IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. E376 OF 2020

BETWEEN

SAFARICOM PLC.....APPLICANT

AND

MULTI CHOICE KENYA LIMITED.....1ST RESPONDENT

JAMII TELECOM LIMITED.....2ND RESPONDENT

KENYA COPYRIGHT BOARD.....3RD RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA.....4TH RESPONDENT

*(Being an application for stay of execution pending the hearing and determination of an appeal from the Ruling and Order of the High Court, Commercial & Admiralty Division at Nairobi (**Okwany, J**) delivered on 26th November, 2020*

in

Misc. Civil Application No. E567 of 2019)

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RULING OF THE COURT

[**1**] On 26th November 2020, the High Court, (**Okwany, J**) delivered a ruling in which it issued a temporary order to **Safaricom PLC** (**Safaricom**), and **Jamii Telecom Limited** (2nd respondent) under section 35(D) (2) of the Copyright (Amendment Act) 2019, to prevent or impede the use of its service, to access a service, website place, domains or facilities situate in or outside Kenya that is used to infringe the applicant's copyright as contained in the take down notice dated 29th October, 2019, pending the hearing and determination of an application that had been filed by **Multi Choice Kenya Limited** (**Multi Choice**).

[**2**] Safaricom which was aggrieved by the High Court order, filed a notice of appeal and is now before us with a notice of motion dated 1st December, 2020 in which it seeks a stay of execution of the ruling and order issued by the High Court on 26th November, 2020 pending the hearing and determination of its intended appeal.

[**3**] Safaricom's motion is based on the grounds stated on the face of the motion, an affidavit sworn by **Linda Anene**, Senior Legal Counsel-Technology & Corporate Centre, and a supplementary affidavit sworn by **Daniel Ndaba**, a Senior Legal Counsel, Litigation in the Company.

[**4**] In effect, Safaricom contends that the order made by the High Court amounts to a mandatory injunction compelling it and Jamii Telecom Limited to put in place measures for preventing their subscribers from accessing 141 websites contained in a take down notice dated 29th October 2019. Safaricom argues that in granting the orders, the High Court failed to consider if there were any special circumstances to warrant the granting of a mandatory injunction, and also failed to consider its replying affidavit which demonstrated that the take down notice relied upon by Multi Choice was defective as Multi Choice had not produced the licence which they made with the owners of the Copyright, authorising the issuance of the notices on its behalf.

[**5**] In addition, Safaricom contends that the learned Judge of the High Court erred in making a conclusive determination on the validity of the take down notices issued by Multi Choice, before taking the evidence and considering the responses filed in the suit. Safaricom urges the Court to grant the orders sought pleading that it is at risk of criminal and civil proceedings, and sanctions from the true owners of the

materials affected, and also being found in contempt of the orders that were issued by the High Court. Its reputation in the global telecommunication industry is also at stake.

[**6**] In its written submissions, Safaricom has urged that its intended appeal is arguable as it raises arguable issues including whether the learned Judge properly applied the law in issuing the interlocutory prohibitory mandatory injunction, and whether the learned Judge made a finding on the validity of the take down notices without considering the responses made by Safaricom and Multi Choice.

[**7**] On the nugatory aspect, Safaricom submitted that effecting the take down notices would affect the rights of other copyright holders, and expose it to future civil and criminal sanctions from those holders, as well as a backlash from its subscribers, and that the damage to its local and international reputation would be irreparable.

[**8**] Multi Choice has responded to the motion by Safaricom through an affidavit sworn by its advocate, **Mr. Eddie Omondi** (**Mr. Omondi**) who depones that Safaricom should not have audience of the Court, as it is a contemnor having neglected and/or refused to comply with the court order of 26th November, 2020 and there are contempt proceedings pending against its Chief Executive Officer.

Mr. Omondi maintains that the order issued by the court is not a permanent injunction but a temporary relief pending the hearing and determination of the application by Multi Choice, and that Safaricom had in fact expressed its willingness to comply with the court order, and even sought a virtual meeting with the counsel for Multi Choice to discuss compliance with the order; that Safaricom was therefore coming to the Court without clean hands and is guilty of the abuse of the Court process in seeking reliefs, when it has no regard for court orders. Mr. Omondi urged that Safaricom has not demonstrated the loss that it is likely to suffer if it complies with the order, nor have they stated any challenges in complying with the order.

[**9**] In its submissions, Multi Choice has reiterated that Safaricom should not be granted any relief as it is yet to purge its contempt of the court order. In this regard, **Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government vs Miguna Miguna & 4 Others [2018] eKLR** was relied upon. In addition, Multi Choice has urged that Safaricom's intended appeal does not raise any arguable issues, nor has it demonstrated that the appeal will be rendered nugatory if the orders sought are not granted.

[**10**] Finally, Multi Choice urges the Court that take down provisions is a new area in the Kenya statutory law, and the Court in staying the proceedings in the High Court, would be denying the High Court the opportunity to substantively pronounce itself on a noble area.

[**11**] Due to the Covid-19 pandemic, this matter was listed for hearing by way of written submissions without the presence of the parties or their advocates. By the date of the hearing only Safaricom and Multi Choice had filed their written submissions which we have highlighted above. None of the other respondents filed any reply or written submissions.

[**12**] We have carefully considered this motion, the affidavit in support and in reply, as well as the written submissions and the authorities cited. Safaricom's motion is essentially for orders of stay of execution of the High Court judgment under Rule 5(2)(b) of this Court's Rules. Safaricom has filed a notice of appeal and therefore this Court's jurisdiction under that Rule has been properly invoked.

[**13**] Both parties have properly cited the law that for an application under Rule 5(2)(b) of the Court Rules to succeed, the applicant must demonstrate that it has an arguable appeal and that if the order of stay is not granted, the intended appeal will be rendered nugatory. (See **Attorney General vs Okiya Omtata Okoiti & anor [2019] eKLR**; **Benson Khwatenge Wafula vs The Director of Public Prosecution & 2 Others [2020] eKLR.)**

[**14**] Both Safaricom and Multi Choice have conceded in their submissions that the dispute between Safaricom and Multi Choice concerns take down notices in Copyright (Amendment Act) 2019, which is an emerging area of law. There is no doubt that the development of this law will require frequent intervention of the courts by way of interpretation of the law.

[**15**] In our view, Safaricom has identified several issues that it intends to raise in its appeal. Of importance is whether the learned Judge properly applied the law in issuing the order subject of the intended appeal. We are therefore satisfied that the intended appeal is not frivolous but is an arguable appeal as at least one arguable issue is sufficient.

[**16**] On the nugatory aspect, the order issued by the learned Judge is of a mandatory nature, as it requires Safaricom to comply with the take down notice. As was stated in **Reliance Bank Limited vs Norlake Investments Limited [2002] 1 EA 227**:

> ***"What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."***

[**17**] In this case, if an order of stay is not issued, Safaricom will be forced to comply with the take down notice. Safaricom has demonstrated that this may have serious ramifications for its company, including risk of civil and criminal sanctions, and the effects of such consequences may be irreversible. As regards the alleged contempt by Safaricom not complying with the order of the learned Judge, although contempt of court order is a serious issue, no order has been produced to show that Safaricom has been found guilty of contempt, and it is not for us in this application to assume that it has deliberately refused to comply with the order. It suffices that Safaricom has given reasons as to why it finds it difficult to comply with the orders, and it is only the court which issued the orders that can address whether those reasons can excuse non-compliance.

[**18**] The upshot of the above is that Safaricom has satisfied the conditions for granting an order of stay of execution under Rule 5(2)(b) of the Court Rules, and deem it appropriate that we grant an order of stay of execution of the order of the High Court issued on 26th November, 2020 pending the hearing of the appeal, and order that costs of the application shall be in the appeal.

[**19**] In light of the novel issues arising in the intended appeal, it is appropriate that the hearing of the appeal be fast tracked. Orders accordingly.

Dated and delivered at Nairobi this 19th day of March, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR