



Kamau & another (Suing on their own behalf and on behalf the class of persons being all registered Airtel Customers /Users/ Subscribers) v Bharti Airtel Limited also known as Airtel & another (Civil Suit E036 of 2021) [2022] KEHC 14376 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E036 OF 2021
A MSHILA, J
OCTOBER 21, 2022**

BETWEEN

**GEOFFREY GORDON ODHIAMBO 1ST PLAINTIFF
LAZARUS MWANGI KAMAU 2ND PLAINTIFF
SUING ON THEIR OWN BEHALF AND ON BEHALF THE CLASS OF
PERSONS BEING ALL REGISTERED AIRTEL CUSTOMERS /USERS/
SUBSCRIBERS**

AND

**BHARTI AIRTEL LIMITED ALSO KNOWN AS AIRTEL 1ST RESPONDENT
COMMUNICATION AUTHORITY OF KENYA 2ND RESPONDENT**

RULING

Background

1. The notice of motion dated April 16, 2021 was brought under section 3(1) and 102 of the [Kenya Information and Communications Act](#), regulation 4(1) of the [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#), order 51 rule l of the [Civil Procedure Rules](#) and sections 1, 1A, 3A of the [Civil Procedure Act](#) for the following orders;
 - a. The court to order that it lacks jurisdiction to hear and determine the plaintiffs'/ respondents' suit at this moment.
 - b. The court to order that by filing this suit before this court, the plaintiffs'/respondents' are in breach of the express provisions of clause 15 of the Airtel money terms and conditions of



service by failing to refer the dispute herein to the defendant's/applicant's manager in charge of Airtel Money Operations and thereafter to arbitration.

- c. The court to order that by filing this suit before this court, the plaintiffs'/respondents' are in breach of the express statutory dispute resolution mechanisms provided for under the [Kenya Information and Communications Act](#) (hereinafter the "Act") and the [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#) (hereinafter the "regulations") by failing to exhaust the statutory mechanisms under the Act and the regulations being the Communication Authority of Kenya and the Communications and Multimedia Appeals Tribunal respectively.
 - d. The plaintiffs'/respondents' suit be dismissed with costs to the 1st defendant/ applicant for failure to follow the requisite statutory dispute resolution mechanism as set out in the [Kenya Information and Communications Act](#) and the [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#).
 - e. The plaintiffs'/respondents' suit be dismissed with costs to the defendant/ applicant for failure to follow the requisite dispute resolution mechanisms under the defendant's terms and conditions of service.
 - f. The costs of this application be provided for.
 - g. The court to grant any other order that it deems fit.
2. The application was supported by the sworn affidavit of Lillian Mugo who stated that the defendant/applicant is licensed under the [Kenya Information and Communications Act](#) to provide telecommunications service. That one of such services and/or products being offered by the 1st defendant/applicant is the Airtel Money service which is a platform where the defendant's subscribers and/or users are able to send and receive money and also pay for other services through their respective mobile phones.
 3. Pursuant to the Airtel Money terms and conditions of service, the parties thereto being the 1st defendant/applicant and its subscribers/users, agreed that in the event of any dispute, the same would be resolved through alternative dispute resolution mechanisms being the (1) the defendant's/applicant's manager in charge of the Airtel Money operations and thereafter in the event the dispute was not resolved then the matter would proceed to arbitration for a final decision.

Applicant's Case

4. It was the applicant's submission that the instant suit is a dispute between a licensee and a customer in the telecommunication industry. The [Kenya Information and Communications \(Consumer Protection\) Regulations, 2010](#) define a "complaint" to mean any statement of dissatisfaction with the services of a licensee made by a customer and further defines a "customer" to mean any person who uses the services or purchases the products of a particular licensee or vendor, without necessarily being a subscriber to that licensee or vendor.
5. It is not in dispute that the 1st defendant/applicant is a licensee under the [Kenya Information and Communications Act](#) and as defined under the [Kenya Information and Communications \(Consumer Protection\) Regulations, 2010](#). As such, it is not in dispute that the instant dispute is one between a consumer and a licensee as envisaged in the [Kenya Information and Communications Act](#), the [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#) and the [Kenya Information and Communications \(Consumer Protection\) Regulations, 2010](#).



6. The *Kenya Information and Communications Act*, the *Kenya Information and Communications (Dispute Resolution) Regulations, 2010* and the *Kenya Information and Communications (Consumer Protection) Regulations, 2010* provide for an effective dispute resolution mechanism where a dispute arises between a licensee such as the 1st defendant/applicant and its customer/consumer such as the plaintiffs/respondents herein.
7. Instructively, regulation 7 of the *Kenya Information and Communications (Consumer Protection) Regulations, 2010* provides for complaint handling procedures of a licensee. The said regulations also provide that where a consumer/customer is not satisfied with a decision made on a complaint by the licensee, the consumer/customer has the option of pursuing an identified escalation process, where the decision of the licensee may be examined by a suitably qualified person in the licensee's organization.
8. Further, paragraph 9 of regulation 7 of the *Kenya Information and Communications (Consumer Protection) Regulations, 2010* provides that where the consumer/customer has already gone through the licensee's escalation process and the complaint has not been resolved to the consumer's satisfaction, the consumer may refer the complaint to the 2nd defendant/respondent.
9. The plaintiffs/respondents did not explore the dispute resolution mechanisms as set out in the *Kenya Information and Communications Act*, the *Kenya Information and Communications (Dispute Resolution) Regulations, 2010* and the *Kenya Information and Communications (Consumer Protection) Regulations, 2010* and instead opted to rush to court without exploring the available remedies.
10. The applicant submitted that the failure by the plaintiffs/respondents to explore the available dispute resolution mechanisms as required under the *Kenya Information and Communications Act*, the *Kenya Information and Communications (Dispute Resolution) Regulations, 2010* and the *Kenya Information and Communications (Consumer Protection) Regulations, 2010* offends the doctrine of exhaustion of alternative remedies. It is imperative to note that where a dispute resolution mechanism exists outside the courts, the same ought to be exhausted before the jurisdiction of the court is invoked.
11. Additionally, the applicant argued that the suit is bad in law, misconceived and also raises no reasonable cause of action as against the 2nd defendant/respondent thus rendering it fatally and incurably defective as per the test laid out in *Anarita Karimi Njeru v Republic* [1979] eKLR.
12. The suit as framed does not meet the test indicated in the aforementioned authorities and that the plaintiffs/respondents have failed to demonstrate to this honourable court with a degree of precision, how their rights were violated in light of the facts of the case by the 2nd defendant/respondent. Moreover, the plaintiffs/respondent merely alleges, without evidence, that their rights under have been infringed by the 2nd defendant/respondent.
13. The applicant urged the court to find that the instant suit is premature and that it is incurably/fatally defective, a non-starter and an utter abuse of the court's process.

Respondents' Case

14. It was the respondent's case that section 6(1) of the *Arbitration Act* obliges the party desiring referral of the dispute to arbitration to make the application promptly and at the earliest stage of the proceedings. After the plaintiff/respondent filed the suit herein *vide* a plaint dated January 14, 2021, the 1st defendant/applicant filed a memorandum appearance dated March 19, 2021. Thereafter, the 1st defendant/applicant filed its statement of defence dated and filed on April 16, 2021. See: *Eunice Soko Mlagui v Suresh Parmar & 4 others* [2017] eKLR.



15. The respondent submitted that the defendant's/applicant's notice of motion application dated April 16, 2021 is bad in law because the 1st defendant's/applicant has acquiesced itself to the jurisdiction of the court by taking several steps after filing its memorandum appearance dated March 19, 2021 by further filing its statement of defence dated and filed on April 16, 2021 along with an index dated April 16, 2021.
16. It was the respondent's position that no customers/users/subscribers of the 1st defendant/applicant was involved in the drafting of the terms and conditions of the 1st defendant of which most customers/users/subscribers do not have the opportunity to read when subscribing to the service. The terms and conditions of the 1st defendant/applicant are so skewed in the 1st defendant's favour that clause 15 presupposes the 1st defendant being a prosecutor, judge and jury which in this instance, the 1st defendant would be deciding on matters of its own default thus bringing the claim herein before the 1st and 2nd defendants would amount to a conflict of interest.
17. Article 46 of the Constitution of Kenya, 2010 gives the consumers of Kenya the right to goods and services of reasonable quality and in furtherance of the rights of the consumers, the Consumer Protection Act, 2012, enacted pursuant to the directive of article 46 of the said Constitution, has its preamble as follows: "To provide for the protection of consumers, prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto". Section 84 of the Consumer Protection Act, 2012 envisages a consumer having a right to commence an action before the court.
18. Further, the "outage credits" sought in the suit herein are indeed the property of the customers/users/subscribers of the 1st defendant/applicant pursuant to the Kenya Information and Communications (Consumer Protection) Regulations, then article 258 of the Constitution, 2010 which gives the plaintiffs every right to canvass the claim in the court on behalf of all the class of persons being all registered customers/users/subscribers of the 1st defendant.

Issues For Determination

19. The court has considered the application and the written submissions by the parties and frames the following issue for determination;
 - a. Whether the proceedings should be stayed and the matter referred to arbitration?

Analysis

20. The application herein was brought pursuant to section 6(1) of the Arbitration Act No 4 of 1995 which provides: -
 - “(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—
 - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”



21. The obligation of the court, upon being moved under the above provision, has been the subject of numerous court decisions. In *Niazsons (K) Ltd v China Road Bridge* [2001] KLR it was held: -
- “All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:
- (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
 - (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
 - (c) Whether the suit intended concerned a matter agreed to be referred to arbitration”
22. Pursuant to the Airtel Money terms and conditions of service, the parties thereto being the 1st defendant/applicant and its subscribers/users, agreed that in the event of any dispute, the same would be resolved through alternative dispute resolution mechanisms being the (l) the defendant's/applicant's manager in charge of the Airtel Money operations and thereafter in the event the dispute was not resolved then the matter would proceed to arbitration for a final decision.
23. The dispute resolution clause under clause 15.4 of the Airtel Money terms and conditions of service thus reads:
- “Any dispute arising out of or in connection with this Agreement that is not resolved by the Airtel Manager responsible for the operations of the Airtel Money Services shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 60 days of the notification of a dispute, upon the application of either party, by the chairman for the time being of the Chartered Institute of Arbitration (Kenya Chapter). Such arbitration shall be conducted in the English language in Nairobi in accordance with the rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the *Arbitration Act* 1995.”
24. Further to the above, the applicant argued that the *Kenya Information and Communications Act*, the *Kenya Information and Communications (Dispute Resolution) Regulations, 2010* and the *Kenya Information and Communications (Consumer Protection) Regulations, 2010* provide for an effective dispute resolution mechanism where a dispute arises between a licensee such as the 1st defendant/applicant and its customer/consumer such as the plaintiffs/respondents herein.
25. Before delving further into the main issue for determination, the other issue that came up is with regard to the timeline of filing the present application. It is notable that the applicant herein entered appearance and went ahead to file a defence. In the said defence however, the jurisdiction of the court is denied.
26. Based on the above mention provision of section 6(1) of the *Arbitration Act*, an applicant seeking to stay proceeding and referral thereof to arbitration should make an application for the same at the time of entering appearance or before acknowledging the claim in question. In the case of; *Eunice Soko Mlagui v Suresh Parmar & 4 others* [2017] eKLR, the court held that, the filing of a defence constitutes acknowledgment of a claim, within the meaning of the provisions of section 6(1) of the *Arbitration Act*. In that matter, the 1st, 2nd and 3rd respondents had already filed and even amended their statements of



defences while the 4th and 5th respondent had entered appearance and filed their statements of defences. The court held that, the defendants had already submitted to the jurisdiction of the court and the matter could not be referred to arbitration.

27. This court associates itself with the decision Court of Appeal in the case of; *Charles Njogu Lofty v Bedouin Enterprises Ltd* [2005] eKLR, the Court of Appeal (Omolo, Waki & Deverrel, JJA) where it was stated that:

“On the plain reading of that section, before the court can consider the issue raised in paragraphs (a) and (b) and (b of section 6 (1) of the act, the court has to satisfy itself that the party applying for reference to arbitration has applied to the court: ----not later than the time when that party enter appearance or files any pleadings or takes any other step in the proceedings...”

28. The import of the above is that the defendant herein acknowledged the claim and submitted itself to the jurisdiction of the court the moment they took the further step in filing the defence. The applicant did not comply with the provisions of section 6 of the *Arbitration Act* No 4 of 1995, for the reasons that, he did not file this application promptly, after entering appearance and/or the filing the application to strike out the suit as stated herein.

29. By the filing of the defence, this court is satisfied that the applicant has acquiesced to the jurisdiction of the court.

Findings And Determination

- i. This court finds the application for stay of the proceedings and referral of the matter to arbitration to be devoid of merit.
- ii. This application is dismissed with costs to the respondents.
- iii. Mention on October 27, 2022 before the Deputy Registrar for case management.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Aquino for the 1st defendant/Applicant

Mwangi for the 2nd defendant

Lucy-----Court Assistant

