMPLAINTS AGAINST SAFARICOM TENDER PROCEDURES

We, Transcend Group (TMG) received an email on 25th January 2016 from Safaricom inviting us to participate in a tender for provision of 2nd ATL-BTL Creative and Digital Agency. We responded by submitting our bid via the provided online portal on 12th February.

In addition to the above we were separately also invited to submit bids for Experimental marketing, Out of Home and Digital agency work.

The brief for the creative and digital agency focused on the high potential category of youth between 18-24 years. On 16th February we were called in to pitch to the evaluation Committee and did well enough to proceed to the next round. On 2nd March we presented to the Executive committee and were told to await the results outcome after being in competition with 2 other finalist bidders namely:

1. Brainwave Communications
2. Saracen Media in collaboration with 5ive limited and Bean interactive.

Saracen Media are purely a specialized media buying firma and have no creative or digital capacity which then required them to get partners in these areas in order to qualify to bid for this tender of integrated Creative and digital agency. Anyway after a month of waiting we were later to learn that Saracen won the contract but were shocked to find that they had been FORCED by senior Safaricom staff to work with staff from TMG who had participated in the bid while under employment, namely:

1. Thomas Omanga – Client Service Director & Lead for Safaricom pitch
2. TimlaTieng – Senior Art Director
3. Brian Oyugi – Designer
4. Christine Muchendu – Account Director

The above personnel quickly set up a company named Fieldstone Helms and tasked with handling all the creative aspects of the newly awarded contract. First off, Saracen did NOT bid on joint venture with Fieldstone Helms, they bided with 5ive Ltd as their creative partner but what Safaricom did was to insist that they work with our staff namely the lead, Thomas who subsequently resigned on 4th April 2016 to go and handle the Safaricom account.

Safaricom called us Friday, 15th April, 3.45pm to inform us of the outcome of the pitch after they realized that the industry was conversing about the manner in which they mismanaged the entire procurement process.

Saracen confessed they had been forced to work with Fieldstone Helmsa Company that is a start up and that never bided whatsoever for the lucrative tender. They do not have bona fide offices neither have they even been prequalified by Safaricom as was the case with all invited bidders including TMG.

Our suspicion is that the User department colluded with our staff to leave TMG and obtain the work through the back door through this dubious scheme. The personnel involved in this are Ms. Sylvia Mulinge – Head of Consumer and a Mr. Nicholas Mulila – head of risk. The later even approached us to try and obtain a bride during the bidding process, we flatly refused and he punished us by ensuring we did not get the job. He was working in partnership with Ms. Mulinge. The monies he requested from us through our Chairman Mr. Michael Njeru was Ksh.50 million. He has evidence in form of text messages through a proxy contact Mr. Mulira was using as a conduct to solicit the said bride, he tells his friend in a local dialect the reason he

did not approve TMG was because Mike Njeru was broke and could not afford to pay him what he wanted.

Safaricom has come out publicly through the CEO as a company that has zero tolerance on corruption. In fact only recently Mr. Bob Collymore was enlisted by the President of the Republic of Kenya to help fight corruption in the private sector. It is unfortunate that he is fully aware of what was going on with his staff as they colluded to tamper with the procurement procedures. He is known to favour a close friend of his of many years one Bharat Thakrar, CEO of WPP Scan group who has held a monopoly on all marketing and communications business from Safaricom for the last 10 years exclusively.

Two years ago TMG bided against Scangroup and won but we were denied the job following what they termed as not having capacity. Then and even now Bharat has repeatedly tried to poach our employees to weaken us and gain advantage but has failed, this time we suspect he is behind this latest scheme together with senior safaricom employees to have then set up an alternative agency which we suspect he is behind in order to deny us the work. Bob Collymore and Bharat are best of friends to an extent they meet every Tuesday evening socially in a group they dabble in the Whiskey club together with others.

What is even moresad is the fact that we are confident and sure we won this business fair and square and would like to be shown the scoring results of the evaluation committee and also for the Executive committee in order to prove we scored the highest or not. The Procurement staff called us last Friday 15th April but did not divulge reasons for us losing the bid they were extremely cagey with details insisting they are not authorized to divulge details.

We are appealing to you to investigate this scam that is brewing and that is getting the industry talking to protect the reputation of your esteemed organization globally before it gets out of hand.

We also fear that Safaricom will use our intellectual property without paying any form of compensation for it through our former employees even after signing an NDA with TMG.

We present 4 concepts, which we will provide for your reference. Please note we have since proceeded to protect them under the Kenya Copyright Board. The ideas presented were:

1. NEXT NATION

2. HACT IT

3. TRIBE DIGITAL

4. SAFCOM 2.0 – Coded free

Transcend Media consulted our legal team and want to seek legal redress but have held that process in order to engage with you as Principle shareholders of Safaricom to come in to do a thorough audit and investigation and bring the culprits to book and award the rightful Agency that won the tender fairly the contract. 5ive Ltd agency were kicked out at the last minute and are also very distraught and have not been contacted by Saracen nor Safaricom since the award was given out. The M.D Mr. John Otieno has expressed his willingness to testify in this matter in solidarity with us and verify sequence of events from the beginning of this bidding process together with Saracen up until they went silent on the outcome after being awarded. The question begs why would an agency that is purely a Media buying outfit win a job that is for provisions of Creative services?

As TMG were are aggrieved because our employees at the time of the tender were induced by the senior Safaricom personnel to form an agency and use our work to win the tender only for them

to leave without any form of notice and be awarded the job illegally. It has caused us irreparable damage and cost us a lot of time, money and resources to put together work that has now been stolen. We commissioned research that informed our successful Strategy and incurred costs of production to produce ready to run material for TV, newspaper and radio. The second question begs, if Transcend Media were unsuccessful in the bid why then did they have to steal our employees who worked on this bid in order to use the ideas we generated at TMG?

Please intervene expeditiously on this matter. I am available at any instance to testify under oath to help you with this investigation. I have also enclosed crucial documents and email correspondences to support the above allegations.

Kind Regards.

Signed

Tony Gatheca

Chief Executive Officer.

CC.

Michael Njeru – Chairman, Transcend Media Group

34. The notice published on 27th may 2016 in the Daily Nation reads:-

"TRANSCEND MEDIA GROUP

ADVERTISER'S ANNOUNCEMENT

Our attention has been drawn to numerous print, electronic and social media reports with regard to Transcend Media Group (TMG) and wish to clarify as follows:-

- 1. TMG is a wholly owned Kenyan company specializing in advertising, media and communication services.*
- 2. The Group employs more than 80 young Kenyan Professionals directly; and offers opportunities to thousands of others indirectly through third party suppliers whom it constantly engages. These include producers, artistes, creatives, activators, printers, event organizers, IT and emerging Media practitioners, among others.*
- 3. The Group espouses patriotism and has a Kenyan bias with regard to employment and sourcing of services.*
- 4. At the same time, the Group is affiliated internationally to one of the largest Advertising networks in the world; that is, Inter Public Group of Companies (IPG), namely McCann World group and Mullen Lowe. This partnership has enabled the Group to tap into the best in class strategic tools to provide top-notch communications solutions to clients. Further, the Group has invested in a robust operating system to support the work flow processes and efficiencies.*
- 5. The Company has experienced organic growth over the years, to become a major player in the media, communications and advertising industry by attracting the best talent, applying best industry and corporate governance practice. The company is a signatory to the Code of Ethics of Business in Kenya, through its membership in the Kenya Private Sector Alliance (KEPSA).*
- 6. Over the years, TMG has competitively won major blue chip company accounts, as well as Multinationals, Kenyan Corporates, NGO's and government agencies. The Group has*

satisfactorily carried out major assignments to the full satisfaction of its clients leading to recognition awards from the Marketing Society of Kenya (MSK) and International Quality Crown Awards (IQCA) and African Sun Advertising Awards (ASAF).

7. With regard to the foregoing, we wish to state as follows:-

On 19th December 2013, Safaricom Kenya (Safaricom) sent out an RFP (Request on Proposal) for a creative and digital agency pitch to eight out of hundreds of potential media, advertising and communication agencies in the country. The pitch included the following:

- a) Ability to deliver both ATL & BTL (Above the line and Below the line);
- b) Strong financial capability due to Safaricom's huge spends;
- c) Working relations with an of Safaricom's competitors;
- d) Strong worldwide partnership and international network; and
- e) A clear strategy proposal

The Selection of the eight companies was based on an intense market research by Safaricom to identify the country's top agencies that satisfy the RFP requirements.

Notably, four of the eight agencies that bid were interestingly WPP/Scangroup affiliated companies.

It has now emerged that Scanad were awarded the contract as detailed in a KPMG report which noted that "although Transcend Media was ranked first during the technical and commercial analysis, we observed that they were not selected". Notably the award was for a period of one year, yet two years down the line, Scanad continues to offer services without being subjected to a rigorous procurement process.

8. Fast forward to January 2016, with Scanad as its agency, Safaricom sought to procure a second agency to handle the youth segment brand communication. Once again, TMG was identified and shortlisted by Safaricom among the leading Kenyan agencies to bid for this specialized communication.

9. TMG was further identified to bid for four other categories owing to the fact that the company is a full service integrated marketing and communication agency. The events that unfolded were thus:

- a) The company went through three stages of the rigorous bid process
- b) Before officially communicating the results of the tender to the participating agencies, Safaricom awarded the business to Saracen Media Limited (Saracen), an excessively medial buying agency.
- c) Details have emerged that Saracen had initially bid with a creative agency known as 5ive ltd, which was dropped at the behest of Senior Safaricom management staff.
- d) In short, Safaricom, awarded the business to Saracen and a company owned by former TMG staff who were involved in our bid including the team leader. The said company is now illegally implanting TMG's intellectual property.
- e) TMG has already instituted a legal process with regard to the staff departure, corporate espionage and sabotage; as well as infringement of its intellectual property and proprietary tools.

Further, TMG has severally demanded for return of its submitted strategy and creative body of works from Safaricom but to no avail.

CONCLUSION

The ongoing malicious and defamatory media campaign against TMG and its directors is a diversionary tactic aimed at intimidating them from pursuing justice and fairness with regard to compromise of our intellectual property rights.

Indeed, it is a concerted affront on an indigenous company by multinational entities which are privileged to carry out lucrative business in the country, and which are enjoying the patronage, goodwill and profits on account of the very Kenyans that they are illegally denying business through lack of corporate probity.

Every Kenyan or Kenyan company has a constitutional right to seek justice and to seek answers from public corporations in regard to the conduct of their affairs.

We wish to underscore the importance of fostering creativity through respect and protection of intellectual property rights of others. A nation cannot be built on disregard for originality and promotion of copycats”.

35. As required by the provisions of Order 2 Rule 10(1) of the Civil Procedure Rules, Safaricom gave particulars of Falsity and Malice in its pleadings. There are:-

Particulars of Falsity

- a. The Defendant did not win the tender for the BLAZE brand promotion;
- b. The Plaintiff did not procure the departure of the Defendant’s staff and their recruitment by Saracen Media Limited for purposes of implementing the BLAZE brand promotion;
- c. The KPMG Audit report relied upon by the Defendant as evidence of having won the BLAZE brand promotion tender has not been finalized and submitted to the Plaintiff;
- d. The Plaintiff has not engaged in any corporate espionage and sabotage;
- e. The Plaintiff has not engaged in any illegal or corrupt activities in the tender for the BLAZE brand promotion; and,
- f. The Plaintiff is not illegally implementing the Defendant’s intellectual property;

Particulars of Malice

- a. The Defendant and Saracen Media Limited are competitors;
- b. The Defendant was disgruntled when it lost the BLAZE brand promotion tender to Saracen Media Limited; and,
- c. The Defendant published or caused to be published the said words knowing they were false or recklessly, not caring whether they were true or false, in order to induce or procure the Plaintiff to terminate the partnership with Saracen Media Limited and transfer the BLAZE brand promotion contract to the Defendant.

Let me consider whether these were established to the standard required at this interlocutory stage. First has Falsity been established?

36. There is a claim by Transcend that were it not for the irregularities that beset the tender process it would have won. To disprove this claim it would be expected that Safaricom would set out or explain how it found the bid by Saracen to be the most responsive. In addition the claim of irregularities needed to be confronted by Safaricom with some clear evidence. No such evidence was forthcoming from Safaricom and Mr. Ndaba's Affidavit was rather general.

37. Safaricom maintains that it did not secure the Departure of Transcend staff and their recruitment by Saracen. Transcend had alleged that it was Senior Safaricom Staff and Staff from its user Department who were evolved in the Scheme. In fact Transcend named them as Sylvia Mulenge and Nicholas Mulila. Although this was denied by Safaricom, there was no Affidavit by Sylvia Mulenge and/or Nicholas Mulila reacting to these allegations. Could the falsity of these statements be established without word from these two?

38. On the KPMG Audit Report, the position taken by Safaricom in the pleadings is that the Audit Report has not been finalized. But where is that evidence? At any rate Safaricom did not demonstrate to Court that the issues flagged out from the Draft Report by Transcend were false.

39. And to debunk the allegations of corporate espionage and sabotage and the impropriety of the Tender Process, and Implementation of The Blaze Campaign, Safaricom needed to present some evidence that all allegations made by Transcend were false. Remembering that the burden was on it to prove falsity.

40. On the allegation of illegality and corrupt activities in the Tender process, none of the members of staff of Safaricom who participated in the process swore an Affidavit in response to the allegations by Transcend. For example there was a pointed allegation that Mr. Mulila requested for a 50 million bribe. Surely, if the falsity of this allegation was to be established, Mr. Mulila would have to say something about it.

41. Was there an allegation by Transcend that Safaricom was illegally implementing its intellectual property? Reading both the letter and the notice, it would seem that the allegation by Transcend is that Safaricom was enjoying use of its intellectual property through Saracen and Fieldstone Helms. It is however common ground that Transcend filed the Copyright suit against Saracen Fieldstone Helms and Thomas Omanga for copyright Infringement and Damages arising out of the implementation of the Blaze campaign. Whether or not that allegation is unjustified or malicious will have to await the outcome of those proceedings.

42. On the whole, Safaricom approached this Application on the assumption that the onus was on Transcend to establish the truthfulness of the allegations it made. Safaricom was happy to make general denials. Safaricom may have misapprehended the law on this aspect and did not make sufficient effort to prove Falsity. It approached this matter as though the cause of action it had presented was one of Defamation where falsity is presumed. It would seem to me that, generally, it is more challenging to bring a claim for Malicious Falsehood than an action in Defamation. As Falsity has not been established it would be needless for this Court to consider the limb of Malice.

43. Let me turn my attention to the cause of Action in respect to the Tort of occasioning loss by unlawful means.

44. When urging this Cause of Action on behalf of his Client, Mr. Havi for Safaricom referred this Court to the holding of Lord Denning of blessed memory in TORQUAY HOTEL CO. LTD BS. COUSINS & OTHERS [1969] ALL ER 522 where at page 530 the Judge held:-

"I must say a word about unlawful means, because that brings in another principle. I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough. Thus in *Rookes V. Barnard* (19) (as explained by Lord REID in *J. T. Stratford & Son, Ltd. V. Lindley* (20) and also by LORD UpJOHN (21) the respondents interfered

with the employment of Rookes – and they did it by unlawful means, namely, by intimidation of his employees”.

45. There is no doubting the correctness of the above statement by the eminent Judge. That said, the Decision was made in the era when the conventional thinking was that there were four main Economic Torts namely The Tort of Conspiracy, The Tort of Procuring a breach of Contract, The Tort of unlawful interference and the Tort of Intimidation. Then the Tort of unlawful interference with Contractual relations was taken to be an instance of causing loss by unlawful means. In other words the former was taken to be a specie of the latter.

46. The House of Lords in OBG LTD & ANOTHER VS. ALLAN AND OTHERS, DOUGLAS & ANOTHER VS. HELLO LTD & OTHERS, MAINSTREAM PROPERTIES LTD VS. YOUNG & OTHERS [2007]4 ALL ER 545 disapproved that unified theory. The Decision distinguished The Tort of causing loss by unlawful means from the Tort of inducing Breach of Contract in four respects:-

“First, unlawful means was a tort of primary liability, not requiring a wrongful act by anyone else, while Lumley, v. Gye created accessory liability dependent upon the primary wrongful act of the contracting party. Secondly, unlawful means required the use of means which were unlawful under some other rule (independently unlawful), whereas liability under Lumley v. Gye required only the degree of participation in the breach of contract which satisfied the general requirements of accessory liability for the wrongful act of another person. Thirdly, liability for the unlawful means did not depend upon the existence of contractual relations; it was sufficient that the intended consequence of the wrongful act was damage in any form, for example, to the claimant’s economic expectations. Under Lumley v Gye the breach of contract was of the essence. If there was no primary liability, there could be no accessory liability. Fourthly, although both were described as torts of intention, the results which the defendant had to have intended were different. In unlawful means the defendant had to have intended to cause damage to the claimant (although usually that would be a means of enhancing his own economic position) Because damage to economic expectations was sufficient to found a claim, there need not have been any intention to cause a breach of contract or interfere with contractual rights. Under Lumley V. Gye an intention to cause a breach of contract was both necessary and sufficient.

47. I have found it necessary to set out that distinction because although one cause of Action by Safaricom was Occasioning Loss by Unlawful Means (see paragraph 21 to 24 of The Complaint), Safaricom makes reference to The Tort of Inducing Breach of Contract as though the two are fused and are one and the same. The latter is found in paragraph 21 of the Supporting Affidavit of Daniel Ndaba in which he deposes:-

“The Defendant has, in an attempt to induce and procure the Unlawful termination of the contract between Saracen Media Limited and the Plaintiff, published injurious Falsehoods to the Plaintiff’s shareholders, business associates and the public, falsely accusing the Plaintiff of corruption and illegality in the tender for procurement of the contract for the implementation of the BLAZE brand promotion”.

But as parties are bound by their pleadings, it is explicit that Safaricom relies on The Tort of Causing Loss by Unlawful Means.

48. What are the essential elements of this Tort?

- i) There must be an Act intended to cause loss to the claimant.
- ii) The Act must interfere with the freedom of a 3rd Party to deal with the claimant.
- iii) The Act against the 3rd party is unlawful.
- iv) An unlawful Act for this purpose is one that is actionable by a third party or would be, if it

suffered loss.

See the OBG supra.

49. The Tort of occasioning loss by unlawful means is pleaded in paragraphs 21,22,23 and 24 of the Plaintiff. Paragraphs 23 and 24 are substantive and read as follows:-

23. "Upon the Defendant's loss of the tender for the implementation of the BLAZE brand promotion, the Defendant commenced a public smear campaign to malign the Plaintiff, its directors and employees.

a. On the 18th day of April, 2016, the Defendant wrote to the Plaintiff's major shareholders, Vodafone Group of Companies demanding that an audit be undertaken against the Plaintiff's directors and employees;

b. On the 15th day of May, 2016, the Defendant wrote to the Plaintiff's major shareholder, Vodafone Group of Companies accusing the Plaintiff's Chief Executive Officer of complicity in the alleged claims of corruption;

c. On the 27th day of May, 2016, the Defendant published a paid up notice in the Daily Nation falsely accusing the Plaintiff, its directors and employees of corruption in the procurement of the tender for the BLAZE brand promotion; and,

d. On the 6th day of June, 2016 the Defendant filed Cmccc No.3644 of 2016, sought and obtained orders against Saracen medial Group Limited, to impound documents and materials used in the implementation of the BLAZE brand documents and materials used in the implementation of the BLAZE brand promotion, the effect of which was to injure the Plaintiff in its business.

24. The Defendant's action was calculated to cause pecuniary damage to the Plaintiff in the implementation of the BLAZE brand promotion.

50. Looking at paragraph 23 which outlines the particulars, this Court agrees, partly, with the Submissions by Counsel Maingi for Transcend that the plea by Safaricom of interference with its Economic Rights should be seen as a consequence of The Tort of Malicious Falsehood as pleaded in the Plaintiff. Nothing demonstrates that more clearly than paragraph 23 of the Plaintiff. Particulars (a) (b) and (c) reiterates the falsity of the publications referred to therein. Save for the acts related to the Copyright suit, the other acts complained of by Safaricom are connected with its claim for Malicious Falsehood.

51. And as this Court has already held that, this far, Safaricom has not demonstrated the falsity of the publications, a substantial part of the claim of causing loss by unlawful means has not been established as required at this Interlocutory stage. What this Court must now do is to consider whether the impoundment of the documents and materials used by Saracen in the Implementation of the Blaze Brand promotion was unlawful.

52. It is common ground that the impoundment was made pursuant to a Court Order obtained by Transcend against Saracen in the Copyright suit. There is no suggestion by Safaricom that the Orders obtained in the said Action are unlawful. Quite to the contrary Mr. Havi for Safaricom submits that the lawful manner open to Transcend to protect its Copyright was a Court Action under the auspices of The Copyright Act. Mr. Havi then submitted that as Transcend had already commenced the Copyright suit, it should let that lawful course play out instead of seeking a determination in the Court of public opinion. Safaricom will be fully stretched to establish that the Court action commenced by Saracen and the orders issued by the Court therein are unlawful means.

53. The inevitable decision this Court reaches is that Safaricom has failed to demonstrate that this is one of the clear cases which warrants the grant of an Injunction at an Interlocutory stage to curtail the

Freedom of Expression and Speech of the Defendant.

Dated, Signed and Delivered in Court at Nairobi this 4th day of October ,2016.

F. TUIYOTT

Havi and Kisera for Plaintiff

Maingi for Respondent

Alex -Court Clerk