



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION NO E003 OF 2020

IN THE MATTER OF ARTICLES 3, 19, 20, 22, 23, 28, 29, 31, 35, 46, 165,243, 244 & 245 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY JUSTUS JAVAN OCHIENG

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER

THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF RULE 3 (1), 4 AND 10 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTIONS 27A, 27B, 27C AND 27D OF THE KENYA INFORMATION

AND COMMUNICATIONS (AMENDMENT) ACT, 2013

AND

IN THE MATTER OF REGULATIONS NUMBER 5 (1), 6(2), 6(3), 7(2) B AND 17 OF THE KENYA INFORMATION

AND COMMUNICATIONS (REGISTRATION OF SIM-CARDS) REGULATIONS, 2015

BETWEEN

JUSTUS JAVAN OCHIENG.....PETITIONER

VERSUS

AIRTEL NETWORKS KENYA LIMITED.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. In its Notice of Motion application dated 24th November 2020 and filed on 25th November 2020, the 1st Respondent sought that time for

filing its Memorandum of Appearance and Statement of Grounds to oppose the Petitioner's Petition herein be extended and that the said Memorandum of Appearance and Statement of Grounds relied upon to oppose the said Petition be deemed to have been duly filed upon leave being granted. The said application was allowed as the Petitioner was not opposed to the same.

2. Subsequently, on 10th December 2020, the 1st Respondent filed a Preliminary Objection of even date and urged this court to dismiss the Petition herein *in limine*. It pointed out that this Honourable Court lacked jurisdiction to determine the dispute between it and the Petitioner herein by virtue of Article 159 (2) (c) of the Constitution of Kenya 2010, Sections 102F and 102G of the Kenya Information and Communication Act and Regulations 2, 3 and 8 (6) of the Kenya Information and Communication (Dispute Resolution) Regulations, 2010.

3. It added that the Petitioner had otherwise not shown that he had exhausted statutorily provided alternative remedies and dispute resolution options as against it.

4. It was its case that the dispute between it and the Petitioner was that of a consumer and a licensee as envisaged under the Kenya Information and Communication Act and Regulation 2 of the Kenya Information and Communication (Dispute Resolution) Regulations, 2010 on the ground that the Petitioner was aggrieved that six (6) mobile phone numbers it allegedly registered under his name without his authorisation. They had both failed to reach an amicable resolution.

5. It submitted that such a dispute fell under the jurisdiction of the Communications Authority of Kenya as established under Section 3 of the Kenya Information and Communications Act with powers under Regulations 3 the Kenya Information and Communication (Dispute Resolution) Regulations, 2010 and not under the jurisdiction of this court.

6. It added that this court only acted as a second appellate jurisdiction as envisaged under Section 102G (1) of the Kenya Information and Communication Act.

7. In this regard, it relied on the cases of **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] eKLR**, **Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR** and **Boniface Waweru Mbiyu vs Mary Njeri & Tai Yun Hwang [2005] eKLR** where the common thread was that a court had no jurisdiction to deal with a matter where no such jurisdiction existed.

8. It was its further contention that the Petitioner had not exhausted the statutorily provided alternative remedies and dispute resolution options as against it. It urged this court to be guided by Article 159 (2) (c) of the Constitution of Kenya and the cases of **Sammy Ndung'u Waity vs Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR** and **Leonard Otieno vs Airtel Kenya Limited [2018] eKLR** where the common thread was that where a statute had provided a remedy to a party, the court was called upon to exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the disputes.

9. It therefore urged this court to sustain its preliminary objection and dismiss the Petitioner's Petition herein.

10. On its part, the Petitioner placed reliance on the case of **Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others [2015] eKLR** where the court cited the case of **Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors (1969) EA 696** and argued that a preliminary objection should be founded on a settled and crisp point of law and that the 1st Respondent's Preliminary Objection had not met that threshold.

11. It was his case that the jurisdiction of the commission and or authority as submitted by the 1st Respondent only arose where there was a consumer-licensee relationship and where the dispute did not involve a violation of Constitutional Rights as the one before court.

12. He submitted that for one to be deemed to have been a consumer, as defined under the Kenya Information and Communications (Dispute Resolution) Regulations and under the Consumer Protection Act No 46 of 2012, there had to be a connection between a consumer and the licensee, which the consumer was aware about, which was not the case herein, as he was not aware of the existence of the said six (6) SIM card lines in his name.

13. He further argued that the common word was a 'user' implying that there had to be use of products and services. He pointed out that he never used the said lines as laid out clearly in his Petition. He contended that the 1st Respondent never alluded to him having been a user of the said lines. He added that in the impugned jurisdiction of the authority, the complaint had to be on the product and or service which was not the case herein.

14. He distinguished the cases cited by the 1st Respondent in that the petitioners therein were subscribers of the said numbers and thus were consumers of the services of the respondents therein.

15. It was his further averment that in his Petition, he was complaining about lines registered without his consent and or knowledge, which did make him a consumer and that where a question of whether he was a consumer or not, the preliminary objection failed, as those were facts to be ascertained at the hearing. To buttress this point, he relied on the case of **Oraro vs Mbaja [2005] 1 KLR 141**.

16. He pointed out that the Kenya Information and Communications (Registration of SIM-Cards) Regulations 2015 which provides for requirements for registration, verification of registration identification particulars and the subscriber to appear in person and that it was only after the said conditions prescribed above had been met, did one become a consumer of a telecommunication service.

17. He further submitted that having not participated in registration of the said lines he cannot be termed as a subscriber as was envisaged under the Kenya Communications Regulations, 2010. He was emphatic that the email he sent to the 1st Respondent requesting for information could not be construed to have formed a consumer-licensee relationship, as submitted by the 1st Respondent.

18. He invoked Article 23 (1) and Article 165 (3) of the Constitution of Kenya 2010 and argued that this court had jurisdiction to hear and determine his Petition, arising out violations of his constitutional rights. He added that the said Communications Authority of Kenya lacked jurisdiction to award damages for violation of constitutional rights and other orders sought. He urged this court to dismiss the 1st Respondent's Preliminary Objection as it does not meet the threshold as required in law.

LEGAL ANALYSIS

19. It is now settled and trite law that a preliminary objection is one that raises a pure point of law. It cannot be raised if any fact has to be ascertained by further evidence or in circumstances where a court is called to exercise its discretion. It is a clear cut case where the point of law requires no explanation and/or clarification.

20. In the case of **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Ltd (1969) E.A 696**, a preliminary objection has been defined as follows:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

21. The question of whether or not this court had jurisdiction to hear and determine the dispute between the Petitioner and the 1st Respondent was not a pure point of law. Indeed, whether or not the dispute between the Petitioner and the 1st Respondent was that of a consumer and a licensee as envisaged under the Kenya Information and Communication Act and Regulations 2, 3 and 8 (6) of the Kenya Information and Communication (Dispute Resolution) Regulations, 2010, which ought to have been channeled first, to the Commission under Communications Authority of Kenya, required the ascertainment from facts to be placed before the court.

22. The 1st Respondent's argument that the Petitioner did not exhaust statutorily provided alternative remedies is also disputed by the Petitioner and thus a matter of fact that required to be proven by facts.

23. Going further, in his Petition, the Petitioner sought the following reliefs:-

- a. A declaration that the rights of the petitioner were violated.**
- b. An order directed to the 1st respondent to deregister numbers xxxx,xxxx,xxxx,xxxx and xxxx.**
- c. An order directed to the 2nd respondent to stop any further investigation against petitioner in relation to the above stated numbers.**
- d. Damages for violation of the rights of the petitioner to privacy, security, dignity, economic rights, protection from misleading information and psychological torture.**
- e. Any other relief the court fits deem (sic) to grant.**

24. Whereas the Commission may have had power to consider relief (b) of the Petition if a complaint had been placed before it, it had no power to deal with reliefs (a), (c) and (d) of the Petition. The jurisdiction to determine whether or not there had been a violation and/or infringement of the Constitution of Kenya as contemplated under Article 23 (1) of the Constitution of Kenya and/or to award damages only lay with the High Court.

25. Indeed, Article 23(1) of the Constitution of Kenya stipulates that:-

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

26. Article 165(3)(b) of the Constitution of Kenya further provides as follows:-

Subject to clause (5), the High Court shall have jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

27. Notably, it is only the High Court that can grant the following orders:-

- a. a declaration of rights;**
- b. an injunction;**
- c. a conservatory order;**
- d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the**

Bill of Rights and is not justified under Article 24;

e. an order for compensation; and

f. an order of judicial review.

28. The court restrained itself from considering whether or not the Petitioner had demonstrated that it had no consumer- licensee relation as had been contended by the 1st Respondent herein and/or whether there was a violation as he had argued and if so, the quantum of compensation to be awarded to him, if at all, for the reason that that would be delving into the merits or otherwise of the Petition herein which was within the purview of the court that would be hearing and determining the Petition herein.

29. Suffice it to state that it was the considered view of this court that the Petitioner's Petition was properly filed and could be entertained. The 1st Respondent's Preliminary Objection did not meet the threshold that was set out in the case of **Mukisa Biscuit Manufactures Limited vs West End Distributors Ltd** (Supra).

30. This court wishes to add that dismissing suits *in limine* must be exercised with caution as this very court held in the case of **Wilmot Mwadilo & 4 Others vs Eliud Timothy Mwamunga & Another [2017] eKLR**. It is a draconian step that must be exercised with caution and a last resort.

31. In fact, Article 159(2)(d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to technicalities. No matter how weak a party views his opponents case, that party must be given an opportunity to fully present its case in the best way it knows how. Every party to a case must have his or her day in court.

DISPOSITION

32. For the foregoing reasons, the upshot of this court's decision was that the 1st Respondent's Preliminary Objection dated and filed on 10th December 2020 was not merited and the same be and is hereby dismissed with costs to the Petitioner.

33. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE 2021

J. KAMAU

JUDGE