



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 316 OF 2002

COMMUNICATIONS COMMISSION OF KENYA.....PLAINTIFF

VERSUS

ROYAL MEDIAL SERVICES LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 12th March 2002, seeking for judgment against the Defendant for; a sum of Kshs. 39,479,364.50, together with interest at commercial rates or such rate of interest as the Honourable Court may determine, until payment in full, costs of the suit plus interest thereon at Court rates and any other or further relief that the Honourable Court may deem fit to grant.
2. The Plaintiff avers that, the Defendant, by letter dated 11th August 1995, applied to the then Ministry of Information and Broadcasting (herein “the Ministry”), seeking for authorization to establish FM radio and television stations. The authorization was given on the 22nd April 1997, for stations in; Nairobi, Nyeri and Mombasa. The Defendant was then referred to the defunct; Kenya Posts and Telecommunications Corporation (herein “the Corporation”), for assignment of broadcasting frequencies.
3. By a letter dated 9th July 1998, the Permanent Secretary in the Ministry extended the aforesaid authorization to cover; Saba Saba, and Nyambene in Meru, Nanyuki, Kinangop and Rongai. By a letter dated 23rd April 1999, approval was granted for radio frequencies at Timboroa. However, the Timboroa frequencies were not assigned due to scarcity thereof.
4. In order to operationalize the licenses granted by the Ministry, the Corporation by their letter of 17th July 1997, assigned the Defendant frequencies for use; in Nairobi, Nyeri and Mombasa. By a letter dated 5th August 1998, frequencies were assigned for use at; Saba Saba, Nyambene, North Kinangop, Nanyuki West, Nyahururu and Rongai.
5. The above letters set out the conditions pertaining to the broadcasting permits granted. For Nairobi, Nyeri and Mombasa, it provided at clause 3.1 and 3.2 inter alia, that: -

3.1 The TV transmitters shall operate a license which must be kept in force by making the payment of the requisite license fee of Kshs. 1,844,897.00 and a 15% VAT of Kshs. 276,734.60 per station per frequency. Thus, your three TV stations, the total license fee and VAT per annum payable shall be Kshs. 6,364,895.80. Please note that this money should be paid within 90 days from the date of this letter.

3.2 Your FM Radio transmitters shall also operate under license which must be kept in force by making the payment of the requisite license fee of Kshs. 55,150.90 and VAT of Kshs. 8,272.60 per station per frequency. Thus, for your five FM stations, the total license fee and VAT shall be Kshs. 190,270.50, like in 3.1 above, that this money should be paid within 90 days from the date of this letter.

6. As regards Saba Saba, Nyambene, North Kinangop, Nanyuki West, Nyahururu and Rongai frequencies, the letter stated that, payments for the television transmitters was to be made pursuant to clause 3 above as follows: -

a) Saba saba: License fee Kshs. 1,344,532.00

16%VAT Kshs. 215,125.00

b) Nyambene:	License fee	Kshs. 1,344,532.00
	16% VAT	Kshs. 215,125.00
c) North Kinangop:	License fee	Kshs. 1,638,592.00
	16% VAT	Kshs. 262,175.00
d) Nanyuki West:	License fee	Kshs. 1,344,592.00
	16% VAT	Kshs. 215,125.00
e) Nyahururu:	License fee	Kshs. 1,344,532.00
	16% VAT	Kshs. 215,125.00
f) Rongai:	License fee	Kshs. 1,638,592.00
	16% VAT	Kshs. 262,175.00
	Total amount	Kshs. 10,040,162.00

7. The FM radio transmitter at Rongai was to operate under license to be kept in force by making the payment of the requisite fee of; Kshs. 41,070, as license fee of; Kshs. 35,407 and Value Added Tax (VAT) of, Kshs. 5,665. It was also payable within ninety (90) days from the date of the authorization letter. Further, the clause 3.5 thereof, provided that; the assignment of these frequencies to the Defendant shall only be valid when the license and broadcasting permit are in force and shall immediately cease with the lapse of one of these instruments.

8. Subsequently, by virtue of Section 2 of the 3rd Schedule to, Kenya Communications Act, No. 2 of 1998, all the licenses granted by the former Kenya Posts & Telecommunications Corporation, were deemed to be granted by the Plaintiff.

9. The Plaintiff in accordance with the above conditions for issue of licences raised the following invoices: -

<u>Invoice Number</u>	<u>Kshs.</u>
048914	3,067,628.30
048915	3,067,628.30
048916	3,067,628.30
048917	3,981,683.00
048918	4,702,941.00
048919	4,702,941.00
048920	3,981,683.00
048921	3,981,683.00
048922	3,981,683.00
048923	106,676.90
048924	106,676.90
048925	106,676.90
048926	120,102.00

048927	90,449.00
048928	5,810,736.00
048929	13,509.00
<u>Total</u>	<u>40,890,325.60</u>

10. That, the above total amount of; Kshs, 40,890,325.60, was due by 14th March 2001. Subsequent attempt to settle the dispute amicably failed, and the Defendant, on the 11th January 2000, filed a suit; HCCC No. 15 of 2000, against the Plaintiff and others.

That, following the order made by the court in that matter, dated 22nd November 2001, the Defendant deposited in court a sum of Kshs. 1,410,961.10, which according to the Defendant, represented the amount owing, in frequency fees. However, the balance of the sum has not been paid to date.

11. The plaintiff avers that, despite numerous demands for payment, the Defendant declined to oblige compelling the Plaintiff on 17th April 2001, to cancel the frequencies; so as not to continue accumulating unpaid debt. However, despite repeated demands for payment; the Defendant has refused and/or ignored the demands and/or make payments of Kshs. 39,479,364.50, after taking into account the amount deposited in court.

12. However, the Defendant filed a statement of defence dated 17th April 2002, terming the suit herein as; an abuse of the court process in that, the issues raised herein; are the same as, those in, HCCC No. 15 of 2000, in which the Defendant is one of the Plaintiff and the Plaintiff herein is the third Defendant. Further that, the subject matter of this suit is appropriate subject matter of a counterclaim in the said suit.

13. The Defendant admitted that, it applied for and was granted authority to establish FM and Television stations as stated in the Plaintiff but contented that, the terms were varied by the parties in August 1998. The parties agreed that, since it was not putting to use all the frequencies allocated immediately, the fees stated in various letters would become payable, when the Defendant put them to use, and there are frequencies which the Defendant has not put to use to date.

14. That, it was further agreed that, the payments which would fall due would be recovered from a deposit of, Kshs. 3,484,668.60 which the Defendant paid to the Plaintiff's predecessor, Kenya Posts and Telecommunications Corporation. Further, the Defendant would only make additional payments after the said deposit was utilized, which deposit has not been utilized.

15. The Defendant admitted the Plaintiff is the successor to the rights of the former Corporation but denied that, it owes the sum of; Kshs. 40,890,325.60 or any part thereof as claimed. The Defendant further admitted depositing in court the amount stated, which it has admitted owing but argued that, it had not paid more because, none is due.

16. The Plaintiff responded to the defence by filing a reply thereto, dated 24th April, 2002 denying that, the subject matter of this suit is the appropriate subject matter of a counterclaim in HCCC No. 15 of 2000. It was averred that, the aforesaid suit deals with several diverse disputes and has been amended so many times thereby, obfuscating the real matters in issue therein.

17. Further, while HCCC No. 15 of 2000 was filed on 11th January 2000, the claims forming the subject matter of this suit relates to a period as late as April 2001, and accordingly, this suit should be tried separately. The Plaintiff averred that, it is a stranger to the alleged agreement to alter the terms of payment of the fees payable under the various letters exchanged between the parties. It denied that there was ever any agreement that payments falling due would be recovered from the Plaintiff's predecessors, either as alleged or at all. That is also a complete stranger to the alleged deposit payments to its predecessor.

18. The case proceeded to full hearing, whereby the Plaintiff's case was supported by the evidence of; Peter Ngigi Njoroge, a technical frequency planning officer. He literally reiterated the averments in the pleadings, save to state that, the Plaintiff does not grant permits for broadcasting but merely allocates frequencies for an area indicated in the permit and once the frequencies are allocated, it determines the amount of frequency fees to be paid and notifies the applicant. It also ensures that, the equipment used meet the approved international standards.

19. That, the Defendant did not pay for the frequencies assigned and alleging that, it was using a lower transmission power and therefore a new fee was recalculated on; 5th September, 1997 and new figures indicated and the money was paid. However, the fees that accrued thereafter was never paid. That, at the time of filing suit, the outstanding amount was; Kshs. 31, 627, 154.30. The witness stated that failure to use the frequencies is not a sufficient reason not to pay for the frequencies, in that, once a frequency is allocated, it cannot be assigned to someone else.

20. He confirmed during cross examination that, the frequencies were cancelled vide a letter dated, 21st January, 2000, but maintained that, the claim herein is in respect of fees for the period of; 5th August, 1998 to 2000. He further stated that the Plaintiff charges for frequencies per the full financial year and it does not matter whether they are cancelled mid-year. That the charges herein are up to 1st July, 2001.

21. He denied knowledge of a letter dated 10th August, 1998, referring to an amount of Kshs. 3,484,668.80, paid by the Defendant on 31st October, 1997. He confirmed that, the Plaintiff is not contesting the fact that, there may be frequencies that were not used. He also confirmed that the Defendants broadcasting stations were shut down twice, in January, 2000 and April, 2001.

22. That, after the first shutdown the relationship between the parties became acrimonious. He also confirmed confiscation of the Defendant's equipment. He further testified that, by the time the first invoice was issued on 1st June, 2000, the Defendant's stations had been shut down. That, all invoices were issued in the year 2000 and not 1999.

23. He confirmed that, the letter dated 21st January, 2000 addressed to the Defendant showed that, the frequencies were cancelled due to non-payment of Kshs. 10,081,234.00. He further stated that, he was aware after shut down, the broadcasting resumed without the Defendant paying any money. He was aware of reconciled sums for the period; 1997 to 30th June, 2000 and 1st July, 2002. However, he denied that, following the reconciliation, the suit became unnecessary, stating that, the reconciliation was for a different period and different frequencies. He further denied re-opening a bargain and creating imaginary hostilities between the parties.

24. The Defendants case was supported by the evidence of S. K. Macharia; who relied on the statement filed in court dated 19th November, 2018, and the bundle of documents filed therewith. In a nutshell, he stated that, the Defendant started real broadcasting in the year 1998.

25. That, the parties engaged in negotiation over the claim herein and the Defendant paid what was due. However, after the second shutdown, all the its' equipment were confiscated. The Plaintiff was to return the equipments and withdraw the case but did not.

26. In cross-examination, he confirmed that, he applied for frequencies and was issued with the same for the first three stations as stated in the letter dated 17th July, 1997 and varied by the letter dated 5th September, 1997. He conceded that he paid for the same but applied for more frequencies thereafter.

27. He testified that, he did not pay for frequencies not put in use, because, it was agreed, that, due to interruptions by closure, the Defendant was to pay for the frequencies used only. In re-examination, he stated that, the negotiated sum was Kshs. 3,400,000.00, which the Defendant paid.

28. The parties filed their final submission and thereafter highlighted the same. The Plaintiff invited the court through its submission dated 18th January, 2019, to consider the following issues: -

- a) *What is the period and issues in the present claim;*
- b) *Whether the Defendant was liable to pay for frequency assigned by the Plaintiff; whether utilised or otherwise including: -*
 - i. *Whether there was a variation in the licensing procedure and/or terms of assignment of frequencies; the subject matter of this suit with regard to payment;*
 - ii. *Whether the Defendant was in breach of the Frequency Licensing terms in the period and/or the Frequency Assignment;*
 - iii. *Effect of the shut down on the liability of the Defendant under the license terms; and*
 - iv. *Whether the Defendant has proved the allegations of political influence in charging of frequency license fees.*
- c) *Whether the Plaintiff is entitled to the reliefs sought in this suit; and*
- d) *Who should bear the costs of this suit.*

29. The Defendant on its part, filed submissions dated 1st February, 2019, wherein it invited the court to consider the following issues: -

- a) *Did the parties enter into a contract/contracts for supply by the Plaintiff to the Defendant of radio and television frequencies?*
- b) *If the answer to (a) is in the affirmative, what are the terms of the contract/contracts?*
- c) *Were the terms varied by the parties on 10th August, 1998, whereby the Defendant was to pay for only those frequencies it accepted, and put to use and that, Kshs. 3,684,688.60 paid was to be used as a deposit?*
- d) *Is the Plaintiff entitled to the reliefs which it is seeking?*
- e) *Is the Plaintiff's claim fraudulent? In other words, does it offend the conscience of this Court? Has the Plaintiff based its claim on its own wrong?*

30. I have considered submissions alongside the evidence adduced supported by the documents produced and I note that, the Plaintiff filed documents dated; 24th November, 2004, 18th February 2009 and 15th November 2011 and the Defendants filed document dated 6th February 2009, 11th June, 2015 and 18th November 2018. I find that the following issues have arisen for consideration: -

- a) *Whether the Defendants applied for frequencies from the Plaintiff;*
- b) *If the answer to (a) is in the affirmative what were the terms and conditions of the engagement between the parties; or*

- c) *Is there a valid contract between the parties; and if so, what were the terms and conditions thereof;*
- d) *Did the parties perform their contractual obligation; If the answer is in the negative, which party is in breach thereof;*
- e) *Is the Plaintiff entitled to the reliefs sought; and*
- f) *Who will bear the costs of the suit?.*

31. However, before I deal with these issues; I wish to make a general observation that the parties have filed length submissions running into several pages of 21 and 43 by the Plaintiff and Defendant respectively. I have read through the entire submissions and I find that, the parties have delved it several issue either not pleaded or that do not form part of the claim herein, or over which no substantive orders are sought.

32. The said issues include but are not limited to; unlawful shut down of the stations and the loss associated therewith, the confiscation of the Defendant's equipment, political influence in shutting down the stations, the allegations of fraud and/or extortion on the part of the Plaintiff. In that regard, any evidence led in relation to these issues will only be considered, in so far as, it is relevant to the pleadings herein. It also suffices to note that, there is no counterclaim herein.

33. It is also trite law that parties are bound by their pleadings as well submitted by the Defendant and supported by the case of; *Independent Electoral and Boundaries Commission & Another –v- Stephen Mutinda Mule & 3 Others (2014) eKLR.*

34. I shall now consider the first issue as to whether the Defendant applied for frequencies from the Plaintiff. From the documents produced by the Plaintiff, it is evident by a letter dated 17th July, 1997 that, the Defendant was assigned television and radio broadcasting frequencies as indicated therein. The frequencies were assigned for use in; Nairobi, Nyeri, and Mombasa. The Defendant admits the same in its defence and evidence.

35. The Plaintiff has also produced a letter dated 9th July, 1998, addressed to the Corporation, by the Ministry, in response to the Defendant's letters dated; 28th February 1998, 28th May 1998 and 3rd July 1998, seeking for; extension of frequencies and/or allocation of; additional frequencies to cover; Saba Saba, Nyambene (Meru), Nanyuki, Kinangop and Rongai. These frequencies were assigned vide a letter dated 5th August 1998. The Defendant have also admitted through their statement of defence that the frequencies were assigned to them.

36. However, two issues are in dispute: as to whether the Defendant accepted the terms and conditions set in those two letters, and paid for the frequencies assigned and/or whether the payment that was subsequently made, in the sum of Kshs. 3,484,688.80 was made in relation to assignment of all frequencies assigned or relates to the frequencies in Nairobi, Nyeri and Mombasa only.

37. In that regard, the Defendant submitted that, the terms of the original letter of offer dated 17th July, 1997, were not acceptable to it, and were re-negotiated and a second offer dated 5th September, 1997, issued. However, the letter dated; 5th September, 1997, contained a last paragraph, requiring, that the offer be accepted in writing. The paragraph reads: "*please write back to confirm your acceptance of this conditions.* However, there is no evidence that, the Defendant wrote back accepting the offer therefore there is no valid contract between the parties. That similarly the letter dated 5th August 1998 was not accepted.

38. I have considered the above argument and find that, indeed, there is no evidence that, the letters of offers were expressly accepted by the Defendant in writing. However, it suffices to note that, the Defendant has admitted that, it was assigned both; television and radio frequencies referred to in the first letter of offer dated 17th July 1997, for use in Nairobi, Nyeri and Mombasa and the other additional stations. That the terms of the original offer were varied, following the decision to scale down the technical operating parameters of the it's transmitters. Thus, total sum of; Kshs. 6,364,895.80 indicated in the letter of 17th July 1997 as the amount due was scaled down to Kshs 3,484,668.80.

39. In my considered opinion, by accepting to frequencies assigned in the letters of offer and using the frequencies them and/or in the making payments for the use of frequencies, the Defendant by conduct, accepted the offers made and are estopped from pleading otherwise. I therefore, find that there is a valid contract between the parties.

40. The next question to determine is whether; the parties performed their contractual obligations. The Plaintiff has testified that the frequencies were assigned, and therefore the issue that arises is whether, the Defendant used and paid for them. According to the contents of the letters of offer, the sum payable, for the respective frequencies was to be paid within ninety 90 days from the date of the letter.

41. The plaintiff submitted that all the sums due under the original offer were paid and are not part of the claim herein. Therefore, in relation to the letter of offer dated; 5th August 1998, the payment should have been made on or before 5th November 1998. The Plaintiff, testified that, the payment has never been made hence the claim herein. The Defendant on the other part, submits that it has made all the payments that were due and owing; as negotiated by the parties.

42. From the evidence, adduced, and in considering the same I find that several issues arisen for consideration as follows: -

- a) *What is the exact period, is the Plaintiff basing its claim;*
- b) *How much then is due and owing;*

c) *How did the Plaintiff arrive at the figure claimed herein; and*

d) *Has that figure been proved.*

43. The pleading that binds the parties reveal that, the Plaintiff's claim is based on a total number of; sixteen (16) invoices, outlined under paragraph 7 of the plaint. I have looked at those invoices, (produced by the Plaintiff in the documents filed on 2nd December 2004) and note that: -

a) *Invoice numbers; 048914 to 048916, and 048923 to 048925, indicate that; they were issued on; 1st June, 2000 and due for payment on 31st July 2000.*

b) *Invoices numbers; 048917 to 048919, 048922 and 048926; were issued on; 1st July, 2000 and due for payment on 31st August, 2000.*

c) *Invoices numbers; 048928 and 048929, were issued on 1st August, 2000 and due for payment on 30th September, 2000; and*

d) *Invoice number; 048927, was issued on 1st October, 2000, payable on 30th November 2000.*

e) *It is therefore evident that, these invoices relied on were issued on different dates and indicates payments were due on different dates too. The due date for payment range from; 31st August, 2000, to 30th November 2000.*

44. In the same vein, the Plaintiff has also produced invoices in the bundle of filed on 16th February 2009. These invoices were issued on various dates mainly on;

a) *4th February 2000, and due for payment on various dates; 31st August 1999, 30th November 1999, and 30th September 1999;*

b) *1st June, 2000, due for payment on 31st July, 2000;*

c) *1st August, 2000, due for payment on 30th September, 2000;*

d) *1st October, 2000, due for payment on 30th November, 2000.*

45. The two sets of invoices raise several issues: what period does the invoices under paragraph 7 of the Plaint relate to? And can the Plaintiff rely on the invoices produced in its bundle of documents filed on 16th February 2009, when they are not expressly referred to under paragraph 7 of the Plaint? The answer to the last question is in the negative. Therefore, the only invoices that I shall consider are those referred to under paragraph 7 of the plaint and analysed at paragraph 43 above.

46. It suffices to that the Plaintiff's case is that, the Defendant was issued with frequencies on 5th August 1998. The licence is issued and paid for annually. It is based on the financial year of June to July. Therefore, the fees sought for was due in July, 1999, and subject for renewal thereafter.

47. The Plaintiff's witness testified that, the claim herein is in respect of fees for the period of; 5th August, 1998 to 2000 and the charges herein are up to 1st July, 2001. The question therefore remains; do the invoices stated in the Plaint and produced support this period and/or the claim? I shall revert back to this issue.

48. The next issue to consider, therefore, is whether the Defendant has ever paid for frequencies assigned in the second letter of offer. I have already made a finding that, the sum payable should have been paid within ninety (90) days of the letter of offer. The Defendant testified that, it paid a sum of Kshs. 3,484,668.00 for the frequencies used and as per the negotiation of the parties and only owes the amount deposited in court.

49. I note from the documents produced that, there is evidence that that sum of money was paid by cheque number 701905; dated 31st October, 1997 issued by the Defendant in favour of the Corporation. It is acknowledged vide a receipt No. 2554368 issued on 4th November, 1997 and supported by the bank statement of the Corporation for the period 4th November, 1997.

50. However, my analysis of the payment reveals that; the payment in question, supported the frequencies granted initially by the letter dated 17th July 1997 and varied by a letter dated 5th September 1997. The payment in relation to these additional frequencies is indicated in the letter of 5th August 1998, as a sum of Kshs. 10,040,162.00, for the television transmission. The letter indicates that, the radio transmission at; Rongai required a payment of; Ksh 41,072.00. Thus, it is not possible therefore, that the payment made by the cheque dated 31st October 1997 could have been in relation to payment of additional frequencies granted by letters dated 5th August 1998.

51. The key question however remains, whether the Defendant ever paid for any of the frequencies, it was allocated, vide the letter of 5th August, 1998. The Defendant testified that, it never used the frequencies in six areas namely; Mombasa, Nakuru, Nyambene, Nyahururu 50, and Nanyuki 58. However, even if the Defendant is given a benefit of doubt, has it proved that it paid for the other frequencies. It also suffices to note that, some of the stations it has referred to are not among the stations mentioned in the letter of 5th August, 1998.

52. Be that as it were, the Defendant submitted that the parties were engaged in negotiation which culminated into an agreement as evidenced by a letter dated, 10th August, 1998, that varied the terms of the license. The Plaintiff disputed knowledge of that letter and as bearing the Defendant's name only and that, there is no proof that the same was ever served upon the Plaintiff. Further there is no evidence that the meeting alleged therein took place and/or there was reconciliation of figures as alleged.

53. The Defendant also relied on documents at pages 23 to 25 of its list of documents filed on 16th February, 2009. I have looked at those documents, and note that, they are not signed by the parties, and there is no evidence that, the Plaintiff concurred to or was party to the findings therein. They also relate to the frequencies assigned to areas outside those in the letter of 5th August, 1998, and to years after the period of 2000. In addition, the document at page 25, relates to; studio to transmitter links in Nairobi, which is not a subject of that letter. The upshot of all this, is that the documents at pages 23 to 25, do not relate squarely to the frequencies that are a subject of the claim herein.

54. The Defendant further argued that, the Plaintiff is claiming for payment for the period when the station was shutdown. The first shutdown was on, 21st January, 2000 and was reopened on 1st March, 2000, following a court order. The second shutdown was on 17th April, 2001, when the Plaintiff cancelled the frequencies. However, the Plaintiff argues that, the interruption whatever the case may be, does not exempt, the Defendant from liability.

55. I note from a summary of outstanding frequency fees statement produced by the Plaintiff, the amount as at; 1st July 2001; produced by the Plaintiff, the frequency fees claimed is; Kshs. 31,627,154.30, made up of; Kshs 469,344.65, for the FM sound stations and Kshs. 25,720,800.95 for the Television stations. The Plaintiff has produced a letter dated 14th March 2001 in support of that sum of money. However, the content of that letter reveals that, the demand for payment is in relation to the period of; years 1999 to 2000 and 2000 to 2001, but the period is not fully supported by the invoices pleaded.

56. However, the question that arises and remains unanswered is; why the Plaintiff did not enforce the recovery of the sum sought after expiry of ninety (90) days as stated in the letter dated 5th August, 1998. Why did the Plaintiff allow the Defendant to use the frequencies for two consecutive years without payment?

57. It is apparent that, the Plaintiff only took action on; 17th April, 2001 when they terminated the use of the frequencies and made a formal demand for payment by a letter dated; 14th April, 2001 from the law firm of; Kiplagat & Associates. It is also noteworthy that, by a letter dated 8th November 2001, written by the same law firm, in relation to the matter in HCCC No. 15 of 2001, states in part that "frequency fees are payable from the date the frequencies are assigned and NOT when they are put in use".

58. It further states that; neither of the parties had the power to alter that position. This letter confirms that, the Plaintiff should have been paid the amount indicated in the letter dated 5th August, 1998 upon assignment of the frequencies and even before use. In fact, the Defendant by a letter dated 9th October, 2001 to the Plaintiff questioned the same.

59. As stated herein, Plaintiff's witness Mr. Peter Ngigi Njoroge testified that, the frequencies were payable based on a full financial year, running from June to July the following year. Therefore, the payment for frequencies assigned through the letter of 5th August 1998, was due for renewal by July 1999. Thereafter, automatically expired. So, how was the Defendant allowed to continue using the frequencies without payment?

60. In the same vein, why the Defendant did not surrender the frequencies that were not in use and/or why did it retain the frequencies that were not in use, when there was no express agreement to suspend payment until the frequencies were in use? It also suffices to note that, the Defendant deposited a sum of: Kshs. 1,410,961.30, in court as the amount owing and payable to the Plaintiff. However, there is no explanation as to how it arrived at that figure.

61. In summation, having considered all the aforesaid evidence, I find that the parties herein entered into a contractual relationship vide letters dated; 17th July 1997 and varied on 5th September 1997 and the other dated 5th August 1998. The Plaintiff is categorical that the claim herein is founded on the 2nd contract of; 5th August 1998. This is supported by the letter dated 21st January 2000, from the Plaintiff to the Defendant.

62. That letter states part, "consequently, this is to inform you that; the frequencies assigned to you, vide your letter dated 5th August, 1998 have been cancelled for; non-payment of Kshs. 10,081,234.00 (Ten Million, Eighty-One Thousand, Two Hundred and Thirty-Four Only) and further renewal fees for, 1999 amounting to Kshs. 10,081,234.00"

63. However, I note that some of the invoices relied on, herein, relate to the frequencies that were issued in the original offer, dated 17th July 1997 and varied on 5th September 1997. These invoices are as follows: 048914, 048923, 048928 & 048929 (Nairobi); 048915 & 048924 (Mombasa); 048916 & 048925 (Nyeri); the total sum in these invoices is Kshs. 15,347,160.60. Therefore, from the outset, the Plaintiffs case cannot succeed to that extent. Therefore, if that sum is deducted from the figure in the Plaintiff, the balance will be; Kshs. 24,132,203.90.

64. However, the Plaintiff having failed to enforce payment of the sum claimed, within the ninety (90) days as indicated in the letter dated 5th August 1998, they, cannot be allowed to benefit from their indolence and neither can they, now purport to recover the same inclusive of the subsequent years, nor the sum of; Kshs. 10,081,234.00 claimed as renewal fees of 1999.

65. Similarly, the Plaintiff cannot have sat back, right from 21st January, 2000, when they cancelled the frequencies for non-payment to; 13th March 2002, when they filed the suit herein. The principles of equity are clear, he who goes to equity must go with clean hands, and equity assist the vigilant and not the indolent. In that regard, the only sum recoverable is the sum stated in the letter of 5th August, 1998, being Kshs. 10,040,162.00, plus Kshs. 41,072.00, totalling Kshs. 10,081,234.00, less Kshs. 1,410,961.30 the sum already deposited in court, which

equals Kshs. 8,670,542.70.

66. This figure takes into account the fact that, the Plaintiff did not enforce payment as stipulated in the subject letter, and must bear the consequences of its negligence and Defendant did not surrender the frequencies not utilised so that they could be assigned to someone else. Further, the negotiations alluded to in relation to the same or any other issue are not supported by evidence. The Defendant remains liable to pay for the frequencies for the year 1998 to 1999, the financial year when the frequencies remained valid.

67. The upshot, is that I enter Judgement in favour of the Plaintiff as against the Defendant in the sum of; Kshs. 8,670,542.70. This sum will attract interest at court rates, from the date of judgment to payment in full, which period shall be suspended, if the judgement is delivered, during the embargo, imposed on execution of decrees during the period the corona virus pandemic persists. The resumption of the period upon which interest will accrue will be effective (upon) the date of lifting the embargo. Given the circumstances of this case, I order that each party pays its own costs.

68. It is so ordered

Dated and delivered on this 29th day of April 2020

G. L. NZIOKA

JUDGE

In the presence of:

Ms. Okimaru for the Plaintiff

Dr. Kamau Kuria for the Defendant

By virtual communication