



**Flodida Construction Machinery Limited v Wanyonyi (Cause
E017 of 2025) [2025] KEELRC 1695 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1695 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E017 OF 2025
JK GAKERI, J
JUNE 12, 2025**

**BETWEEN
FLODIDA CONSTRUCTION MACHINERY LIMITED CLAIMANT
AND
PETER WEPUKHULU WANYONYI RESPONDENT**

RULING

1. Before the court for determination is the applicant's Notice of Motion dated 13th May, 2025 filed under Certificate of Urgency seeking orders that:
 1. Spent
 2. Spent
 3. This Honourable Court be pleased to issue an order directing Safaricom PLC, the Interested Party, to within seven (7) days of making this Order, to supply and/or furnish the claimant and to produce before this court:
 - a. Certified Mpesa statement for telephone number 0720 288344 for the period between 1st August, 2023 and 16th December, 2024.
 - b. Certified Mpesa statement for telephone number 0720486810 for the period between 1st August, 2023 and 16th December, 2024.
 4. This Honourable Court grants leave to the claimant to file additional list and bundle of documents and witness statement.
 5. All costs and expenses reasonably incurred in prosecuting this Application be borne by the Respondent.



2. The motion is expressed under Rule 45 and 55 of the Employment and Labour Relations Court (Procedure) Rules, 2024, Section 27A(3)(c) of the Kenya Information and Communication Act and Section 45(c)(i) of Data Protection Act and is based on the grounds set out on its face and the Supporting Affidavit of David Owuor Ogeno sworn on 13th May, 2025.
3. The applicant avers that it had received information from its customers by way of Mpesa statements and affidavit showing that they paid for purchase of quarry materials from the applicant into the respondent's Safaricom Mpesa line 0720288344 instead of the applicant's KCB Bank Account Number 1295614952, thereby diverting its funds and the customers had granted the applicant consent to use their Mpesa statements as evidence in the claim.
4. The applicant alleges that between 1st August, 2023 and 16th December, 2024, the respondent sold the claimant's quarry materials valued at Kshs.99,078,085 and the amount deposited in the applicant's Bank Account at KCB was Kshs.70,910,364, a diversion of Kshs.28,167,721 through the respondent's mobile numbers 07202883444 and 0720486810.

Response

5. In his Grounds of Opposition dated 2nd June, 2025, the respondent stated that the instant application was an abuse of court, waste of judicial time and the Orders sought infringe the respondent's right to privacy as the applicant was on a fishing expedition and had unclean hands.
6. That the application was aimed at prolonging litigation.

Applicant's submissions

7. Counsel for the applicant submitted that the guiding principle in determining an application seeking production of certified M-pesa records was restated by Maureen Onyango J in *Tourism Promotion Services (Management) Ltd v Charles Otieno Ogada* [2021] eKLR.
8. Reliance was also placed on the provisions of Section 27A(3) of the [*Kenya Information and Communications Act*](#) on the circumstances in which a telecommunication operator may disclose registration particulars of a subscriber as well as the provisions of Section 45(c)(i) of the Data Protection Act as was the decision in *Dr. Isaac Kiplimo Ng'etich v Safaricom PLC and others* [2023] KEHC 22759 (KLR), to urge that the respondent, while in the applicant's employment as Operations Manager diverted the employer's funds amounting to Kshs.28,167,721 between 1st August, 2023 and 16th December, 2024 by misleading the applicant's customers.
9. Counsel submitted that the respondent had the opportunity to commit fraud as he was co-ordinating all aspects of the quarry including the crusher plant, production planning and directing customer payments. That the applicant had availed sworn affidavits of Jacqueline Ahoya and Ben Otieno to reinforce its case that between 2nd April, 2024 and 14th December, 2024, the two customers paid the respondent a sum of Kshs.1,464,400 as per their M-pesa statements.
10. Finally, counsel submitted that between 1st August, 2023 and 16th December, 2024, the claimant had many customers and sold quarry materials amounting to Kshs.99,078,085.00 as per the invoices but the amount deposited in its KCB Bank Account No. 1295614952 was Kshs.70,910,364 a short fall of Kshs.28,167,721.00 and only the respondent could explain the shortfall.



Respondent's submissions

11. Counsel for the respondent urged the court to accept the grounds of opposition dated 2nd June, 2025 as a proper response to the applicant's application.
12. Concerning infringement of the right to privacy, counsel cited Article 31 of *the Constitution* of Kenya to urge that the applicant had not proved ownership of the two cell phone numbers and could infringe the registered owners right for the period in question and there was no compelling reason to warrant the infringement of the rights of the owners.
13. As regards fishing for evidence, counsel submitted that the applicant had not proved that the documents are in possession of the opponent or that the documents are specific and not aimed at fishing for evidence and related to the instant case.
14. Reliance was placed on the decision in *Nyanza Management Ltd & another v National Bank of Kenya Ltd & 3 Others* [2023] KEHC 19329 (KLR) on the essence of discovery.

Analysis and determination

15. I have considered the Application, Grounds of opposition and submission by the parties.
16. The singular issue for determination is whether the Interested Party ought to be compelled to provide the information sought by the applicant.
17. It is common ground that the respondent was an employee of the applicant effective 1st August, 2023 under a written contract of service of even date and the applicant accuses him of having misdirected its customers to deposit monies in mobile phone numbers 0720288344 and 0720486810 instead of its KCB Bank Account Number 1295614952 while serving as its Operations Manager incharge of all Quarrying activities.
17. To buttress its case, the applicant relies on the Affidavits of one Jaquelyne Ahoya and Ben Ouma Otieno both depose that they were long-term customers of the applicant and often purchased quarry materials at the applicant's quarry and between 22nd August, 2024 and 14th December, 2024 and 2nd April, 2024 and 11th December, 2024, respectively, they purchased materials from the quarry and interacted with the respondent manager who had told them that the company belonged to him and although they were issued with company invoices, payment was to be channelled to cell phone number 0720288344 creating the impression that the number belonged to the company.
18. The two affiants deposed that they paid Kshs.563,800.00 and Kshs.900,600.00 respectively on diverse days.
19. That they only learnt later that the applicant company did not belong to the respondent.
20. Notably, neither of the two affiants made reference to cell phone number 0720456810 identified by the applicant.
21. Rule 55 of the Employment and Labour Relations Court (Procedure) Rules, 2024, provide:
 1. The court, may, on its own motion where it considers it fit, or upon application by a party, serve or order service of a pleading on any person whom it is satisfied may be interested, affected or necessary for efficient and final determination of the dispute.
22. In addition, Section 22 of the *Civil Procedure Act* provides that:



Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) Issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

23. Similarly, in *Nyanza Management Ltd & another v National Bank of Kenya Ltd & 3 Others* (supra) Aburili J. held:

Discovery is a formal pre-trial process through which a party to litigation may seek to discover evidence and facts that are crucial to his case and as seen from Section 22 cited above, the scope of discovery is quite broad...

24. Regarding the centrality of discovery the court observed in *Oracle Productions Ltd v Decapture Ltd & 3 others* [2014] eKLR the pre-trial discovery is so central to litigation that the entire Order 11 of the Civil Procedure Rules, 2010 has substantially devoted to it...

Discovery is also intended to aid a party access vital documents to his case that are solely in the custody of the opposite party, thus levelling the litigation ground (see *Ramji Megji v Kisii University* [2016] eKLR. In *Concord Insurance Co. Ltd V NIC Bank* [2013] eKLR the court emphasized that only relevant documents should be disclosed and that relevance is to be tested in the pleadings and discovery should not be used as a fishing expedition (see also *Selecta Kenya GmbH & Co. Kg & another v Peter Wanderi* [2015] eKLR).

25. In *ABN Amro Bank NV v Kenya Pipeline Co. Ltd* [2019] eKLR, the Court of Appeal held that the court may order discovery of documents on application being made where those documents are related to the suit before it and the purpose of discovery is to ensure that all documents or information necessary for the just determination of the suit are made available to all parties as to the court”.

26. In the instant case the applicant is seeking information in possession of the Interested Party but relating to the respondent’s cell phones number 0720288344 and 0720486810, which the applicant believes were used to misdirect payments which ought to have been made to its KCB Account No. 1295614952.

27. The instant application, needless to emphasize is an exception to the Article 35 of *the Constitution* of Kenya, 2010 which confers on every person the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. (See *Federation of women Lawyers – Kenya & 28 Others v Attorney General & 8 Others* [2015] eKLR, Lenaola J. (as he then was).

28. In his grounds of opposition, the respondent argues that his right to privacy will be infringed but has not elucidated how the right will be violated or infringed as the application is seeking very specific information on M-pesa transactions between 1st August, 2024 to 16th December, 2024.

29. But more significantly, the right to privacy enshrined in Article 31 of *the Constitution* of Kenya is not absolute and may be and is qualified by law in various circumstances.

30. For instance, Section 45(c)(i) of the Data Protection Act provides:



Without prejudice to Section 44, sensitive personal data of a data subject may be processed where-

- a. ...
- b. ...
- c. Processing is necessary for-
 - i. The establishment, exercise or defence of a legal claim.

- 31. It is unclear to the court why the respondent did not swear an affidavit denying that the cell phone lines in question belonged to him and/or that they were not used to misdirect the applicant's funds.
- 32. As adverted to elsewhere in the ruling the information sought is for a specific period and which the applicant believes will be essential in the prosecution of its case against the respondent for a just determination by the court.
- 33. The upshot of the foregoing is that the applicant's Notice of Motion dated 13th May, 2025 is merited and is allowed in the following terms.
 - a. The Interested Party shall furnish the Applicant/claimant herein with certified copies of Mpesa statements for cell phone number 0720 288344 for the period between 1st August, 2023 and 16th December, 2024 within 21 days.
 - b. The Applicant/Claimant has leave to file additional list and bundle of documents and witness statements within 21 days.
 - c. Costs shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 12TH DAY OF JUNE, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

****JUDGE**

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