



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 57 OF 2018

BETWEEN

SAFARICOM LIMITED.....APPELLANT

AND

JACK J. KHANJIRA.....1<sup>ST</sup> RESPONDENT

JOASH N. MORURI.....2<sup>ND</sup> RESPONDENT

(Being an appeal from the Order of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) delivered on 6<sup>th</sup> March, 2018

in

H.C.C. Suit No. 231 of 2011.)

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JUDGMENT OF THE COURT

1. This appeal arises from the order of P.J. O. Otieno, J. given on 6<sup>th</sup> March, 2018. Other than being an interim order, we note that the same was restricted to giving some directions on how the matter was to proceed. It did not touch on the merits of the case, which was yet to be heard. That being so, we must eschew making any comments on the substantive suit which is still pending before the High Court lest we embarrass the court that will eventually be seized of the matter.

2. It is nonetheless necessary to place the appeal in proper perspective. According to the respondents herein, Jack J. Khanjira and Joash N. Moruri; sometime in 2007, they came up with an invention which was like a mobile banking application that would use mobile telephone communication services to transact. Their invention would target individuals, small scale, medium and large scale traders and /or service providers. This project, which would contribute immensely to the country's economy, would inevitably require partnership with the appellant (Safaricom Limited), one of the major mobile telephone providers in the country, and other mobile telephone providers.

3. With this in mind, they approached the appellant in a bid to sell the idea/innovation to it. The 1<sup>st</sup> respondent wrote to the appellant, severally seeking an appointment to meet the appellant's marketing manager to enable him sell this great innovation to the appellant but his letters were initially not acknowledged. Thereafter, the respondents posted their invention to the appellant and decided to follow up the matter afterwards.

4. It would appear from the record that after several letters to the appellant, a meeting was arranged between the 1<sup>st</sup> respondent and the person in charge of the appellant's legal services, Mr. Nzioka Waita. The meeting appears to have materialized but it is not clear what was discussed, and whether the appellant had acknowledged receipt of the said project. There was however no communication from the appellant for several years inspite of several follow up letters from the respondents.

5. According to the respondents, three years after sending the project to the appellant, and without the respondents' consent, the appellant used the project and rolled out what they dubbed M-Kesho, a banking system which they distributed to many banks. It was the respondents' case that the appellant used their innovation without their permission and refused to recognise them as the initiators/originators of the said system. They were therefore denied income by way of commissions from the banks and any other entities that would use the innovation. This is what prompted them to move to the High Court by way of a plaint dated 8<sup>th</sup> August, 2011 but amended on 22<sup>nd</sup> September, 2011.

6. In the amended plaint, the respondents sought one principal order against the appellant to wit;-

***“An inquiry as to damages for infringement or moral, economic rights and an order for payment of all sums found due upon making such inquiry together with interest thereon or pursuant to this court’s equitable jurisdiction.”***

7. In its statement of defence dated 5<sup>th</sup> September, 2011, the appellant maintained that it receives many proposals which it subjects to its standard proposal indemnity forms and that it destroys unsolicited proposals as part of its corporate policy. Examples of such proposals are referred to in the statement of defence including some that are subject of court cases. The appellant denied the respondents’ claim saying the respondents had no cause of action against it.

8. Witnesses’ statements were duly filed along with bundles of documents. The respondents also filed the following draft issues on 5<sup>th</sup> October, 2011:-

- 1. Is the document project entitled Chemi-Chemi na Safaricom written by the Plaintiffs and hence original? If so does it qualify protection under the Copyright Act No. 12 of 2001 Laws of Kenya?*
- 2. Did the Plaintiffs send the project to the Defendant? If so how did they send it, is it through email or postage? Was it received?*
- 3. What is the project all about?*
- 4. Was the project capable of being acted upon by the Defendant? If so in what respect?*
- 5. What was the Plaintiffs intention in sending the document to the Defendant? Did they expect anything inform of royalty or reward if any? Did they have to send it to the Defendant? Was the information special for a business or for public? Did it give rise to an obligation of confidence?*
- 6. Did the Plaintiffs travel to Nairobi on invitation by the Defendant’s staff/official? Who did they meet? Is Nzioka an employee and /or servant of the Defendant?*
- 7. Did the Plaintiffs and the Defendants official discuss the project (on 22-08-2007) i.e. Chemi-Chemi na Safaricom? If so what was the arrangement or the way forward?*
- 8. Did Mr. Nzioka communicate to the Plaintiffs on 3<sup>rd</sup> June, 2009?*
- 9. Did the Defendant launch a mobile money depositing system on 18<sup>th</sup> May, 2010, entitled M-Kesho with similar objectives as those of Chemi-Chemi na Safaricom? If so what are the similarities?*
- 10. In the circumstances did the Defendant infringe the Plaintiff’s moral rights?*
- 11. Was the document subjected to derogatory treatment by making an adaptation or mutilation or modification of the whole and that a substantial part of it was altered by the Defendant?*
- 12. What is the duration of the copyright? Does it raise any legitimate expectation of a reasonable benefits from the literary work or the project? If so are the Plaintiffs entitled to an annual share of profits?*
- 13. Does the Defendant get a commission/charge fees from mobile money depositing system? If so are any banks or subscribers involved in it have had their commission/charges/fees and profits?*
- 14. What should be the share if any? Is a referee i.e. a qualified accountant be appointed for the purposes of taking the accounts and an inquiry? If so how should he/she be remunerated?*
- 15. Has the project contributed in valued added services for the Defendant? If so how far has the mobile money depositing system been exported as a service? Is an inquiry necessary as well as taking of accounts?*
- 16. Does the Defendant get any commission/fees as a result of partnership with banks and or financial institutions from mobile money depositing system? If so should the accounts be known? Who should provide the list and or business information necessary for the inquiry?*
- 17. Should the Court fix a time limit of accounts taking and or inquiry?*
- 18. Are the plaintiffs entitled to the relief sought in the Plaint?*
- 19. Who should bear the costs of the suit?”*

9. All we can say for purposes of this judgment is that none of these drafted issues requested for appointment of an expert for purposes of determining the originator of the innovation in question. The only expert asked for is a qualified accountant for purposes of taking the

accounts and an inquiry. The only inquiry anticipated by the respondents therefore was in respect of taking accounts for purposes of ascertaining how much money the respondents were owed.

10. From the court proceedings of 30<sup>th</sup> September, 2016, which are contained in a document filed by the respondents titled “*schedule to facts relied on in the submissions.*” It would appear that the court, out of the blues made the impugned order which reads as follows:-

**“There is need to get assistance of an expert to determine who the originator of the work was and the court is consulting with the government agencies on communication and information technology for assistance in identifying a competent report.”**

That order was made without prompting by any party.

11. When the matter came up in court for “*mention for further orders*” on 10<sup>th</sup> October, 2016, Mrs Nyange, learned counsel for the respondent addressed the court as follows:-

**“Since last appearance in court, my instructions for Ms Ohaga (sic) is that the court ought to fix the nearer (sic) for hearing after pre-trial conditions are met. However, if the court was to refer the matter to an expert then we pray that the expert be called as a witness to produce his report/finding.”**

The 2<sup>nd</sup> respondent responded:-

**“We are prepared to go to the expert.”**

12. From the above, it is clear to us that the parties did not apply that the matter be referred to the expert. This course of action was taken by the learned Judge without any application by either of the parties. The learned Judge then proceeded to state as follows:-

**“In order to expedite the resolution of the dispute herein and appreciating the conditions of the court to assess whether or not the plaintiff (sic) were the originators of that system now operated by the defendant and called “Mobile Banking Depositing System” I have made consultations and I have identified one Kebenei Kiplimo Tel 0722 773271 ... as an expert to assist determining whether or not the plaintiffs were the originators of the concept. Parties shall contact the said expert on the contacts provided and agree with him among other; (sic)**

**i) The documents the expert shall require to enable him hear the parties;**

**ii) In date or dates and venue for meetings to hear them;**

**iii) The quantum of his fees and mode of payment thereof.”**

13. The expert was then supposed to file his report in court. There is nothing on record to show that the parties sat with the court appointed expert and agreed on the rules of operation as directed by the learned Judge. From the record however, it would appear that the respondents presented their documents to the “*expert*” but the appellants never appeared before the said expert. When the parties appeared in court for mention on 6<sup>th</sup> March, 2018, the learned Judge reiterated that it was not open for the appellant to defy the court order and ordered further that the expert files his report with or without the appellant’s input within 40 days from that date. The report never materialised. Instead, the appellant moved to this Court on appeal against the said order citing twelve grounds of appeal contained in the memorandum of appeal dated 11<sup>th</sup> May, 2018.

14. In essence, the appellant is aggrieved by the said order because the learned Judge misdirected himself on the nature of the dispute; parties were not consulted on the appointing of the expert; parties should be bound by their own pleadings; and eventually that the court had failed to take into account the additional costs associated with the appointment of the said expert.

15. The appellant urged us to allow the appeal and set aside the said order and send the matter back to the High Court for hearing before any Judge other than P.J. Otieno, J.

16. Parties filed written submissions which they relied on. The appellant’s submissions were filed on 21<sup>st</sup> September, 2018 while the respondents filed theirs on 4<sup>th</sup> February, 2019. We have carefully read these submissions and noted the contents thereof.

17. As stated elsewhere in this ruling the substantive suit is yet to be heard and we must resist any invitation to consider any issues outside the order appealed from. We cannot therefore make any determination that may have a bearing on the merit of the suit. It is for this reason that we are reluctant to state whether the nature of the dispute required appointment of an expert or not.

18. From the outset, we have no doubt in our minds that the law allows the court, *suo motu*, where necessary to call expert evidence where the justice of the case so requires **Section 48** of the Evidence Act. **Cap 80** of the Laws of Kenya provides for opinions of expert witnesses. An ‘*expert*’ opinion can be sought by a party in support of its case and can also be called by the court where the court finds such expertise necessary. There was therefore essentially nothing wrong with the learned Judge *suo motu* making an order for calling of an expert’s report.

19. In our view however, before such an order is made, the court must never lose sight of the fact that it is an impartial arbiter and must never appear to be gathering evidence for the benefit of one side. The court must by all means always remain a bastion of impartiality. Towards

this goal, even where the court feels that expert opinion is necessary, it must consult the parties and agree on the appointment particularly if the expert is not a government expert for instance a government analyst, a government surveyor, handwriting expert etc. This is even more so when the expert is in the private sector and has to be paid for the services rendered. The parties would need to agree on the costs, the modalities of the exercise, the ambit etc.

20. Secondly and most important is that there must be solid basis established before a court can decide to call an expert. Firm ground must be laid and this can only be done by hearing the parties first to enable the court identify the specific specialised areas where the court would need guidance. The court cannot by a cursory look at the pleadings determine, before even taking down evidence, that an expert would be necessary. In this case, the court just decided even before hearing the parties, that an expert was necessary to determine who the originator of the project was, which issue was actually not apparent on the face of the pleadings.

21. There was also the issue of the expert himself. How did the court source him? How much fees was to be paid, were the parties able to meet his costs etc. In our view, the learned Judge needed to discuss all these issues with the parties. The learned Judge also needed to lay some basis for engaging an expert and this could only have been done after hearing the parties and learning the extent of the ignorance or lack of expertise that would have necessitated the calling of expert evidence.

22. We think we have said enough to show that the order of 6<sup>th</sup> March, 2018 was made in haste, it was premature and literally imposed on the parties. We have no hesitation in allowing this appeal which we hereby do. The said order is hereby set aside in its entirety. We direct that **High Court Civil Case No. 231 of 2011** be and is hereby remitted back to the High Court for hearing by a Judge with jurisdiction, other than P.J. Otieno, J. Costs of this appeal to abide the outcome of the suit before the High Court.

**Dated and delivered at Mombasa this 14<sup>th</sup> day of March, 2019.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**