



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 635 OF 2016**

**BETWEEN**

**GOLD CROWN BEVERAGES [KENYA] LIMITED.....CLAIMANT**

**VERSUS**

**MAINA NGUGI.....RESPONDENT**

**RULING**

1. The Claimant Company employed the Respondent as its General Manager, on 6<sup>th</sup> January 2016. He resigned on 4<sup>th</sup> June 2016. The Claimant states that resignation was in breach of contract and filed this Claim, seeking general damages and special damages.
2. It is averred by the Claimant, that in the course of his employment, the Respondent unlawfully procured kickbacks from Claimant's Customers. These kickbacks are part of the damages sought to be recovered from the Respondent by the Claimant.
3. Procurement is alleged to have been made through M-pesa money transfer platform.
4. In an Application filed on 20<sup>th</sup> June 2018, the Claimant asks the Court to make the following order:-

*“That this Honourable Court be and is hereby pleased to issue an order directed to Safaricom Public Limited Company, to produce records of certified M-pesa statements for the period between May 2015 and June 2016, for Respondent's number 0722529825.”*

5. The Application is based on the Affidavit of Claimant's Finance Manager Daniel Karanja, sworn on 14<sup>th</sup> June 2018.
6. The Respondent filed a Replying Affidavit sworn on 10<sup>th</sup> July 2018.
7. Parties agreed to have the Application considered and determined on the strength of their respective Affidavits and Submissions, in an order recorded in Court on 23<sup>rd</sup> July 2018. They confirmed filing of Submissions on 22<sup>nd</sup> November 2018.

**The Court Finds:-**

8. M-pesa statements are sought to show that certain Customers of the Claimant, paid to the Respondent kickbacks.
9. At paragraph 4 of the Affidavit sworn by Finance Manager Daniel Karanja, it is stated that ‘*the claims arose out of the Respondent's conduct of unlawfully procuring money as kickbacks from the Claimant's Customers, during subsistence of employment contract. Annexed hereto and marked DK-1, are copies of statements from Customers showing just a few of the Customers who paid kickback to the Respondent via M-pesa.*’
10. The Court does not think it is necessary at this stage, to direct Safaricom to produce Respondent's statements for the given period. There are specific Customers, some who have volunteered information to the Claimant, who are said to have given kickbacks, to the Respondent. They have recorded statements with the Claimant. It is possible for these Customers to produce their own Safaricom statements, showing that they paid money to Respondent's account number 0722529825, when they are called to give evidence on behalf of the Claimant. A specific amount is alleged to have passed between the Customers and the Respondent in kickbacks. The specific Customers and amounts ought to be known to the Claimant. It is the preliminary view of the Court, that it is for these Customers to present their Safaricom records, showing they paid money to the Respondent, and show in Court, the nature of these payments.
11. If it becomes apparent upon hearing evidence from the Claimant's Witnesses, that it is necessary to have Safaricom disclose

Respondent's personal data, the Claimant shall be at liberty to renew its Application, mindful of the Respondent's constitutional safeguards, as regards such disclosure.

12. At this stage, there is no need to issue orders directed at Safaricom.

IT IS ORDERED:-

*a) The Application filed by the Claimant on 20<sup>th</sup> June 2018 is declined.*

*b) Parties shall endeavour to comply with Rule 15 of the E&LRC [Procedure] Rules 2016, and set down the main suit for hearing without further delay.*

*c) Costs in the cause.*

**Dated and delivered at Mombasa this 24<sup>th</sup> day of January 2019.**

**James Rika**

**Judge**