



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 14 OF 2019

(Formerly CMCC No. 4431 of 2017)

Before Hon. Lady Justice Maureen Onyango

TOURISM PROMOTION SERVICES

(MANAGEMENT) LIMITEDCLAIMANT

VERSUS

CHARLES OTIENO OGADA.....RESPONDENT

RULING

The Claimant/Applicant, Tourism Promotion Services (Management) Limited filed a Notice of Motion Application dated 6th January 2020 seeking that this Court issues an order directing Safaricom Public Limited Company to produce records of certified M-Pesa Statements for Account Holder TPS Head Office, Account Code *****, Mobile Number **** for the period between 1st January 2011 and 31st December 2015. The Applicant further seeks that costs of the Application be in the cause. The Application is supported by the grounds that:

- i). The Respondent discharged his duties as the Applicant's Group Financial Controller ("GFC") until his voluntary retirement on 31st December 2015. The Respondent was in charge of the Applicant's finances, employees' payroll and benefits. He was also a Trustee of the Applicant's pension scheme.*
- ii). During the tenure of his employment, the Respondent used his position as the Applicant's GFC to inter alia demand and receive several unauthorised company, salary and M-Pesa advances. The Respondent confirmed in writing on 16th December 2015 that the cumulative M-Pesa advances as at 16th December 2015 stood at Kshs.18,874,924 and that he was indebted to the Applicant in respect thereof.*
- iii). The Respondent on various occasions proposed to come up with a payment plan for the outstanding M-Pesa balance of Kshs.18,874, 924, which promise he has failed to honour to date. Further, the Respondent now disputes the said M-Pesa advancements despite acknowledging the debt in writing.*
- iv). The Applicant sought to recover the M-Pesa Statements for Mobile Number ***** for the period between 1st January 2011 and 31st December 2015 to enable it support its claim on the unauthorised M-Pesa advancements but was notified by Safaricom Public Limited Company that the same could only be secured and/ or released by a court order.*
- v). In the circumstances, it is imperative that the M-Pesa Statements for Mobile Number 0722521639 for the period between 1st January 2011 and 31st December 2015 be released to the Applicant.*
- vi). The Respondent will not be prejudiced by the said order as it will in fact provide clarity on whether the said amounts were advanced to him by the Applicant during the tenure of his employment as the GFC.*
- vii). It is just and equitable in the circumstances that the orders sought herein are granted.*

The Applicant also filed a Supporting Affidavit sworn on 14th January 2020 by its Chief Financial Officer, Nooren Hirjani who annexed to the affidavit copies of correspondence on the Respondent's outstanding M-Pesa debt marked as **NH-1**.

The Respondent, Charles Otieno Ogada filed his Grounds of Opposition dated 10th February 2020 stating that the Application as filed and presented before this Court is frivolous, vexatious and unmeritorious. Further, that the prayers sought in the Application are a serious affront to the provisions of **Article 31 of the Constitution of Kenya, 2010** which guarantees the Respondent's right to privacy. He states that in the circumstances, the Application is procedurally and substantively bad in law and should be dismissed and/or struck out with costs to the Respondent.

He also filed a Replying Affidavit dated 10th February 2020 averring that this Court has unfettered discretion to make lawful orders only on grounds well set in the law and upon the Claimant demonstrating sufficient cause to warrant the exercise of such discretion. That the Claimant has not presented sufficient ground as required by law to warrant the grant of the orders sought and further, no proof has been tendered before this Court to show that the alleged important evidence was not within the Claimant's knowledge and could not be produced at the time of the pre-trial conference. The Respondent contends that allowing the application herein as prayed is not only against the interest of justice but will also prejudice his interest as it will delay the hearing and conclusion of the matter.

The Respondent denies making any unauthorized payments as alleged by the Claimant and states that all the payments were made by Cheque which were countersigned by the signatories. Further, the Mpesa system at the Claimant's office required an initiator, supervisor and the authorizer whenever there was any transfer between the Claimant's Mpesa account and the Safaricom account. That he would only act as the authorizer which is the reason the Claimant is fraudulently and illegally claiming from him the off-the balance sheet advances made to the directors in the senior management through the Claimant's Mpesa system and other cash transaction systems. That it can therefore be deduced that the Claimant is trying to sanitize illegally obtained evidence which is inadmissible. He challenges the Claimant to produce its Mpesa and other financial transaction records from its system for the period in question.

He contends that the Application herein was brought in bad faith and after undue delay. That since the said delay has not been explained, the Application is rendered an abuse of the court process and should be dismissed with costs.

The Claimant/Applicant filed a Further Affidavit sworn on 4th March 2020 by Nooren Hirjani who avers that the Respondent seeks to mislead the Court on the reasons for the request by the Claimant of its own Mpesa Statements and to further delay the determination of this matter. That the claim against the Respondent is wholly premised on the Respondent's indebtedness to the Claimant to the tune of Kshs.10,574,363.27, being sums obtained by him during the tenure of his employment. That the Respondent's reply highlights the need to produce the Mpesa statements in question so as to determine the issues in dispute between the parties and that the Claimant will have an opportunity to respond to the documentation in the course of the hearing and not at this stage.

Nooren further avers that the pre-trial conference is yet to be concluded as the suit has not been certified ready for hearing. That parties were on 4th November 2019 given leave to file Supplementary Documents which is what the Claimant is seeking to do. That issuance of the orders sought will serve to expedite pre-trial compliance by the Claimant and the documents will aid the court in the just determination of the issues in dispute. That the Respondent has not demonstrated he will suffer any prejudice as he will have an opportunity to review and respond with reference to the documentation produced in support of the Claimant's case. The claimant contends that it is not benefitting from any delay.

The Claimant's Application was amended orally in open court on 10th March 2020 by consent of parties after the Claimant's advocate informed the court that there was an error in respect of the phone number. The application was amended by deleting reference to mobile number *****.

Following the amendment, the Respondent filed further grounds of opposition dated 4th July 2020 to the effect that the amendments to the application made orally in open court, alter the character of the original application so substantially resulting in confusion; for instance, the grounds are oddly at variance with the prayers. That in other words, the application is vague and lacks specificity as it fails to state the Mpesa Account Number whose statements are sought and the period to which the statements relate thus making the orders sought incapable of being granted. That the Applicant has further failed to exhibit or identify the Mpesa statements it is seeking from Safaricom and therefore the Court cannot grant the orders sought. The Respondent prays for costs irrespective of whether or not the application is granted on grounds that the same has occasioned unnecessary expense and resulted in delay of the hearing of the main suit.

Oral Submissions

The Applicant's advocate submitted in court that the Respondent has changed his position on the consent they recorded in court on 10th March 2020 and tried to go back on the issue. Counsel submitted that there is no confusion on what the amendment raises and that they have annexed a sample of the Statement. Counsel urged the Court to lift the restriction to enable the Applicant present the best evidence contending that there is no reason why the Respondent should object to the application. It was submitted that the Respondent's brief is to delay this suit and that his objection is to be rejected as there will be no prejudice. The Applicant relied on **Section 20 (1) of the ELRC Act** which sets out general powers of Court.

The Respondent's advocate submitted that the initial reference to his client's account number was replaced with another account number meaning the Court is incapable of granting the prayers as it is not clear what the applicant is seeking from the Court. That the Respondent has filed authorities that where a party is not clear, the court will not speculate on what the applicant seeks. The Respondent's advocate stated that he seeks costs irrespective of outcome.

The Applicant's advocate responded that she has referred to a Code as Corporate Mpesa have codes and not telephone numbers

Analysis and Determination

The main issue for determination is whether this Court should issue an Order directing Safaricom Public Limited Company to produce records of certified M-Pesa Statements for Account Holder TPS Head Office, Account Code ***** for the period between 1st January 2011

and 31st December 2015.

It is on record that the parties herein recorded consent orders before Ongaya J. in terms amending the Application by deleting reference to mobile number *****. No application has been made to set aside the consent orders. I thus find the amendment to be valid. Having been made by consent, the Respondent is estopped from denying the validity or to contest the effect thereof.

The High Court in the case of Laiser Communications Limited & 5 others v Safaricom Limited [2019] eKLR affirmed what the authorities cited by the plaintiffs reiterated: that pre-trial discovery is central to litigation and that such discovery should be limited solely to matters in contention. The Court in the above mentioned case stated at paragraph 7 that:

“The relevance of making an order for discovery was discussed in the case Kenya Commercial Bank of Kenya Limited v Kenya Pipeline Company Limited [2014] eKLR where the Court stated:

“The objective of discovery has been captured in Halsbury’s Laws of England Vol. 13 Paragraph 1 which states as follows:-

“The function of discovery of documents is to provide the parties with the relevant documentary material before trial so as to assist them in appraising the strength and weakness of their relevant cases, and thus provide the basis for the fair disposal of the proceedings before it or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary evidence material to support or rebut the case made against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

The Applicant is entitled to records of certified M-Pesa Statements being that it is the owner of the Account Code ***** referred to in the application herein. The Applicant has also submitted that the said records would enable it present the best evidence in support of its case and aid the court in the just determination of the issues in dispute. This is in essence the purpose of discovery as stated in Halsbury’s Laws of England Vol. 13 Paragraph 1 as set out in the case.

I find no merit in the objections raised by the Respondent with the result that the application succeeds. I thus order Safaricom Public Company Limited to produce records of M-Pesa statements for Account Holder TPS Head Office, Account Code *****, for the period between 1st January 2011 to 31st December 2015.

Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2020

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE