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CONSTITUTIONAL & HUMAN RIGHTS DIVISION

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 247 OF 2019

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS ENshrined UNDER ARTICLES 31 (C) AND (D) AND ARTICLE 46 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: ARTICLES 2 (1) (5) (6), ARTICLES 3(1), ARTICLES 22(1), ARTICLES 22(2) (B) AND (C), ARTICLE 23(1) AND 23(3), ARTICLE 258(1) AND ARTICLE 258(2) (B) AND (C) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: ARTICLE 12 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND ARTICLE 17 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

IN THE MATTER OF: SECTION 4 AND SECTION 86 OF THE CONSUMER PROTECTION ACT, SECTION 27(A) (2) (B) OF THE KENYA INFORMATION AND COMMUNICATIONS ACT

IN THE MATTER OF: REGULATIONS 3(1)(D), 4(2), 15(1)(2)(3) OF THE KENYA INFORMATION AND COMMUNICATIONS (CONSUMER PROTECTION) REGULATIONS, 2010

BETWEEN

BENEDICT KABUGI NDUN'GU.....PETITIONER

AND

SAFARICOM PLC.....RESPONDENT

PETITION

To:

The High Court of Kenya,  
NAIROBI.

The Humble Petition of BENEDICT KABUGI NDUNG'U of P.O Box 2607 00200 Nairobi, in the Republic of Kenya is as follows:-

1. The Petitioner is an adult male of sound mind residing and working for gain in Nairobi within the Republic of Kenya. The Petitioner's address for the purpose of this Petition shall

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REG. SAFARICOM LTD.  
SECRETARIAL SERVICES DEPARTMENT

be Care of MAINA & MAINA ADVOCATES, 14<sup>TH</sup> FLOOR, WING A, VIEW PARK TOWERS, UTALII LANE/ UHURU HIGHWAY, P.O BOX 2607- 00200, NAIROBI.

2. The Respondent is a Public listed Company and the leading telecommunications network in Kenya boasting a subscriber base estimated at over 30,000,000 (Thirty Million) subscribers.
3. The Petitioner herein is a subscriber of the Respondent herein and has from time to time gambled through SportPesa Android Application using his Safaricom mobile number 0724 837 553.
4. The Petitioner herein presents this Petition:-
  - (i) for his own benefit in his individual capacity as a Safaricom subscriber who has used his Safaricom number to gamble ;
  - (ii) on behalf of all Safaricom subscribers who gamble using their Safaricom lines;
  - (iii) and further in the interest of the public.
5. The Petitioner thus invokes Articles 22(1), 22(2)(b), 22(2)(c) , Articles 258 (1), 258(2) (b) and (c) of the Constitution of Kenya, 2010 and Section 4 of the Consumer Protection Act in presenting this Petition.
6. The Petitioner avers that by virtue of being the leading telecommunications Network in Kenya, the Respondent herein has a wealth of data flowing through its systems from its millions of subscribers.
7. The Petitioner avers that the data received and processed by the Respondent from its subscribers is private, protected and confidential by virtue of:-
  - a) Article 31 (c) and (d) of the Constitution of Kenya, 2010:- which guarantees the Right to privacy and which right includes the right not to have information relating to their family or private life unnecessarily revealed.
  - b) Article 12 of the Universal Declaration of Human Rights which provides that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

- c) Article 17 of the International Covenant on Civil and Political Rights which provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
  - d) Section 86 of the Consumer Protection Act, which provides for confidentiality and secret of any information received whilst delivering services to a consumer;
  - e) Section 27(A) (2) (b) of the Kenya Information and Communications Act which mandates the Respondent to ensure that the registration details of a subscriber are kept in a secure and confidential manner, and shall not be disclosed without the written consent of the subscriber.
8. The Petitioner avers therefore that the Respondent is under a Constitutional and statutory mandate to ensure that the data received from its subscribers is treated in a secure and confidential manner.
  9. The Petitioner avers that on 18<sup>th</sup> May, 2019, he was approached by an individual who had in his possession data estimated at 11,500,000 (Eleven Million, Five Hundred Thousand) Safaricom subscribers. The data which the Petitioner herein viewed personally was specific to gamblers who had used their Safaricom mobile numbers to gamble on various betting platforms registered in Kenya.
  10. The Petitioner avers that he was astounded by the magnitude of the data held by the said individual as the information available included :-
    - (i) Full names (first name, middle name and surname) of all subscribers who gamble;
    - (ii) The subscribers mobile number;
    - (iii) The Gender, date of birth and nationality of the subscribers;
    - (iv) Details various betting platforms of which the subscribers gamble with;
    - (v) Identity numbers, passport numbers, military identity card numbers, certificate of incorporation numbers, and alien identity card numbers of the subscribers;
    - (vi) The total amounts expended towards gambling by each of the subscribers with the data being up to date;

- (vii) The number of Betting companies, number of pay ins, latest bet date and latest pay in;
  - (viii) The make and type of device used by the subscriber together with the device's IMEI (International Model Equipment Identity) number;
  - (ix) Handset name and manufacturer;
  - (x) Indicator on the network used (2G/3G/4G);
  - (xi) Specification on whether dual SIM or single SIM;
  - (xii) The location of the subscriber including area, region and country.
11. The Petitioner avers that he immediately searched the data using Identity Card number and realised that the data presented constituted a serious violation of his right to privacy, given that his particulars were included in the data, as well as a violation of the right to privacy of around 11,500,000 (Eleven Million, Five Hundred thousand) subscribers whose information was contained therein.
  12. The Petitioner avers that in light of the gravity of the circumstances, he reported the serious breach to several police stations and when he realised that no action was taken on the issue, he wrote officially to the Respondent and even personally approached a senior official with the Respondent to report the breach.
  13. The Petitioner avers that the feedback received from all quarters was that he should proceed to communicate with the individual with the data whilst awaiting communication on the way forward.
  14. The Petitioner avers that he complied with the directions given and kept in communication with the individual involved and was thus shocked to say the least when on 6<sup>th</sup> June, 2019 he was apprehended and taken to Directorate of Criminal Investigations Headquarters where he wrote a statement and subsequently detained at Gigiri Police Station.
  15. The Petitioner avers that at no point was he informed of the reason for his arrest and he was detained overnight and released with the investigators requiring that he assist in nabbing the individual with the data which the Petitioner was happy to assist with.

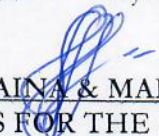
16. The Petitioner avers that given all the facts presented and further given that the Petitioner did everything within his power to report the breach within the Respondent and even continuously took on the role of undercover agent all in a bid to have the culprits brought to book, his arrest and detention had no basis and was thus illegal and irregular.
17. The Petitioner opines that there was a deliberate break in the chain of command within the investigating agency where the DCI officers attached to the Respondent deliberately ignored the complaint that had been filed by the Petitioner at various Police Stations
18. The Petitioner avers that with his assistance several arrests were made on 7<sup>th</sup> June with regard to the breach and two individuals who are employees of the Respondent namely Simon Billy Kinuthia and Brian Njoroge Wamatu were charged in court with regard to the illegal access to data.
19. The Petitioner avers therefore that the Respondent breached his rights under the Constitution and specifically Article 31 (c) and (d) of the Constitution of Kenya, 2010.
20. The Petitioner further avers that the failure by the Respondent to secure in a confidential manner the data obtained from its 11,500,000 (Eleven Million, Five Hundred Thousand) subscribers (including the Petitioner herein) who gamble using their Safaricom numbers is in breach of Article 31(c) and (d) and Article 46 of the Constitution of Kenya, 2010 and Sections 86 of the Consumer Protection Act as well as Section 27A (2) (b) of the Kenya Information and Communications Act.
21. The Petitioner avers that as a result of the action of the Respondents herein, the Petitioner's right to privacy has been infringed upon, with the Petitioner being illegally detained, being exposed to mental anguish and his reputation severely and irreparably damaged.
22. The Petitioner thus seeks damages for violation of his rights under Articles 31 and 46 of the Constitution of Kenya, 2010 as well as violation of the rights of all the 11, 500,000 (Eleven Million, Five Hundred Thousand) subscribers affected by the breach.

**REASONS WHEREFORE** the Petitioner prays for:

- a) **A DECLARATION** that the Respondent has breached the Petitioner's rights to privacy as enshrined under Articles 31 and 46 of the Constitution of Kenya, 2010.

- b) **A DECLARATION** that the Respondent has breached the right to privacy as enshrined under Articles 31 and 46 of the Constitution of Kenya, 2010 of its 11,500,000 (Eleven Million, Five Hundred Thousand) subscribers who gamble using their Safaricom Mobile Numbers.
- c) **A DECLARATION** that the Respondent has breached its statutory duty under Sections 27 A(2) (b) of the Kenya Communication and Information Act and Section 86 of the Consumer Protection Act and is therefore in breach of public policy.
- d) Compensation in the amount of Kshs. 100,000,000 (Kenya Shillings One Hundred Million) for breach of the Petitioner's right to privacy as enshrined under Article 31 of the Constitution of Kenya, 2010.
- e) Compensation in the amount of Kshs. 10,000,000 (Kenya Shillings Ten Million) for each of the 11,500,000 (Eleven Million, Five Hundred Thousand) Safaricom subscribers who gamble using their Safaricom lines and who have joined this Petition for breach of their right to privacy as enshrined under Article 31 and 46 of the Constitution of Kenya, 2010.
- f) Any other relief that the Honourable Court deems fit to grant.
- g) Costs of this Petition.

DATED at NAIROBI this.....<sup>or</sup> 21.....day of June.....2019

  
**MAINA & MAINA**  
**ADVOCATES FOR THE PETITIONER**

**DRAWN & FILED BY:**

Maina & Maina Advocates  
View Park Towers  
14<sup>th</sup> Floor  
Utali Lane/Uhuru Highway  
P.O Box 2607-00200  
**NAIROBI**  
Tel No. 0707 822442  
Email: *info@mainadvocates.com*

**TO BE SERVED UPON:**

Safaricom PLC,  
Safaricom House,  
Waiyaki Way, Westlands,  
P.O Box 66827 00800,  
**NAIROBI.**

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BETWEEN

BENEDICT KABUGI NDUN'GU.....PETITIONER

AND

SAFARICOM PLC.....RESPONDENT

SUPPORTING AFFIDAVIT

I, BENEDICT KABUGI NDUNG'U a Resident of Nairobi within the Republic of Kenya and of P.O Box 2607 00200 Nairobi do hereby make oath and state as follows:-

1. **THAT** I am the Petitioner herein, well versed with the facts leading up to this Petition and competent to swear this Affidavit.
2. **THAT** I am a subscriber of the Respondent herein under mobile phone number 0724837553 and I have from time to time used my Safaricom mobile number to gamble.

3. **THAT** on 18<sup>th</sup> May, 2019, I was approached by an individual who introduced himself merely as 'Mark' and who indicated that he had data on at least 11,500,000 (Eleven Million Five Hundred Thousand) Safaricom subscribers with the data being specific to betting trends.
4. **THAT** I had opportune to look at the data as claimed and was taken aback by the amount of data and information held by Mark with the indication being that the data was current and retrieved directly from the Respondent.
5. **THAT** the information available of the 11,500,000 (Eleven Million, Five Hundred Thousand) subscribers was as follows:-
  - (i) Full names (first name, middle name and surname) of all subscribers who gamble;
  - (ii) The subscribers mobile number;
  - (iii) The Gender, date of birth and nationality of the subscribers;
  - (iv) Details of which entities the subscribers gamble with;
  - (v) Identity numbers, passport numbers, military identity card number, certificate of incorporation number, alien identity card number of the subscribers;
  - (vi) The total amounts expended towards gambling by each of the subscribers with the data being up to date;
  - (vii) The number of Betting companies, number of pay ins, latest bet date and latest pay in;
  - (viii) The make and type of device used by the subscriber together with the device's IMEI (International Model Equipment Identity) number;
  - (ix) Handset name and manufacturer;
  - (x) Indicator on the network used (2G/3G/4G);
  - (xi) Specification on whether dual SIM or single SIM;
  - (xii) The location of the subscriber including area, region, country.



6. **THAT** I searched for my National Identity card number in the data and found my data with all the above information with the data being completely accurate and this confirmed the authenticity of the data.
7. **THAT** Mark indicated that he wished to hold a meeting with the Chairman of Sportpesa, which is a leading betting Company in Kenya, I made no commitment on the issue and terminated the meeting.
8. **THAT** the following day on Sunday 19<sup>th</sup> May, 2019, Mark called me severally having obtained my number from a mutual acquaintance and I maintained a non-committal attitude over the issue.
9. **THAT** on the 20<sup>th</sup> May, 2019 I visited the Divisional Criminal Investigation Officer, Parklands Police Station, one Mr. Njoroge and reported the entire incident involving Mark and even surrendered a sample of the data containing 10,000 (Ten Thousand) subscribers that I had received from Mark.
10. **THAT** Mr. Njoroge put me in touch with Mr. Raballa who is a Divisional Criminal Investigation Officer attached to the Respondent's Cyber Crimes Operation Unit and I yet again shared all the information with Mr. Raballa including the sample that I had on WhatsApp.
11. **THAT** Mr. Njoroge and Mr. Raballa advised that I string Mark along and do nothing to raise any red flags while they investigated the matter and advised on the way forward.
12. **THAT** Mr. Raballa indicated that he would let me know the way forward by end of 21<sup>st</sup> May, 2019 but I heard nothing further from him despite several attempts to contact him. Since I had no official document showing that I had reported the matter, on 22<sup>nd</sup> May, 2019 I went to the Central Police Station and again reported the matter to the Cyber Crime Unit under OB No 80 of 22<sup>nd</sup> May, 2019 (*Annexed herein at page 1 of the Annexure marked "BK" is a copy of the OB slip given*)
13. **THAT** to avoid raising any red flags and in keeping with the directive given by Mr. Raballa, I continued interacting with Mark who introduced me to another individual named Charles whom he was working with.

14. **THAT** I was concerned that I was not receiving any feedback on the issue from any of the investigating agencies and I decided to bring the matter to the attention of the Respondent and I personally approached a Mr. Lopokoiyit on the 25<sup>th</sup> May, 2019 who is the Director for Financial Services with the Respondent. *(Annexed herein at page 2 to <sup>9</sup> of the Exhibit marked BK is a copy of the communication with Mr. Lopokoiyit)*
15. **THAT** I further instructed the firm of Prof. Albert Mumma and Company Advocates on the 30<sup>th</sup> May, 2019 and they dispatched a formal letter to the Respondent. *(Annexed herein at page <sup>10</sup> to <sup>12</sup> of the Annexure marked 'BK' is a copy of the letter)*
16. **THAT** Mr. Lopokoiyit referred me to a Mr. Patrick Kinoti who is also an employee with the Respondent and I met with Mr. Kinoti and narrated the entire series of events and also shared the sample which I had with Mr. Kinoti verifying that the sample was authentic.
17. **THAT** Mr. Kinoti then requested that I assist in nabbing the two individuals as it was the only way to discover the source of the data. Mr. Kinoti offered me Kshs 3,000,000 (Three Million) as compensation for infringing the Petitioner's Right to Privacy. He sent me a deposit of Kshs 50,000 (Fifty Thousand) on Mpesa *(attached herein at page <sup>13</sup> of the Annexure Marked BK is proof of Mpesa payment)*
18. **THAT** I rejected the offer and instead counter offered at 100,000,000 (One Hundred million) as compensation for infringing my rights to privacy and assisting them to apprehend the persons behind the data breach. *(The conversation is attached at page <sup>14</sup> to <sup>20</sup> of the Annexure marked 'BK')*
19. **THAT** Mr. Kinoti requested for time to consult internally whilst making it clear that I should in the interim maintain contact with Mark and raise no red flags. *(Annexed herein at page <sup>21</sup> to <sup>34</sup> of the Annexure marked BG is a copy of correspondence between myself and Mr. Kinoti)*
20. **THAT** I now found myself in a rather unique position to say the least as I was awaiting feedback from the investigating officer and from the Respondent whilst creating all manner of lies to keep Mark from suspecting anything.

21. **THAT** it was not possible to keep communicating with Mark and offer all manner of excuses without raising a red flag and as such I orchestrated a meeting with Mark and Ronald Karauri of SportPesa on 3<sup>rd</sup> June, 2019. Mr. Kinoti was aware of this.
22. **THAT** it was thus surprising and infuriating that given all my efforts to report the matter as well as all my efforts to assist in nabbing the individuals involved, I was on the 6<sup>th</sup> June, 2019 arrested and taken to DCI headquarters and thereafter detained overnight at Gigiri police station, without any charge
23. **THAT** I nonetheless assisted the police on 7<sup>th</sup> June, 2019 and participated in a sting operation which led to the arrest of Mark and Charles, with the police also confiscating the laptop containing the data with regard to the 11,500,000 (Eleven Million, Five Hundred Thousand) subscribers.
24. **THAT** the arrest of Mark and Charles led to the police to the source of the illegal data access with the culprits being employees of the Respondent namely Brian Wamatu and Simon Billy Kinuthia with the latter being the Head of Regional Expansion-Mobile Money.
25. **THAT** the two employees were subsequently arrested and charged in court on the 10<sup>th</sup> June, 2019 and I am listed as a witness to the case. *(Annexed herein at page 35 to 36 of the Annexure marked 'BK' is a copy of the charge sheet)*
26. **THAT** the Complainant in the above criminal case is the Respondent and a perusal of the charge sheet confirms that there was indeed a breach as the charge sheet confirms that privileged Safaricom subscriber's data information was unlawfully copied and transferred.
27. **THAT** what is baffling is that Charles and Mark, who had illegally accessed the data were not charged and have to date not been charged, they have instead been listed as witnesses.
28. **THAT** I wish to state categorically that Mark and Charles were unknown to me before being approached by Mark on the 18<sup>th</sup> May, 2019.

29. **THAT** unfortunately the ordeal was not over as I was yet again arrested and charged on the 13<sup>th</sup> June, 2019 and further arrested again on the 19<sup>th</sup> June, 2019. (*Annexed herein at page ~~37~~ of the Annexure marked 'BK' is a copy of the charge sheet*)
30. **THAT** it is an established fact that the Respondent allowed breach of the data of 11,500,000 (Eleven Million, Five Hundred Thousand) subscribers being accessed illegally a fact which is confirmed by the charge sheet attached at page ~~35-36~~ herein by the Respondent itself which is the Complainant. And its subsequent hawking to third parties.
31. **THAT** despite the enormous breach, the Respondent herein has not informed any of the subscribers of the breach as no apology or explanation has been proffered.
32. **THAT** I took all steps within my power to report the breach in a timely manner and it is my belief that the criminal case has been instituted against me with the sole intention of stifling my voice and preventing the public from becoming aware of the breach.
33. **THAT** I cannot begin to describe the vulnerability and exposure that I have felt since the discovery that this amount of data was accessed from the Respondent's database and the nature and specificity of the information adds to the magnitude of the vulnerability felt.
34. **THAT** I am not an employee nor have I ever been an employee of the Respondent herein as has numerous been reported in the media. (*Annexed herein at page ~~32~~ to ~~4~~ of the Exhibit marked 'BK' are newspaper clippings evidencing the same*)
35. **THAT** this whole incident has been harrowing to say the least, I have been arrested severally, my name has been printed in numerous newspapers and my name and image irrevocably tarnished.
36. **THAT** it is unfortunate that my attempts to do what is right have led to this and I will not waiver in pursuing my rights and the rights of the uninformed subscribers.
37. **THAT** it is for this reason that I present this Petition not only on my behalf but on behalf of the 11,500,000 (Eleven Million, Five Hundred Thousand) subscribers whose right to privacy has been breached by the Respondent.
38. **THAT** it is my belief that it is in the public's interest that the breach be brought to light and the Respondent held accountable.

39. **THAT** we now live in an era where we conduct all manner of transactions from the most mundane to the most serious on our phones and the Respondent is in a position of trust, collecting and storing all manner of data and information from its subscribers.
40. **THAT** given the trust placed in the Respondent, the Respondent has a duty not to breach that trust and this duty is enshrined in the Constitution, Statute and International Treaties.
41. **THAT** as such, a breach of this nature whether involving one subscriber or the 11,500,000 affected herein should not be taken or treated in a trivial manner.
42. **THAT** I thus pray that this Petition be allowed not only as compensation for breach of my Constitutional rights but also to send a message that is loud and clear that the right to privacy cannot and should not be ignored or overlooked.
43. **THAT** I pray that the court renders a decision that ensures that the behemoth that is the Respondent treats the issue of privacy with the graveness that it deserves and that a breach of this nature does not happen again.
44. **THAT** I further annex herewith correspondences made by my advocates and the responses received thereto at page 42 to 45 of the Annexure Marked 'BK'.
45. **THAT** what is deponed herein is true to the best of my knowledge, information and belief.

SWORN at NAIROBI by the said )

BENEDICT KABUGI NDUNG'U on )

This 21<sup>st</sup> day of June 2019 )

Before Me )

Commissioner for oaths )

**DRAWN & FILED BY:**  
Maina & Maina Advocates  
View Park Towers  
14<sup>th</sup> Floor

SAMUEL M. MWANIKI  
ADVOCATE  
COMMISSIONER FOR OATHS  
P. O. Box 2959  
00100 NAIROBI

  
.....  
Deponent

Utalii Lane/Uhuru Highway  
P.O Box 2607-00200  
**NAIROBI**  
Tel No. 0707 822442  
Email: *info@mainadvocates.com*

**TO BE SERVED UPON:**

Safaricom PLC,  
Safaricom House,  
Waiyaki Way, Westlands,  
P.O Box 66827 00800,  
**NAIROBI.**