



REPUBLIC OF KENYA



**Safaricom PLC v Nderitu & 2 others (Civil Application
E016 of 2023) [2023] KECA 1474 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1474 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E016 OF 2023
HM OKWENGU, JM MATIVO & K M'INOTI, JJA
DECEMBER 8, 2023**

BETWEEN

SAFARICOM PLC APPLICANT

AND

WILFRED NDERITU 1ST RESPONDENT

CHARLES KANJAMA 2ND RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA 3RD RESPONDENT

(Application for injunction and stay of further proceedings pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Mwita, J.) dated 18th January 2023 in HCCC No. 444 of 2022)

RULING

1. The applicant, Safaricom PLC, is a public limited company and a registered mobile network operator and telecommunications provider in the Republic of Kenya. It seeks, under rule 5(2) (b) of the [Court of Appeal Rules](#), 2022, an order of injunction and stay of further proceedings in the High Court of Kenya at Nairobi pending appeal from the ruling and order of Mwita, J. dated 18th January 2023. By the impugned ruling, the learned judge granted Wilfred Nderitu (1st respondent) and Charles Kanjama (2nd respondent), both subscribers to the applicant's services, leave to continue their Suit No. 444 of 2022 as a class action on their own behalf and on behalf of other registered subscribers of the applicant. The applicant's main complaint is that the order in question was made irregularly and without affording it an opportunity to be heard.
2. The brief background to the application is as follows. On 24th February 2022, the 3rd respondent, Communications Commission of Kenya directed all Mobile telephone operators, including the applicant, to ensure that they had updated registration details of all their subscribers by 15th April



- 2022, which deadline was subsequently extended to 15th October 2022. On the deadline, the applicant suspended the Subscriber Identity Module (SIM) card services to its subscribers, including the 1st and 2nd respondents, who had not complied with the 3rd respondent's directive.
3. Aggrieved by the suspension of service, on 4th November 2022, the 1st and 2nd respondents filed Suit No. 444 of 2022 in the High Court, seeking various reliefs, among them declarations that the applicant and the 3rd respondent were in breach of contract; that the applicant and the 3rd respondent were in breach of privacy rights of subscribers; that the applicant's data privacy statement was null and void; an injunction to stop the applicant and the 3rd respondent from suspending the 1st and 2nd respondents' and other subscribers' SIM cards, general, aggravated and exemplary damages; damages of Kshs 10,000 per day for each subscriber whose SIM card was suspended; compensation of Kshs 2,000 per day for each of the said subscribers; and costs.
 4. Simultaneously with the suit, the 1st and 2nd respondent took out a motion on notice for leave to continue their suit as a class action on their own behalf and that of the applicant's subscribers whose SIM cards had been suspended and to issue public notices to such subscribers to join the suit as plaintiffs. They also sought interim injunctions to stop the applicant from effecting its data privacy statement.
 5. The applicant opposed the application vide a replying affidavit sworn by Daniel Mwenja Ndaba, its Senior Legal Counsel (Litigation) on 27th November 2022. The applicant defended its action as within the law and averred that the 1st and 2nd respondents had not met the threshold for grant of injunction or leave to continue their suit as a class action. For its part, the 3rd respondent also opposed the application vide a replying affidavit sworn on 13th January 2023 by Liston Kirui, its Deputy Director, Postal and Telecom Services. The thrust of this respondent's response was that the registration of SIM cards was within the law and was meant to ensure registration of new and existing subscribers for purposes of ensuring the authenticity and accuracy of information contained in the service providers' database. The 3rd respondent also raised a jurisdictional issue, contending that under the Dispute Resolution Regulations, the 1st and 2nd respondents' complaint ought to have been addressed to the 3rd respondent and if they were not satisfied, they had a right of appeal to the Communications and Multimedia Appeals Tribunal and thereafter, a further appeal to the High Court.
 6. On 18th January 2023, the suit was listed for mention for directions on, among other things, whether the suit would be heard by the Commercial and Tax Division or the Constitutional and Human Rights Division. On the said date, the High Court issued the following directions:
 - i. That the suit will proceed as a class action before this court, that being the case, the plaintiffs do publish a notice of institution of this suit in a daily newspaper with a nation-wide circulation informing those interested in joining this suit that they may do so.
 - ii. That those parties interested may apply to be joined in the suit as soon as possible;
 - iii. That defendants may file and serve defence, if any, within 7 days from the date hereof;
 - iv. That the plaintiffs will have 14 days after service to file and serve reply to defence if need be; and
 - v. That directions on 14/3/23
 7. The applicant was aggrieved and after lodging a notice of appeal on 19th January 2023, filed this application for the reliefs we have already adverted to. In support of the application the applicant filed submissions on 18th March 2023 in which it contends that it has an arguable appeal, succinctly set out in paragraph 18 of the supporting affidavit, which risks being rendered nugatory if the injunction



- and stay of proceedings are not granted. Mr. Ohaga, SC, for the applicant, submitted that the High Court erred by granting substantive prayers on the 1st and 2nd respondents' application for leave to proceed with the suit as a class action, yet on the material date the matter was listed only for mention for directions.
8. Counsel further submitted that the High Court erred by determining the application on merits without affording the applicant and the 3rd respondent, who had filed affidavits in opposition to the application, an opportunity to be heard. Had the applicant and the 3rd respondent been afforded the opportunity to be heard, he added, they would have demonstrated that the suit did not qualify as a class action. Counsel urged that the court granted leave for the suit to proceed as a class action without even considering the 1st and 2nd respondents' replying affidavits in opposition to the application. He added that the manner in which the High Court proceeded amounted to violation of the applicant's constitutional right to be heard. Counsel relied on the decision of this Court in [*Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others*](#) [2013] eKLR on what constitutes an arguable appeal.
 9. Regarding whether the intended appeal risked being rendered nugatory, the applicant submitted that the 1st and 2nd respondents were seeking payment of colossal sums of 10,000 per day for each affected subscriber for the period of suspension and additional payments per day for the days the SIM cards were suspended, exposing the applicant to potentially astronomical liability. The applicant further submitted that if the suit in the High Court proceeded as a class suit and the appeal subsequently succeeded, it will be rendered nugatory because the applicant had no prospect of recovering moneys awarded to individual subscribers. The applicant also contended that it stood to suffer irreparable loss and damage to its reputation and valuation at the Nairobi Stock Exchange where it is listed.
 10. The 1st and 2nd respondents, represented by Mr. Kanjama, SC, and Ms. Wambui, learned counsel, opposed the application *vide* a replying affidavit sworn by the 1st respondent on 31st January 2023 and submissions dated 22nd June 2023. The substance of the response is that the intended appeal is not arguable and is an abuse of the process of the court. In paragraph 4(d) of the replying affidavit, the 1st respondent deposed that the impugned orders of 18th January 2023 were issued "upon hearing counsel for all the parties." He added that pursuant to the impugned order, the notice to affected subscribers of the applicant had already been published on 26th January 2023, and thus the application had been overtaken by events. Relying on [*Thomas Maseko Opiyo & another v. Alfred Oyoko Olunje*](#) [2021] eKLR, these respondents submitted that the application was fatally defective due to lack of a draft memorandum of appeal.
 11. It was further submitted that the Court should not grant the order of stay of proceedings as it affects and interrupts the right of a party to conduct litigation. In support of the proposition the 1st and 2nd respondents cited [*Raymond Ruto & 5 others v. Stephen Kibowen*](#) [2021] eKLR. Lastly, these respondents submitted that the intended appeal will not be rendered nugatory because all that will happen is that the High Court will proceed with the hearing and in the event the applicant is dissatisfied with the outcome, it has a right of appeal. They relied on the decision in [*Katangi Developers Ltd v. Prafula Enterprises Ltd & Another*](#) [2018] eKLR.
 12. The 3rd respondent supported the application *vide* written submissions dated 22nd June 2023. Its learned counsel, Ms. Museve, submitted that the 3rd respondent had filed a replying affidavit in opposition to the application for the suit in the High Court to proceed as a class action and expected directions on the hearing of that application. Instead, the High Court granted the application without hearing the parties, which was contrary to the rules of natural justice and a violation of the right to a hearing under the [*Constitution*](#). It was submitted that the intended appeal raises arguable issues which deserve to be considered and determined by this Court and that unless orders of injunction and



- stay of proceedings were granted, the appeal would be rendered nugatory. The 3rd respondent further contended that the class action had grave financial implications for it and that there were no prospects of recovering moneys paid to the applicant's subscribers.
13. We have considered the application, the submissions by learned counsel and the authorities they relied on. It is common ground between all the parties that to warrant an order of injunction or stay of proceedings, the applicant must establish that its intended appeal is arguable and that unless the orders sought are granted, the appeal will be rendered nugatory if it succeeds (see [Stanley Kangethe Kinyanjui v. Tony Ketter & Others](#) [2013] eKLR). Both those requirements must be satisfied, otherwise the applicant will not prevail if it satisfies only one of the requirements (see [Republic v. Kenya Anti-Corruption Commission & 2 Others](#) [2009] KLR 31).
 14. Beginning with the 1st and 2nd respondent's objection that the applicant has not presented a draft memorandum of appeal, we note that the purpose of a draft memorandum of appeal is to enable the Court to gauge whether the intended appeal is arguable or is a mere frivolity. But demonstrating whether an appeal or intended appeal is arguable or not does not have to come only from a draft memorandum of appeal, though it is preferable. It can be demonstrated, like in this case, in the supporting affidavit. Looking at paragraph 18 of the affidavit of Daniel Mwenja Ndaba in support of the application, we are satisfied that it serves the same purpose as a draft memorandum of appeal serves at this stage.
 15. On the first consideration of an arguable appeal, we recall that an arguable appeal is not one which must necessarily succeed but rather one which is not frivolous and raises even a single bona fide arguable point that deserves to be considered and determined by the Court. (see [Kenya Tea Growers Association & another v. Kenya Planters & Agricultural Workers Union](#), Civil Application No. Nai. 72 of 2001 and [Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others](#) [2014] eKLR).
 16. Upon careful consideration of the application before us, we are satisfied that the intended appeal is not frivolous. Among the issues that the applicant has identified as deserving to be heard and determined by this Court include whether the High Court erred by granting the application for the suit to proceed as a class action without hearing the parties; whether the High Court erred by granting the application without considering the replying affidavits on record; whether the applicant's constitutional right to a fair hearing was violated; and whether the High Court erred by granting substantive and dispositive orders on a date scheduled for a mention. We are constrained, at this stage not to say more on the intended appeal lest we prejudge the issues without the benefit of full argument to the embarrassment of the bench that ultimately hears the appeal. (see [Central Bank of Kenya Deposit Protection Fund Board v. Uburu Highway Development Ltd & Others](#), CA No. 95 of 1999).
 17. As regards the second consideration of whether the intended appeal risks being rendered nugatory, the relevant principles are that what will render an appeal nugatory depends on the peculiar circumstances of the case (see [Reliance Bank Ltd v. Norlake Investments Ltd](#) (2002) 1 EA 227) and that the Court's concern is to ensure that a successful appeal does not end up as a mere pyrrhic victory or paper judgment (see [Hashmuklal Virchand Shah & 2 Others v. Investment & Mortgage Bank Ltd](#) [2014] eKLR). An appeal will be rendered nugatory if what is apprehended cannot be undone once it happens or cannot be undone without undue hardship or expense, or cannot be adequately compensated by award of damages (see [Stanley Kangethe Kinyanjui v. Tony Ketter & Others](#) (supra)).
 18. The 1st and 2nd respondent seek hefty awards for themselves and numerous subscribers of the applicant. At the heart of the intended appeal is whether the High Court erred by directing the suit in question to proceed as a class action without hearing the parties. If the suit is heard as a class action, as it looks it will be without an order of stay of proceedings, and subsequently this Court finds that it ought not



to have proceeded as such, the appeal will be rendered nugatory. If awards are made in favour of the numerous class of subscribers, the prospect of recovery looks remote. True, as submitted by the 1st and 2nd respondents, this Court issues an order of stay of proceedings with great circumspection. However, where it is alleged, as in this case, that the proceedings in the trial court are continuing in violation of a party's constitutional rights, the Court will be justified in staying the proceedings until the complaint is addressed.

19. In the circumstances of this application, we are satisfied that the applicant has met both requirements under rule 5(2)(b) of the *Court of Appeal Rules*. Accordingly, we grant the application dated 19th January 2023 until the hearing and determination of the intended appeal. Costs of this application shall abide the outcome of the appeal. It is so ordered.

Dated and delivered at Nairobi this 8th day of December 2023,

H. M. OKWENGU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

