



REPUBLIC OF KENYA



KENYA LAW
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DCI Nakuru East v Safaricom Kenya Limited (Miscellaneous Criminal Case E275 of 2024) [2024] KEMC 149 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEMC 149 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
MISCELLANEOUS CRIMINAL CASE E275 OF 2024**

PA NDEGE, SPM

JUNE 6, 2024

BETWEEN

DCI NAKURU EAST APPLICANT

AND

SAFARICOM KENYA LIMITED RESPONDENT

RULING

1. Vide an ex parte Notice of Motion application, the Applicant herein, DCI Nakuru East, has prayed for the following substantive orders: -
 - a. That the honorable court be pleased to issue a warrant to the applicant NO. 113791 PC Nelson Luheya, an investigator with DCI Nakuru East to have access and obtain information and carry away documents related to Safaricom Kenya Ltd m-pesa account numbers 0796226524 and 072XXXX362 between 01/04/2024 to 08/05/2024 and also freeze the said account numbers until after conclusion of our ongoing investigations.
 - b. That the orders of this honorable court be served upon the Manager Safaricom Ltd Nairobi.
 - c. That upon service of the court orders, the manager Safaricom Kenya Ltd Nairobi be bound in totality to facilitate the investigations contemplated by the court order.
 - d. That there be no orders as to cost of the application.
2. The application is based on the 8 grounds on the face of its and the annexed supporting affidavit of NO. 113791 PC NELSON LUHEYA, sworn at Nakuru on 09/05/2024, mainly that: -
 - a. The applicant is undertaking investigations relating to the alleged Intentionally Withholding Payment Delivered Erroneously c/section 35 of Computer Misuse and Cyber Crime Act. No. 5 of 2018.



- b. The case was reported to Nakuru Central Police Station by MOSES MACHARIA vide OB NO. 64/07/05/2024.
 - c. The said complainant while at Nakuru town, was to receive some amount from his friend to purchase some construction materials and since he had reached the daily m-pesa limit transaction, he opted to give out his other friend's number to the sender so that the money could be sent to ease the transaction.
 - d. The complainant mistakenly copied Safaricom m-pesa number 072XXXX362 which belongs to a 'car wash man' where he usually clean his car and posted it to the person who was to send the money.
 - e. After a short period of time, the complainant made a phone call to the sender to inquire, only to be told that Kshs. 320,000/- had already been sent to Safaricom m-pesa number 072XXXX362, who received the amount, but then switched off his phone.
 - f. Preliminary investigations has directly linked the Safaricom Kenya Ltd m-pesa account number 072XXXX362 to have received the money and later transferred to another Safaricom m-pesa account number 0796226524
 - g. The case is still pending under investigations at the DCI office Nakuru East.
 - h. It is only through the warrant sought herein that the applicant can be able to have access and obtained information and carry away documents related to the said account numbers as part of the investigations and also freeze the accounts.
3. The application is premised on the provisions of sections 118 and 121(1) of the [*Criminal Procedure Code*](#) and section 180 of the [*Evidence Act*](#), Cap. 80 Laws of Kenya. Section 118 provides as follows:
118. Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.
4. Section 118A provides that the application under section 118 shall be made ex parte to a magistrate, while section 121 provides for the detention of anything seized pursuant to orders issued under section 118 of the CPC. It states as follows:
1. When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.
 2. If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.
 3. If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.



5. Section 180 of the Evidence Act contains provisions relating to searches of bank accounts. It provides that:

Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.

6. In this case, the applicant has stated on oath that he is investigating a complaint in which some amounts were transferred and fraudulently obtained through these m-pesa accounts. That the funds in the accounts are believed to be proceeds from fraudulent obtainance of funds erroneously transacted in mobile phone money transfer services, commonly known as m-pesa operated by the respondent.

7. In its decision in Samuel Watatua & Another –vs- Republic Court Of Appeal Nai. Criminal Appeal No. 2OF 2013 (UNREPORTED), the Court of Appeal stated that:

A reading of Section 180 of the Evidence Act together with Section 118 and 121 of the Criminal Procedure Code leaves no doubt in anybody's mind that the court, upon application, has the power, not only to authorize access by police to bank accounts of suspected criminals but also to freeze these accounts for the purpose of preserving evidence and the subject matter of the alleged crime...

In this case we find that the limitations in Section 180 of the Evidence Act together with Section 118 and 121 of the Criminal Procedure Code are in consonance with Article 24 of the Constitution.

8. The applicant are thus authorized by law, under the provisions cited above, to apply for orders freezing the suspects' account. Going by the above provisions, such applications are made ex parte and I find, merit in it and allow it as prayed. Necessary warrants and orders to issue accordingly.

**DATED SIGNED AND DELIVERED AT NAKURU THIS ...06TH ... DAY OF
JUNE.....,2024**

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Prosecutions counsel: Chinga

Applicant: Absent

