



**Republic v Safaricom Kenya Limited & another (Miscellaneous Criminal Application E009 of 2023) [2023] KEMC 262 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEMC 262 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
MISCELLANEOUS CRIMINAL APPLICATION E009 OF 2023  
ZK KAGENYO, RM  
FEBRUARY 10, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SAFARICOM KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**AIRTEL KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On the 7<sup>th</sup> day of February, the Applicant moved the Court by way of Notice of Motion dated 7<sup>th</sup> February 2023 supported by the Affidavit of NPS Service No. 258155 PC Wesley Omenta of 6<sup>th</sup> February 2023, brought under Section 180 of the *Evidence Act*, seeking orders that;
  - a. That the application be certified urgent for hearing on priority basis;
  - b. That this Honourable court be pleased to issue an order to No. 258155 PC Wesley Omenta to investigate particulars of M-Pesa & Airtel money accounts pertaining to mobile numbers 0728718809 and 0781055054 held at Safaricom Kenya Limited & Airtel Kenya Limited respectively and take in his custody particulars of the accounts;
  - c. That the manager Safaricom Kenya limited to provide the following;
    - i. Certified registration details of M-Pesa account number 0728718809.
    - ii. Certified copies of M-Pesa statement of account no. 0728718809 from 8/01/2023 to 10/01/2023.
    - iii. Any other relevant information.
  - d. That the manager Airtel Kenya limited to provide the following;



- iv. Certified registration details of Airtel money account number 0781055054;
  - v. Certified copies of Airtel money statement of account no. 0781055054 from 8/01/2023 to 10/01/2023.
  - vi. Any other relevant information.
- e. That the orders of this honourable court be directed at and served upon the Managers Safaricom Kenya Limited and Airtel Kenya Limited.
  - f. That there be no orders to costs.
2. The applicant was heard on the very day and a ruling requested that was reserved to be delivered on 10<sup>th</sup> February 2023, virtually through MS-Teams.

### **Applicant's Case**

3. The applicant informed the court that he is carrying out investigations on a case reported at Diani Police station vide OB entry number 50/09/01/2023 by one Pauline Wanja Mwangi who is a holder of two bank accounts namely xxxxx83186443 and xxxxx91097853 held at xxxx bank.
4. It was the Applicant's case that a person the said complainant alleged that on 7<sup>th</sup> January 2023, she received messages in her phone from xxxx bank indicating that Ksh. 60, 000/- was drawn from her account xxxxx83186443 and credited to M-Pesa account 0728718809 that was registered under Titus Kibet Kirui and that Ksh. 300/= was drawn from the same account and credited to Airtel money account number 0781055054, transactions that were done behind her back.

### **Analysis And Determination**

5. The applicant brought the application under section 180 of the *Evidence Act* which provides that;
- (1) 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.
  - (2) Any person who fails to produce any such banker's book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the book or to take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine.
6. The court placing the application before it against the statutory provisions under which it is brought under sets out the issues for determination as hereunder;
- i. Does the application fall under the legal provisions it has been brought?
  - ii. If the answer to the above is in the affirmative, does the application satisfy the requirements for the Orders to be granted?



## Does the application fall under the legal provisions it has been brought?

7. Section 180 of the [Evidence Act](#) empowers the Court to issue warrants for inspection of any banker's book. In the instant application, the applicant moves this court for orders to investigate mobile phone numbers and in particular the M-Pesa account.
8. The question this court poses therefore is, does an M-Pesa account fall under the ambits of a banker's book?
9. Section 2 of the [Evidence Act](#) defines banker's book as;  
  
includes a ledger, day book, cash book, account book, and any other book used in the ordinary business of the bank, whether in written form or micro-film, magnetic tape or any other form of mechanical or electronic data retrieval mechanism whether kept in written form or printouts or electronic form;  
  
and Bank as;  
  
means a person or company or other body of persons carrying on, whether on his or their own behalf or as agent for another, any banking business (as defined in section 2 of the [Banking Act](#) (Cap. 488), and includes—
  - a. a financial institution within the meaning of section 2 of the [Banking Act](#) (Cap. 488);
  - b. the Kenya Post Office Savings Bank established by the [Kenya Post Office Savings Bank Act](#) (Cap. 493B);
  - c. the Co-operative Bank of Kenya Limited; and
  - d. for the purposes of subsections 176 and 177, any person or company or other body of persons carrying on banking business in Tanzania or Uganda;
10. Section 2 of the [Banking Act](#) defines a bank to mean  
  
a company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank;  
  
it further defines banking business as;
  - a. the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice;
  - b. the accepting from members of the public of money on current account and payment on and acceptance of cheques; and
  - c. the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money.
11. In this court's humble opinion, it would be a misnomer to categorize the Respondents, Safaricom Limited and Airtel Kenya Limited, which are Mobile Network Operators, as banks under the laws of Kenya, to require to inspect their books regarding a particular client of theirs.



12. Section 3 and section 4 of the [Banking Act](#) places the Central Bank as the Licensing Institution for any person who wishes to operate the Banking Business in the country and hence it is the Central Bank which regulates the banking business in the country. On the other hand, the Respondent is regulated by the Communication Authority of Kenya under Kenya section 5 (1) of the Kenya and Information Communications and Act, 1998 and not the Central Bank of Kenya.
13. However, the Court appreciates the fast pace of the technological advancement which seems not to be at par with legislation in the country. For instance even though the mobile network operators have rolled out programs such as mobile money lending in a manner as banks do operate, the same have not been brought under the umbrella of a bank in accordance to the [banking Act](#).
14. The court however appreciates steps which have been taken by the state to bring these quasi-bank institutions under the regulation of the Central Bank of Kenya, the institution that regulates the banks in the country. For instance, in 2011, parliament enacted the [National Payment System Act, 2011](#) to make provision for the regulation and supervision of payment systems and payment service providers, and for connected purposes. Under section 31 of the Act, the National Payment System Regulations, 2014 were formulated where Under Regulation 4, entities such as the Respondent were brought under the regulation of the Central Bank in so far as their dealings with money in ways similar to banks is concerned. Further, time and again, the CBK has been seen to be issuing directives and press statements controlling the conduct of the Respondent. For instance the development of the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022, press release such as one released on 16<sup>th</sup> March 2020 on emergency measures to facilitate mobile money transactions and on 8<sup>th</sup> April 2022 on launch of mobile money merchant interoperability among others.
15. From this conduct of the Central Bank and its apparent regulation of the Respondent, this Court shall place its reliance on section 11 of the [Interpretation and General Provisions Act](#) that;

an applied law shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties or otherwise as may be necessary to make it applicable to the circumstances, to find that, even though the Respondents are not classified as banks, the books held by the Respondents regarding a particular subscriber dealing with the payment and receiving of funds, are subject of section 180 of the [Evidence Act](#) and hence a warrant may be issued for their inspection.

### **Does the application satisfy the requirements for grant of the Orders?**

16. Section 180 of the [Evidence Act](#) requires that when it is proved on oath to the Court 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 court may issue the warrants to investigate.
17. From the above, it is apparent therefore that there is a burden of proof on the part of the applicant as the statute speaks of reasonable suspicion then the standard of proof need not be beyond reasonable doubt but on a balance of probability. The question therefore is, did the Applicant discharge this burden?
18. From the analysis of the Applicant's case, this Court notes that there are specific pieces of information that ought to have been furnished or explained by the Applicant to create reasonable suspicion of the commission of an offence before this court. Some of these pieces of information include but not limited to proof of the transfer of funds from the stated complainant's bank account number xxxxx83186443 to the accounts of interest being the 0728718809 and 0781055054 over and above the existence of the said bank account number.



19. I say this because this is information which was readily available or could be obtained by the Applicant with ease as is information and facts within the knowledge of the said complainant or further that she could obtain the same with ease upon her request from her bank.
20. This court cannot direct the Respondent to divulge the private information of the two SIM Cards as said to be registered, without it having been satisfied that indeed on the face of it, there is evidence to make the court believe that the transactions occurred. The court cannot just assume that such transactions happened.
21. What would make the Court believe that indeed the monies were transferred as stated in the affidavit? Since such transaction could easily be gotten from the complainant and presented to court without much expense on the part of the complainant or delay as the court takes judicial notice that it is instantly done by the commercial banks such as the xxxx bank upon personal request, such is what was to be presented before Court to create reasonable suspicion of the commission of an offence as such is the evidence anticipated by section 180 of the *Evidence Act*.
22. Without such prima facie evidence, this court finds that the investigating officer has not sufficiently proven his case to demonstrate the reasonable suspicion at this stage to warrant the granting of the orders prayed for.

#### **Disposition**

23. The upshot of the foregoing is that the instant application is disallowed as of now with no orders as to costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS-TEAMS ([HTTPS://BIT.LY/3AM8SK7](https://bit.ly/3AM8SK7)) AT KWALE ON THIS 10<sup>TH</sup> DAY OF FEBRUARY 2023.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of;

Mr. Archibald Kimbada - Court Assistant

Ms. Wangari Mwaura, PPC for the State

