REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 358 OF 2015

REPUBLIC……..……..……...……..APPLICANT

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA…...….RESPONDENT

EX-PARTE

GEONET COMMUNICATIONS LIMITED

AND

ATTORNEY GENERAL….....……..……1ST INTERESTED PARTY

SAFARICOM LIMITED……...……..2ND INTERESTED PARTY

AIRTEL NETWORKS KENYA LIMITED.....3RD INTERESTED PARTY

TELKOM KENYA LIMITED..…..….....…….4TH INTERESTED PARTY

KENYA DIASPORA ALLIANCE…….....…..5TH INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 26th October, 2015, the applicant herein, **Geonet Communications Limited**, seeks the following orders:

> **1. An order of *certiorari* to remove into the High Court and quash the decision made by the Communications Authority of Kenya ("CA") on 21st September 2015 dismissing the *ex-parte* Applicant's complaint against the failure and/or refusal of three Mobile Network Operators (Safaricom Limited, Airtel Networks Limited and Telkom Kenya) to enter into Interconnection Agreements with the *ex-parte* Applicant to Interconnect their telecommunications under the *ex-parte* Applicant's International Electronic Communications Gateway Services (IGSS) License.**
>
> **2. An order of mandamus directed to the CA compelling it to direct the three Mobile Network**

Operators(Safaricom Limited, Airtel Networks Limited and Telkom Kenya) to enter into Interconnection Agreements with the *ex-parte* Applicant on the basis of *inter alia;*

I. The principles of the Unified Licensing Framework which is technology and service neutral.

II. The International Electronic Communications Gateway Services ("IGSS") license issued to the *ex-parte* Applicant by CA.

III. The Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010.

IV. The Kenya Information and Communications (Tariff) Regulations, 2010.

IV. The Interconnection Determination Number 2 of 2010 being a determination of Interconnection Rates for Fixed and Mobile Telecommunications Networks, Infrastructure Sharing and Co-location and Broadband Interconnection Services in Kenya.

Applicant's Case

2. According to the Applicant, it is a Company duly registered pursuant to the ***Companies Act*** Chapter 486 Laws of Kenya and traces its origin as a self-help project by Kenyans living in the United States of America aimed at tapping into existing technology to reduce the cost of telephone calls between Kenya, North America, Europe and Asia.

3. The Respondent, **Communications Authority of Kenya**, on the other hand is described in the application is a statutory body established pursuant to the ***Kenya Information and Communications Act*** (hereinafter referred to as "the Act") as envisaged by the Constitution of Kenya 2010 whose mandate includes *inter alia* the regulation of the telecommunications industry in Kenya. According to the applicant, the Respondent is mandated by the Constitution and the Act to be an independent and impartial body responsible for *inter alia* the development and implementation of telecommunications in the Republic of Kenya. The Respondent therefore licenses telecommunications operators and service providers and monitors their compliance with their licensing conditions on a continuous basis to ensure that they discharge their obligations as stipulated by their respective licenses and the Law, in particular the ***Kenya Information Communications Act*** and the Regulations made thereunder.

4. In the discharge of its mandate, it was contended by the applicant that the Respondent has established a Unified Licensing Framework ("ULF") which is network technology and service neutral, intended to ensure the seamless connectivity of the operators' systems and ensure optimal cost effective service delivery to consumers of telecommunications services. To the applicant, the essence of the principle of technology and service neutrality is that the various telecommunications systems deployed in the telecommunications industry can seamlessly interconnect regardless of the technology on which they are run and further regardless of the type of service or content offered on or carried on such systems. The applicant disclosed that under the Unified Licensing Framework the Respondent has the following license categories:

a. International Electronic Communications Gateway Services (IGSS)

b. Submarine Cable Landing Rights (SCR)

c. Network Facilities Provider Tier 1 (NFP T1)

d. Network Facilities Provider Tier 2 (NFP T2)

e. Network Facilities Provider Tier 3 (NFP T3)

f. Applications Service Provider (ASP)

g. Content Service Provider (CSP)

h. Telecommunications Contractors (TEC)

i. Telecommunications Technical Personnel (TP)

j. Business Process Outsourcing Service Providers (BPO)

k. Telecommunications Equipment Vendors (Vendors)

l. Public Communications Centres

5. The applicant averred that it holds the following licenses issued by the Respondent.

a. International Gateway Systems and Services Provider Licence (IGSS)

b. Application Service Provider Licence (ASP)

c. Network Facilities Provider Licence Tier 2 (NFP T2)

d. Content Service Provider License (CSP)

6. However, the applicant averred that the Licence subject of this Application is the International Gateway Systems and Services Provider License (IGSS) which is an internationally accepted technology and is to this end defined by the International Telecommunications Union ("ITU") as "*Any facility which provides an interface to send and receive electronic communications like voice, data and video*". The transmission of electronic communications like voice, data and video is, according to the applicant, regulated by the Respondent, which issues the licensees elaborate licenses and in Kenya there are presently 16 IGSS License holders.

7. The applicant confirmed that it had fully complied with the terms of its IGSS License in recognition whereof the Respondent issued it with a compliance certificate. In its endeavour to attain its objectives as a Company, the Applicant also obtained an International Telecom license from the Federal Communications Commission of the United States of America after rigorous scrutiny by the United States Department of Justice. It was averred that the following are pertinent terms of the IGSS License issued to the Applicant as issued by the Respondent, in the context of the present Application:

a. The Applicant is authorized to construct, install and operate International Electronic Communications Gateway Systems therein termed a Licensed Systems.

b. The License is granted for a period of 15 years.

c. The Licensed System comprises Satellite Earth Stations, Submarine Cable Landing Stations and/or Terrestrial Cross Border Stations for the transmission and reception of telecommunications traffic from a point (s) in the Republic of Kenya to points outside the Republic of Kenya.

d. The Licensee is authorized to connect the Licensed Systems to:

i. Other telecommunication systems operated under a licence granted by the Commission in accordance with the Act.

ii. Any other telecommunications systems duly authorized by a national regulatory authority (NRA) of the country where the international link(s) are to be established, upon notifying the Commission and/or obtaining authorization as appropriate.

e.The Licensed Services are the provision by means of the Licensed Systems of:

i. International connectivity for voice, data, and other applications provided by licensed network facilities providers/ application service providers interconnected with the licensed systems, other telecommunication systems operated under a licence granted by the Commission in accordance with the Act.

ii. Any other telecommunications systems duly authorized by a national regulatory authority (NRA) of the country where the international link(s) are to be established, upon notifying the Commission and/or obtaining authorization as appropriate.

f. The licensee shall provide a Requesting Licensee access to the Licensed System and provide Licensed Services so as to enable the establishment and provision of licensed services by the said requesting licensee.

g. The licensee shall provide the aforesaid services to requesting licensees on a cost based and non-discriminatory manner.

h. With effect from the issuance date, the licensee shall establish the licensed systems taking into account the need for equipment co-location and/or infrastructure sharing with other licensees.

i. The licensee shall ensure that any infrastructure sharing and/or co-location arrangement is provided under an appropriate written agreement, which shall among other things guarantee reasonable access and security.

j. The licensee shall operate the Licensed System in accordance with the national numbering plan (s).

k. Interconnection procedures shall be in accordance with the regulations.

l. Without prejudice to other obligations imposed on the Licensee under the licence, the Licensee shall not engage in any activities, whether by an act or omission, which have, or are intended to or likely to have, the effect of unfairly preventing, restricting or distorting competition in Kenya (or a part of it), in relation to any business activity relating to the Licensed Systems. Without generality of the foregoing, any such act or omission shall include:

i. Any abuse by the licensee, either independently or with others, of a dominant position in Kenya which unfairly excludes or limits competition between the Licensee and any other party.

ii. Entering into any contract or engaging in any concerted practice with any other party, which unfairly prevents, restricts or distorts competition in Kenya.

m. Without prejudice to the obligations imposed on the licensee under the license, the licensee shall not (whether in respect of the rates or other terms and conditions applied or otherwise) show undue preference to, or exercise undue discrimination against, particular persons or persons of any class or description in respect to the provision of the Licensed Systems.

n. In respect of fees, the licensee shall *inter alia* pay to the Commission an initial licence fee amounting to Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) as well as annual licensing fees.

8. The Applicant averred that in respect of its IGSS license, it has to date paid to the Respondent in excess of Kenya Shillings Thirty Four Million Eight Hundred Thousand (Kshs. 34,800,000/=) made up as follows:

a. Kenya Shillings Twenty Five Million Six Hundred Thousand (Kshs. 25,600,000/=) for its IGSS License.

b. Additional charges in respect of the supporting licenses amounting to Kenya Shillings Nine Million Two Hundred Thousand (Kshs. 9,200,000/=).

9. It was contended that the terms and conditions of the licence apply across the board to all licensees under the Unified Licensing Framework and that the Applicant has established a licensed system that is located in Kenya and is connected to the undersea cable via an interconnection agreement with Seacom Limited (an undersea Cable Service Provider) and Liquid Telecommunications Kenya Limited, an International Gateway Service Provider. Their services offer the Applicant an Internet Backbone link between Kenya and the rest of the world and that this contractual and collaborative arrangements offer a more affordable means of linking the Applicant's Points of Presence (POP) and switching facility in Kenya to its Global Telecom Switching Facility in the State of New Jersey, United States of America. To the applicant, having established a licensed system, that enables the reception of calls from points outside Kenya, it is intent to interconnect its System with other Licensees under the Unified Licensing Framework, in order to connect its customers seamlessly to their subscribers at reasonable and affordable rates. It averred that its expectation was that the rates of such interconnection are determined by :

a. The ***Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010***.

b. The Respondent's *Determination Number 2 of 2010*being a determination on interconnection rates for fixed and mobile telecommunications networks, infrastructure sharing and co-location and broadband interconnection services in Kenya.

10. It was disclosed that to this end the Applicant made applications to Safaricom Limited, Airtel Networks Kenya Limited and Telkom Kenya Limited, the only licensed Mobile Network Operators (MNOs) who control the network that serves over 80% of Kenya's population technically referred to as the Public Switched Telecommunications Network ("PSTN") while the Applicant's customers on the other hand largely comprise Kenyans in the Diaspora. To the Applicant however, interconnection with the aforesaid MNOs is the only means by which the Applicant can connect with mobile telephone users served by the PSTN in Kenya. However, contrary to their obligations under the ***Kenya Information and Communications Act*** and the Regulations made thereunder and also under the terms of their licenses under the Unified Licensing Framework, the aforementioned, it was averred that the said MNOs have in the course of time failed and/or refused to enter into the requisite Interconnection Agreements with the Applicant thereby denying the Applicant's customers seamless communication with the customers served by the said MNOs. To the Applicant, the said refusal is contrary to their lawful obligation to do so as stipulated by the ***Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010***(hereinafter the "Interconnection Regulations") which enjoin them to enter into Interconnection Agreements with the Applicant at the rates spelt out by the Respondent in its *Interconnection Determination Number 2 of 2010* being a determination on interconnection rates for fixed and mobile telecommunications networks, infrastructure sharing and co-location and broadband interconnection services in Kenya. The Applicant averred that the Regulations provide the regulatory regime that shall apply to interconnect licensees and interconnecting licensees including the form and content of the interconnection agreements, access and facilities.

11. The Applicant contended that under the Interconnection Regulations, the MNOs are "Interconnect Licensees" (also referred to herein as "interconnection licensees") and are obliged to comply with and adhere to the Interconnection Regulations as they are providers of telecommunications services who in accordance with licenses issued by the Respondent are required to provide interconnection service to other telecommunications licensees such as the Applicant who is an "Interconnecting Licensee" being a provider of a telecommunications service who has requested to interconnect its telecommunications system to the telecommunication system of another licensee in this case the MNOs.

12. It was the Applicant's case that pursuant to the Regulations**:**

a. The *Ex-parte* Applicant has the right to choose its interconnection licensee to route its data traffic and calls towards the customers of another licensee.

b. An interconnection licensee such as the MNOs shall have an obligation, to negotiate the interconnection of its telecommunications system, facilities and equipment with the telecommunications system, facilities and equipment of the interconnecting licensee such as the Applicant.

c. An interconnection licensee such as the MNOs shall accept all reasonable requests for access to its telecommunications system at the network termination points offered to the majority of interconnecting operators.

d. Parties to an Interconnection Agreement shall negotiate in good faith and reasonably endeavour to resolve disputes relating to the form and subject of an interconnection agreement that may arise.

e. Parties to an Interconnection agreement shall negotiate freely between themselves and each negotiating party shall not intentionally mislead the other party, coerce the other party into making an agreement that they would not otherwise have made or intentionally delay or obstruct negotiations.

f. The terms and conditions for interconnection of telecommunications networks shall be based on the agreement reached between the parties and promote increased access and efficient use of telecommunications systems, services and facilities.

g. All interconnection agreements shall facilitate end-to-end connectivity by ensuring that calls originated on the telecommunications system of an interconnecting operator can be terminated.

h. In similar conditions and similar circumstances, and interconnection licensee shall provide interconnection on a non-discriminatory basis.

i. All charges for interconnection services shall:

a) Be objective, independently verifiable and fair,

b) Be charged for each type of telecommunications service related to interconnection.

c) Not be designed to facilitate cross- subsidies.

d) Be below the retail charges levied by the interconnect provider for the provision of any retail service that makes similar use of this network elements that are required by both the retail and interconnection service.

e) Be sufficiently below retail service charges to allow for recovery of the incremental retail costs associated with the provision of the retail services supported by the interconnection service that the interconnect service provider would have to incur in order to compete effectively with the interconnect provider at the retail level.

j. The Respondent shall prescribe guidelines on interconnection charging methodology from time to time.

13. It was further contended that the Respondent in ostensibly keeping with its obligation to "prescribe guidelines on interconnection charging methodology from time to time" did render *Interconnection Determination number 2 of 2010* which stipulated the applicable rates that all mobile and fixed telecommunications operators in the Republic of Kenya shall implement and these rates were tabulated by the Applicant. It was averred that in rendering the aforesaid determination , the 1st Respondent *inter alia* made the following observations and directives:

a. Interconnection is considered a critical tool to the proper functioning of a competitive communications market in Kenya.

b. The current regime of interconnection rate regulation was implemented through the commissions determination No. 1 of 2007 issued on 22nd February 2007 that provided a three year glide path. Since then, the communications market has witnessed further market developments that, *inter alia*, include entry by two new operators, introduction of a Unified Licensing Framework (ULF), the landing of three undersea cables and rollout of terrestrial cable networks, and tremendous growth in both subscriber numbers as well as call (and data) volumes.

c. That the pure LRIC methodology is the most efficient method for setting termination rates as it sets termination rates close to the marginal cost of providing termination services to third parties.

d. That the lower termination rates associated with the pure LRIC model pose no significant financial risks to the operators while the indirect benefits associated with increased competition such as lower retail prices would generate benefits to consumers.

e. That there are no significant risk exposures to the licensees associated with this intervention.

14. It was however contended by the Applicant that its numerous requests to the MNOs to enter into Interconnection Agreements were futile and were in fact with lethargic responses characterized by delays and ultimately outright refusal to enter into the Interconnection Agreements. Further where the MNOs indicated that they may consider entering into an Interconnection Agreement with the Applicant, they insisted that the same would be premised on a rate as high as Kshs. 20.00 per minute as opposed to the Kshs. 0.99 set out by the Respondent. The Applicant disclosed that the MNOs contrary to the aforesaid rate of Kshs. 0.99 have imposed various charges to interconnect the Applicant's customers who are largely based in North America with Safaricom imposing a fee of Kshs. 10 per minute, Telkom Kenya imposing a fee of Kshs. 15per minute and Airtel has imposing a fee of Kshs. 20 per minute which charges are levied upon International Telecommunications companies which are not domiciled in Kenya unlike the Applicant which is for the avoidance of doubt is a Kenyan company, employing and contracting Kenyans and is a registered Tax Payer.

15. To the Applicant, the levies proposed by the MNOs are exorbitant and exponentially above the rating imposed by the Regulations and the same are manifestly calculated to deprive consumers of the immensely reduced rates that they would enjoy if the MNOs interconnected a fact borne out by a perfunctory perusal of the charges levied by MNOs for International calls as found on their respective websites, and a comparison of the same with the charges levied by the Applicant. In the Applicant's view, such obstruction by default deprives consumers of the benefit of drastically reduced rates that they would enjoy if the MNOs complied with the letter and spirit of the Law to Interconnect and this is borne out even by a perfunctory perusal of the charges levied by MNOs for International calls as published on their respective websites with those offered by the *ex-parte* Applicant. As a case in point the Applicant pointed out that on telephone calls to North America, United Kingdom and South Africa the *ex-parte* Applicant is able to offer consumers savings ranging from 500% to 2000% for calls. To the Applicant, the MNOs insistence on such exorbitant, obstructive and exploitative rates is contrary to the regulations both on tariffs and interconnection yet there is no legal basis for such charges and the same amount to a barrier to competition and if accepted by the Applicant, the same will irredeemably diminish its financial integrity and ability to attract capital and is on the whole contrary to the purpose and object of the ***Kenya Information and Communications Act*** and the Regulations made thereunder.

16. As a result of the foregoing the Applicant sought the intervention of the Respondent by way of numerous complaints and requests to enforce the law and the Interconnection Regulations especially on the matter of the applicable rates in Interconnection and the Respondent granted the respective MNOs an opportunity to address the complaints by the Applicant.

17. According to the Applicant, all the three MNOs acknowledged the receipt of the Applicant's Application to Interconnect. However in addressing the same Safaricom alleged that the sole purpose of

an International Gateway System such as the one set up by the Applicant under license from the Respondent was intended to carry local traffic from a carrier to the rest of the world and that the Applicant's proposition to connect its International callers to local networks was unprecedented. It further alleged that the proposed rates of interconnection were not discriminatory or cost based, and more importantly that the charges applicable to an Interconnection Agreement as sought by the Applicant were not regulated by the "Determination Number 1 (sic) of 2010". On its part, Airtel contended that the Applicant had not provided it with the documents it had sought in order to enable it deal further with the request to Interconnect. It however alleged that the Interconnection sought was not a regulated service. Telkom, on the other hand stated that the Applicant was seeking the connection of International calls in respect of which there is no regulation and the rates set out in determination number 2 of 2010 would only apply to "local" calls. It further sought clarification as to the compliance status of the Applicant.It was the Applicant's view that the common discernible thread in the responses of the MNOs was that they did not wish to interconnect the Applicant's International Gateway to their systems, ostensibly to ward off competition from the Applicant.

18. Vide its letter of 22nd July 2015, the Respondent informed the Applicant of the Responses by the MNOs and further sought from the Applicant information regarding a clear business plan and network topology outlining landing points, users and points of interconnection with the local MNOs; expectations of the local MNOs and what the MNOs should expect from the terms of service; the systems in place; how it is intended to use the ICGS and NFP licenses to land international traffic; and the existence of similar arrangements in other jurisdictions. To the Applicant, it furnished the said information sought by the Respondent vide its letter of 24th July 2015 which letter the Respondent acknowledged vide its letter of 29th July 2015 and undertook to deal with the matter conclusively in the shortest time possible.

19. It was averred that vide its letter of 6th August 2015, the Respondent invited the Applicant as well as the respective MNOs to meetings to discuss the issues arising from the Applicant's complaint. At the said meetings, certain issues were raised with the MNOs contending that services within the IGSS license were not regulated despite clarification by the Respondent's representative one **Mr. Musembi** that the services within the IGSS license were actually within a licensed market segment; that the application of the Interconnection Regulations to IGSS License was contested by the parties. The Applicant however insisted that contrary to the MNOs assertion, the Interconnection Regulations apply to services under IGSS. Further, the MNOs insisted that the Applicant was not a local carrier of telecommunications traffic and hence could not have the benefit of the Interconnection Regulations stipulation as to charges levied being "cost based and Non-discriminatory". On 8th August 2015 the *ex-parte* Applicant wrote to the Respondent explaining in greater detail the nature of its licensed system in further urging its case for the application of terms of the Interconnection Regulations. Thereafter, on 14th August 2015, the Respondent wrote to the Applicant notifying it of an inspection of its site at the East Africa Data Centre in order to clarify issues relating to its system and thereafter noted that *"determination of the appropriate interconnection rate is dependent on the nature of interconnection between the systems of GeoNet and Airtel"*. The Applicant however respondent on 19th August 2015 clarifying the nature of its licensed system.

20. However in its decision on the matter dated 21st September 2015, the Respondent made the following determinations:

a. Despite having an IGSS License, the *Ex-parte* Applicant is not operating an IGSS facility.

b. There are only two ways in which an IGSS Licensee can deploy infrastructure to enable connectivity beyond borders. These include; satellite connectivity or terrestrial connectivity beyond Kenya's borders by means of a submarine cable which requires the provider to hold a submarine cable landing rights license.

c. The *Ex-parte* Applicant does not hold a submarine cable landing rights license and is not operating their own satellite facility for the provision of international connectivity.

d. The *Ex-parte* Applicant has not deployed its own infrastructure to the Kenyan borders for connectivity with neighbouring countries infrastructure at the borders. It is instead getting international gateway services through Liquid Telecom, who is connected to the existing SCLR Licensees.

e. In summary, the *Ex-parte* Applicant was operating a switching facility that can only be offered under its ASP Licence, and connection to the Internet through Liquid Telecom's arrangements with the Licensed Submarine Cable Operators. Therefore, their soft-phone service was designed to run as a VOIP service, which can ride on Liquid Telecom, Seacom and TEAMS infrastructure.

f. The current Mobile Termination Rate (MTR) and Fixed Termination Rate (FTR) were determined in 2010 after a detailed Network Cost Study done purely on the local voice and SMS economic markets. The study at the time considered the market structure as it were and used network and financial specific information relevant to local traffic originating and terminating from and into MNOs networks.

g. The service that the *Ex-parte* Applicant is proposing to offer does not fall in the economic markets for which the current MTR and FTR were envisaged. As such those rates are not suitable for use as the basis for interconnect rates between GeoNet and the MNOs. The rates are only applicable to the local voice traffic termination.

h. IGS is not a regulated service in the context of KICA,1998.

i. Clause 3.3 of the IGS License are not applicable to the *Ex-parte* Applicant's case.

j. The *Ex-parte* Applicant should seek interconnection with MNOs under its ASP License without insisting on MTR's and MNOs will be expected to Interconnect with it using non-discriminatory rates given to other ASPs who are offering similar services.

k. The Authority hereby gives the *Ex-parte* Applicant and MNOs not longer than four (4) weeks to conclude the interconnection agreement negotiations from the date of this letter (21st September 2015).

21. This, according to the Applicant is what provoked these proceedings. To the Applicant, from decisions 1-5 the fact that the Respondent has itself issued the Applicant with a compliance certificate certifying that it is in compliance with the terms and conditions of its IGSS License which entails the establishment of an International Gateway System; the IGSS License granted to the Applicant only enjoins it to construct, install and operate an International Electronic Communications System to provide the Licensed Services and does not spell out the manner in which the said system may be constructed, installed or operated; whereas the IGSS License issued to the Applicant provides that the licensed system constructed, installed and operated thereunder comprises Satellite Earth Stations, Submarine Cable Landing Stations and/or Terrestrial Cross-Border Stations, the same does not provide that the licensee must own the said Satellite Earth Stations, Submarine Cable Landing Stations and/or Terrestrial Cross-Border Stations, nor does it prevent the Licensee from entering into collaborative and contractual arrangements to acquire the use thereof; the contractual arrangements between the Applicant and SEACOM Limited and Liquid Telecom are perfectly within the system envisaged in the IGSS Licence and grant it effective connection to submarine cable landing stations; numerous other licensees deploy the same system as deployed by *ex-parte*Applicant and indeed are co-located within the same facilities as those where the *ex-parte* Applicant is housed including the MNOs themselves; ownership of submarine cable landing rights and satellite earth stations is not a pre-requisite to attain International connectivity and it would be irrational to impose such requirement as the same would escalate the costs of such connectivity exponentially while failing to take advantage of available resources thus making the cost of connectivity unattainable to consumers; a party does not have to deploy its own infrastructure to achieve connectivity across borders but rather modern technology and commercial imperatives make it possible to attain such connectivity seamlessly by taking advantage of infrastructure deployed by other providers,

which is in fact the essence of the Unified Licensing Framework; the net effect of the system deployed by the Applicant is the establishment of an International Gateway as contemplated under its license; and it is a matter of public notoriety that even the MNOs have built similar systems to that deployed by the *ex-parte* Applicant as International Gateways.

22. Based on legal advice, the Applicant contended that on the whole the decisions are irrational and *wednesbury* unreasonable; that they breach the Applicant's legitimate expectation that its case would be considered on the terms set out in its IGSS License and in a fair and rational manner; and that the decisions breach the Applicant's right to fair administrative action and therefore *ultra-vires* the Constitution of Kenya in that the Respondent acted lethargically, and ultimately purported to impose non-existent conditions in the IGSS Licence issued to the *ex-parte* Applicant.

23. With respect to decisions 6 & 7, it was the Applicant's position that the current Mobile Termination Rate (MTR) and Fixed Termination Rate (FTR) were determined in 2010 after a detailed Network Cost Study done purely on the local voice and SMS economic markets which study at the time considered the market structure as it were and used network and financial specific information relevant to local traffic originating and terminating from and into MNOs networks; that the service that the Applicant is proposing to offer does not fall in the economic markets for which the current MTR and FTR were envisaged; and that as such those rates are not suitable for use as the basis for interconnect rates between the Applicant and the MNOs since they are only applicable to the local voice traffic termination.

24. It was therefore the Applicant's case that the aforesaid two decisions were based on ignorance of pertinent facts. To the Applicant, the Respondents *Determination Number 2 of 2010* clearly stated that it was made in consideration of among other facts the market developments witnessed in the telecommunications arena including the introduction of the Unified Licensing Framework (ULF), the landing of three undersea cables and rollout of a terrestrial cable network which are the very developments that enable the construction, installation and operation of an International Gateway such as the one contemplated under the IGSS License. Further, the determination number 2 of 2010 which set the MTR and FTR does not exclude international calls but rather deals with the cost of "all" calls terminating on local networks and in any event since the Applicant's Licensed System is locally based, for it to move its call traffic from its telecommunications systems to the MNOs' systems would entail terminating on another "local" network. To the Applicant, therefore the decisions were irrational and *wednesbury* unreasonable.

25. Regarding decisions 8 and 9, the Applicant contended that IGS is not a regulated service in the context of KICA,1998 and Clause 3.3 of the IGS License are not applicable to GeoNet's case. Accordingly, the said decisions were irrational and unreasonable for the reasons that the International Gateway Service is a service that can only be entered into on the basis of a license issued by the Respondent; in the event the International Gateway Service was not a regulated service, the Respondent would not charge over Kshs. 15,000,000/= for a an IGSS License and impose stringent licensing conditions on the same nor would it have collected over Kshs. 34,800,000/= from the Applicant in fees to date; that the case being a case of an Application for Interconnection, it goes without saying that such interconnection must be guided solely by the conditions of the license and hence condition 3.3 thereof which provides that services thereunder must be cost based and non-discriminatory must apply; that the Respondent cannot purport to expunge and ignore provisions of its own license to the detriment of the licensee; that the IGSS license issued to the Applicant in any event categorically contemplates interconnection, access, co-location and end to end connectivity as defined by the Interconnection Regulations; that it is unsustainable to argue that IGSS is not a regulated service yet a regulated service is clearly defined to include a service offered by a licensee; that the Interconnection Regulations clearly provide for Interconnection of all licensees including under IGSS and that by its very nature IGSS aggregates and distributes inbound and outbound international voice and data, which are by themselves regulated services contrary to the Respondent's position on the same.

26. The Respondent was further accused by the Applicant of having acted in profound Jurisdictional Error in abdicating its jurisdiction over IGSS in purporting that the same was not a "regulated service", thereby implying that it has no say over matters touching on IGSS and the same should be left to the whims of

dominant MNOs to the detriment of the consumers it is enjoined by the Constitution and the Law to protect; failing to recognize and address itself to the fact that the IGSS market segment is an uncompetitive market under the vice like grip of the MNOs which manifestly operate in a cartel like manner characterized by the imposition of unsustainable rates by the MNOs in order to stifle any competition by obstructing Interconnection to their telecommunication systems, which control the entire PSTN and by extension lock out access to the entire mobile telephony market in Kenya; purporting to exclude the application of a provision of a licence and substituting the utility of a license with an unrelated license.

27. With respect to decisions 9 and 10, it was contended that the same were made in excess of Jurisdiction in so far as they purport to substitute the ASP license for the purpose and intent of an IGSS License and ratify the refusal of MNOs to honour their lawful obligations.

28. On the whole, the Applicant's case was that the aforesaid decisions by the Respondent are *ultra vires* the Constitution of Kenya (Articles 46 and 47), the Act (sections 5, 5b, 23 and 25), Regulations (Regulations 3, 4, 4(4), 5 (4), 5 (5), 5 (6), 5(7), 5 (8), 5 (10), 5(11), 8, 9, 9 (a) , 9 (b), 9 (d), 12, 13, 13 (5) and 15), the ***Kenya Information and Communications (Tariff) Regulations 2010*** (Regulation 4), the ***International Electronic Communications Gateway Services*** ("IGSS") license issued to Applicant by the Respondent, the *Interconnection Determination Number 2 of 2010* being a determination of Interconnection Rates for Fixed and Mobile Telecommunications Networks, Infrastructure Sharing and Co-location and Broadband Interconnection Services in Kenya, the principle of technology and service neutrality which underpins the Unified Licensing Framework adopted the Respondent.

29. The Applicant asserted that curiously, the decision and directives of the Respondent as set out in its letter of 21st September 2015 are identical to a position taken on the matter at hand as far back as 27th July 2015 in which it rendered the following opinion:

> **"It is also clear, according to legal advice that the interconnection regulations, 2010 do not explicitly take care of the form of interconnection geonet is seeking from the MNOs and that the Authority cannot compel the MNOs to enter into such an agreement with Geonet.**
>
> **Nonetheless, in order to facilitate resolution of the issues, we have requested Geonet to avail the following information to both the Authority and the respective MNOs…**

30. To the Applicant, the foregoing opinion when juxtaposed against the impugned decision leaves one in no doubt that the purported intervention by the Respondent in this matter was nothing more than a façade to hoodwink the Applicant and is a manifestation of a biased and unfair approach to matters by the Respondent, to the detriment of the Applicant.

31. In its submissions, the Applicant relied on the **Kenya National Examinations Council vs. Republic, (1997) eKLR** and submitted that the phrase "such like reasons' as employed therein refers to Wednesbury Principles which requires quashing such a decision as no reasonable authority can properly make when directing itself properly on fact and the law applicable. In the instant case, the *ex parte* applicant submits that the Respondent's decision of 21st September, 2015, was made in either excess of jurisdiction or without jurisdiction. To the Applicant, as Regulation No.3 of the Regulations show, it applies to all inter connect licensees and interconnecting licensees including the form and content of interconnection agreements, access and facilities. On the other hand Regulation No. 4(1) confers on the *ex parte* applicant a right to have an interconnection effected whilst Regulation 4(4) imposes an interconnection licensee to accept from the *exparte* applicant reasonable requests for interconnection. Despite the fact that the interconnection regulations apply to all licensees, the Respondent claims, in the impugned decision, that the service which the *exparte* applicant proposes to provide is not regulated. In so deciding, it was submitted that the Respondent relied on the K.I.C.A, 1998, despite the fact that that Act has been amended and the Regulations made to reflect the position. The applicant relied on Regulations 3 and 4 and submitted that the use of the word "shall" in both Regulation 4(1) and 4 was intended to have a mandatory effect and reference was made **Franco vs. King& Others[1993-2009]EastAfricaGeneralReportsElection61,**the Privy Council decision in **Nair -v- Tiek [1967] 2 All**

ER 34, Kibaki vs. Moi & Others [1993-2009] East Africa General Reports Election98. Further reference was made to **Osogo -v- Shikanga Election Petition No.5 of 1998,**where the Court while relying on the said Privy Council held as follows:

> **"In applying the construction of section 20(1) of the Act...where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the Parliament."**

32. The Applicant also relied on **Republic–v-Disciplinary Tribunal of the Law Society Ex Parte Patrick Lubanga**, **J.R Application No. 443 of 2013,** where it was held at paragraph 37 as follows:

> **"It is however, section 60(12) of the Act that seems to be a source of confusion. That provision states that the Committee may issue a warrant for the levy of the amount of any sum ordered to be paid by virtue of this section on the immovable and movable property of the advocate by distress and sale under warrant, and such warrant shall be enforced as if it were a warrant issued by the Court. It is however my view that this provision must be read in conjunction with the preceding provisions. This provision in my view cannot be read in isolation to the other provisions. It is a principle of interpretation of statutes that the instruments being considered must be treated as a whole and all provisions having bearing on the subject matter in dispute must be considered together as an integrated whole. Although the Respondent took the view that the word "shall" may merely be directory, it has similarly been held that such expressions as "may", "shall be empowered", "maybe exercised", in certain circumstances are to be construed as having a compulsory or imperative force. The test is whether there is anything that makes it the duty on whom the power is conferred to exercise that power. Where a statute confers an authority to do a judicial act, in a certain sense there would be such a right in the public as to make it the duty of the justices to exercise that power: to put it another way where the exercise of an authority is duly applied for by a party interested and having a right to make the application, the exercise depends upon proof of the particular case out of which the power arises. See VeljiShahmad vs. Shamji Bros. and Popatlal Karman & Co. Civil Appeal No.7 of 1956 [1957] EA 438 and *Maxwell on the Interpretation of Statutes* (9th Edn) PP.246-249.]**

33. According to the Applicant, Regulation 5(2) requires that the request for interconnection be given priority by interconnection licensee like the 2nd or 3rd or 4thinterested parties. Regulation 5(11)(a) and(b) imposes on the Respondent the obligation to require the licensee concerned to effect the interconnection if it has not done so timeously.

34. It was submitted that in the case before the court, the ex parte applicant started seeking an interconnection from the 2nd to 4thinterested parties in 2012 and has not obtained it. The Respondent, in breach of its obligations under the above mentioned regulation, never took action. It was only after it was contacted for the umpteenth time by the ex parte Applicant in June 2015 that it purported to start investigations which culminated in the impugned decision of 21st September, 2015. To the Applicant, Regulation requires the interconnection licensee, like the 2nd or 3rd or 4th interested party to undertake the connection in a transparent and non-discriminatory manner.

35. To the Applicant, regulation 12(1) requires the interconnection provider to be objective and fair in charging the interconnection charges. Regulation 13 on the other hand, it was submitted, imposes on the Respondent the duties to ensure that the interconnection negotiations are concluded quickly and take action against an interconnection provider who takes longer to conclude negotiations than it ought to do.

36. According to the Applicant, the evidence on record shows that the Respondent has not discharged its obligations under those provisions. It was submitted that Regulation 5(9)(a) and (b) of the said Inter-connection Regulations give the Respondent power of its "own initiative or upon request of a party to intervene in negotiations on agreements for interconnection where no agreement is reached within six weeks of commencement of negotiations or set time limits within which negotiations on interconnection

are to be completed. "In its *Determination No. 2 of 2010*, the Respondent fixed the interconnection rates applicable where interconnection takes place. Section 5A, on the other hand, it was submitted requires the Respondenttobefreeofcontrolbycommercialinterestofanygroupofactorsorcartel dominating the telecommunications market. Section 5A(2) makes applicable to the Respondent, the national values set out in Articles10and232 of the Constitution. The national values include upholding of the rule of law and respecting such rights as the right under Article27 of the Constitution not to be discriminated against in the course of exercising regulatory functions; the right underArticle40 of the Constitution to property and the freedom of contract under Article19(3)(b) of the Constitution. The decision complained of keeps the exparte applicant out of the inbound terminating International Telecommunications market and seeks to give the 2nd, 3rd and 4th interested parties monopoly of sorts or dominant position in the telecom market.

37. The Applicant submitted that under Article 34 of the Constitution, section 5 of the ***Kenya Information and Communications Act*** and Regulations made under it, the Respondent has the power and is indeed under a common-law and statutory duty to require either the 2nd, 3rd or 4th interested party to undertake the interconnection sought from it by the exparte applicant. It averred that two decisions of the Court of Appeal namely, **P.G. Shah vs. Attorney-General, Court of Appeal at Nairobi, Civil Appeal No. 25 of 1985,** and **Kenya National Examinations Council vs. Republic** (supra), the Courts have stated the circumstances under which the order of *mandamus* will issue. In the former, the law was stated as follows:

> **…Mandamus will be granted if the duty affects the rights of an individual provided there is no appropriate remedy. The person or authority to whom it is issued must be either under statutory or legal duty to do something or not to do something; the duty being of an imperative nature. In the dictionary of English law that mandamus is issued to compel public officers to perform duties imposed on them by common law or by statute. It is also applicable in certain cases where duty is imposed by an Act of Parliament for the benefit of an individual.**

38. The Applicant supported its case with a comparative analysis of other jurisdictions and averred that:

a) The Respondent is, under Article 34 of the Constitution, section 5 of the ***Kenya Information and Communications Act*** and Regulations made thereunder, under statutory and common law duties to compel the 2nd, 3rd and 4th interested parties to undertake the interconnection sought by the ex parte applicant at the rates which it determined in 2010;

b) As **Professor Eli M. Noam** has demonstrated in an article titled **'Interconnection Policy'**–:-

1) in the history of telecommunications, the interconnection between a provider that possesses market power in one stage of the transmission chain and another provider that requires use of the bottleneck in order to provide service has been contentious since the early days of the telecommunications;

2) sometimes, competitors like the 2nd, 3rd and 4th interested parties form a cartel through which they keep competitors out;

3) the government's regulatory function, which is exercised in Kenya by the Respondent, is founded on two considerations namely first telecommunications are a service essential to society and economy; consequently, no one or cartel can be permitted to hold the society to ransom; secondly, monopoly provision is undesirable to society; it is bad for the economy; competition makes it possible for citizens to obtain services at rates determined by the market;

c) Interconnections is always everywhere, done at a price agreed upon by parties or determined by the regulator; it is never done free of charge;

d) as matter of empirical fact, the interconnection is regulated everywhere where competitive telecommunications exist;

e) Interconnection is not a new issue but goes back over a full century; control over interconnection was used to establish the monopoly system; in USA, the Bell Company used the patents to keep competitors out; after the period of the patent expired, it locked other persons out by refusing to interconnect; Interconnection, if granted, was done under a contractual agreement;

f) entrants into the communications seek to enter the market as of right; they seek mandatory interconnections supervised by the state;

g) in USA in 1904, a federal court upheld the powers of the state to mandate the interconnection of rival networks; by 1915, more than 30 states did so; today all states of USA exercise this power;

h) for over 70 years, AT & T's control over interconnection provided it with tools to establish a monopoly shared with small "independent carriers". It used a cartel to lock out other actors out of the market;

i) the turning point came when courts allowed Hush –A- Phone and Carter free which allowed competitive equipment to be owned by the competitors to be owned by customers and to be connected with the network;

j) in 1969, microwave Communications won a court ruling against the USA equivalent of the Respondent, Federal Communication Commission; as in this case, the latter and AT & T whose equivalent are the 2nd, 3rd and 4th Respondents, had refused to interconnect; interconnected competition fundamentally changed the telecommunications market; the AT & T monopoly was ended in 1982 when AT & T's dominance of the market ended;

k) the USA regulator, the Federal Communications Commission, was left with task of regulating interconnection charges.

39. The Applicant also relied on ***Halsbury's Laws of England*** and **G.P. Shah vs. Attorney General**, (supra) where it was held that:

> **"…The applicant for an order of mandamus must show that there resides in him, a legal right to the performance of a legal duty by the party against whom the mandamus is sought or alternatively that he has a substantial interest."**

40. It was averred that the ex parte applicant has invested over Kshs. 300 million in telecommunication Technology Acquisition and Service fees, which include Kshs. 34 million in license fees alone paid to the Respondent for licenses issued to it to carry on business. It has a right to be interconnected of the kind USA companies had when they went to court to get mandatory connection orders. The Respondent's functions are spelt out in Article 3 of the ***Kenya Information and Communications Act*** -"*to license and regulate postal, information and communications services in accordance with provisions of this Act."*

41. The Applicant also relied on **Kenya National Examination Council Case** (supra) on circumstances when an order of *mandamus* is warranted. In the Applicant's view, a public duty has been imposed on the Respondent to regulate the telecommunications sector, the regulation includes enforcement of the ***Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010***, which requires the Respondent to compel mobile network operators to undertake interconnections upon requests of entrants into the sector at rates which it has fixed through the same regulations, that the Respondent has declined to compel them to undertake the connection partly through a misapprehension of the law and partly in support of a cartel which seeks to keep out of the industry new players like the ex parte applicant.

42. According to the Applicant, theInternational Electronic Communications Gateway Services License

held by the *Ex-parte* Applicant enables it to realize an international gateway by which it is able to route international telecommunications to Kenya. However, no matter how many clients the *Ex-parte* Applicant has, or gets to make calls into Kenya through its international gateway, such callers cannot communicate to the subscribers of the 2nd, 3rd and 4th Interested Parties without interconnecting their respective systems through what is known as an Interconnection Agreement. Interconnection Agreements are an imperative and integral part of the telecommunications industry. As observed above, regulation 4 creates a right for the ex parte applicant to obtain an interconnection and imposes a duty on the inter connection provider to provide the requested inter connection. The question of either the 2nd, 3rd or 4th interested party refusing to undertake the connection does not arise.Indeed, as stated in the C.A's Replying Affidavit, at paragraph 29;

> **"As a result of the spread of subscribers over the licensed networks and who must as a matter of necessity, communicate across networks, it is <u>imperative that there must be interconnection</u> between the various licensed MNOs and/or fixed line operators in order to facilitate communication between their respective customers".**Emphasis Added.

43. In light of the foregoing it was contended that it is difficult is difficult to explain the actions of the Respondent and the intransigent interested parties in the light of the clear provisions of those regulations. The crux of the present proceedings, according to the Applicant is that:

a) the *Ex-parte* Applicant contends that pursuant to its IGSS license it has a compliant International Gateway for calls into Kenya;

b) it therefore seeks to enter into Interconnection Agreements with the 2nd, 3rd and 4th Interested Parties;

c) the *Ex-parte* Applicant further contends that the calling rates applicable in such Interconnection Agreements are those applicable to Interconnection Agreements between the said Interested Parties and as set by the Respondent;

d) the 2nd, 3rd and 4th Interested Parties have failed and/or neglected to enter into the said Interconnection Agreements contending that they were not obliged to enter into such Agreements and in any event not at the rates set by the Respondent;

e) the 2nd, 3rd and 4th Interested Parties further contend that the nature of calls carried on by the *Ex-parte* Applicant's gateways being International calls are beyond the jurisdiction of the Respondent;

f) the *Ex-parte* Applicant contends that pursuant to the applicable law, the 2nd, 3rd and 4th Interested Parties are obliged to enter into Interconnection Agreements with it, and should they fail to do so the Respondent is obliged to ensure that the parties enter into the said Agreements;

g) the Respondent agrees with the position taken by the 2nd, 3rd and 4th Interested Parties;

h) further, the Respondent contends that the *Ex-parte* Applicant has, in any event, not established an International Gateway as contemplated by its IGSS license.

44. The foregoing matters culminated in the now impugned decision of the Respondent dated21st September, 2015. It was however submitted thatArticles 19 (3) (b), 27, 34 and 40 of the Constitution read together with Section 84 (w) of the ***Kenya Information and Communications Act*** and ***Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010***, confer on the applicant a right to have an interconnection undertaken by either the 2nd or 3rd or 4th interested party and imposes on the Respondent the obligation to compel them to effect the interconnection in the event of their failing to do so. The regulations also vide regulation 4 (4) imposes on the 2nd, 3rd and 4th interested parties the duty to undertake the interconnection upon

request by the ex parte applicant. According to the Applicant, Article 19(3)(b) of the Constitution which preserves the fundamental freedoms which are not specifically mentioned preserves the freedom to contract which was up held recently by **Onguto, J** in **High Court Petition No. 257 of 2015: Githunguri Dairy Farmers Co Operative Society vs. The Cabinet Secretary Treasury & Others** in which at Paragraphs88and he pronounced himself as follows:

> **"88. The Petitioner contended that its right to freedom of contract is founded under Articles 19(3) and 40 of the Constitution. While Article 40 guarantees an individual or association the right to property, Article 19(3) simply provides that the Bill of Rights is not exclusive. All other rights and freedoms recognized by the law are still preserved. The Respondents did not contest this approach.**
>
> **89. I have no doubt that the Bill of Rights intended to extend and add to other common law rights. By Article 19(3), the common law concepts and principles which guaranteed certain freedoms and rights were embraced and 'subsumed' by the Constitution. The concept of freedom of contract, which assists in the exercise of property rights was one of the subsumed rights."**

45. The ex parte applicant, which has chosen to invest in provision of telephone services is entitled to enter into contracts with potential customers who can only be reached through the inter connection sought. To the Applicant, as in the case of the USA, the freedom of contract includes the right to an inter connection because democracy and their market abhor monopoly and/ or cartels. The democratic society believes that citizens are entitled to services at competitive prices and consequently regulators in the telecommunications center must exercise the state's power to inter connect. This is the right which is recognized by Regulation no. 4, which has been quoted above. The freedom of contract in the case before the court goes hand in hand with the right, under **Article 27** of the Constitution, of every person having equality before the law and equal protection and equal benefit of the law. The ex parte applicant has as much right to provide telephone services as do the 2nd, 3rd and 4th interested parties.

46. It was contended that since the ex parte applicant has spent millions of shillings on its investment in telecommunications, like every other investor, it is entitled to get a return on its investment and right to get such a return is protected by Article 40(2) of the Constitution read together with Regulation 4 of the Regulations. Article 40 relied upon provides as follows:

> ***40.(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property —***
>
> ***a. of any description; and***
>
> ***b. in any part of Kenya.***
>
> ***(2) Parliament shall not enact a law that permits the State or any person —***
>
> ***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***
>
> ***(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).***

47. It was submitted that the ex parte applicant has been trying a return on its investments since 2012, but has been unable to do so because the Respondent has refused to discharge its statutory duties which are imposed by the regulations. Further, Article 34 of the Constitution and section5 of the ***Kenya Information and Communications Act*** guarantees the ex parte applicant an impartial regulation of the telecommunications industry. To the Applicant, case before the court concerns electronic media and that the Respondent is regulating the industry in a manner that favours the 2nd, 3rd and 4th Respondent whilst discriminating against the ex parte applicant. The Respondent, it was submitted, is a state organ within the

meaning of Article 10 of the Constitution and is obliged to uphold the rule of law and respect human rights of all as national values yet the ex parte applicant's rights, under Articles 19, 27, 34 and 40 of the Constitution have been contravened by the ex parte applicant since 2012.

48. According to the Applicant, section 5 of the ***Kenya Information and Communications Act*** provides that the object and purpose for which the authority is published, is to license and regulate postal information and communication services in accordance with the Act. Section 2 provides that the authority shall have all the powers necessary for the performance of its actions under that Act. Section 84 (W) of the Act gives the Minister in charge of Telecommunications, power to make regulations with respect to access including Regulations of interconnection by licensees under the Act and their subscribers to each other's network.

49. As amended by the ***Kenya Information and Communications (Amendment) Act 2013***, section 5A of the Act provides that the Respondent, which is now an authority shall be independent and free of control by the government, political or commercial interest in the exercise of its powers and in the performance of its functions. Section 5A(2) provides that in fulfilling its mandate, the Respondent shall be guided by the national values and the principles in Articles 10 and 232 of the Constitution. Article 232 requires the Respondent to be responsive, prompt, effective, impartial and equitable in provision of services to promote fair competition and merit as the basis of its provision of services. The Respondent was however accused of having provided the services, if at all, in an inefficiently and partisan manner.

50. It was submitted that the ***Interconnection Regulations*** expressed to have been made under section 84 (W) of the ***Kenya Information and Information Act*** provide at regulation 3 that the regulations *"shall apply to all interconnect licensees and interconnecting licensees including the form and content of interconnection agreements, access and facilities***."** Further**,** regulation 4 creates the right to interconnection and imposes on the inter connection licensee, the obligation to "accept all reasonable requests to access to its telecommunication system" and that since the word "shall" has a mandatory effect, the 2nd, 3rd and 4th interested parties have no choice but to accept all reasonable requests. Regulation 5 imposes on the interconnect licensee and interconnecting licensee duties to negotiate in good faith and reasonably. Regulation 5(11) gives the Respondent power to intervene and require the licensee to interconnect. This is one of the duties which the ex parte applicant is seeking to enforce through the order of mandamus.

51. The Applicant's case was that the Respondent is in breach of its duty by failing to order the 2nd to 4th interested parties to undertake the interconnection. The Applicant however appreciated that regulation 6 only gives the Respondent power to approve interconnection agreements where they have been made and that in the case before the court, no agreement has been reached three years after requests were made.

52. According to the Applicant, regulation 8 governs the interconnection and regulation 8 (3) provides that *"all facilities or systems used for inter connection shall be provided in sufficient capacity to enable the efficient transfer of information between inter connected telecommunication systems."*Regulation 9 requires that the interconnection licensee like the 2nd, 3rd and 4th interested parties *"provide interconnection on a non-discriminatory basis and in a transparent manner."*Since regulation 12 governs the charges to be made for the interconnection service, freedom of contract has been reduced in the manners made clear by that Regulation. However, the 2nd, 3rd and 4th interested parties are in breach of this regulation among others. Regulation 13 governs the interconnection procedures which the Respondent and interested parties have flouted which procedures establish timeliness for responding to requests and require the Respondent to intervene to ensure that the interconnect licensees do not frustrate the endeavours of the party that seeks inter connection. As seen above, whereas this rule gives the Respondent the power to compel MNOs to do what regulations require of them, this it has not done.

53. With respect to the consideration of availability of alternative remedies, the applicant relied on **Bernard Murage –v- Fine Serve Africa Ltd & Others, Petition No. 503 of 2014**, where the Court held that where a court has a constitutional jurisdiction to enforce fundamental rights under Article 165(3) of the Constitution, no other body providing a remedy can be allowed to exercise its powers. Since in this case, the ex parte applicant is seeking to enforce its rights under Article 19, 27, 34, 40 and 47of the

Constitution, it was submitted that the Appeals Tribunal under the ***KICA Act*** cannot usurp this Honorable Court's powers more so as under Article 23 of the Constitution, this court has power to grant orders of judicial review to enforce rights in the Bill of Rights in the discussion in paragraphs 53 to 59 of the above judgment, the court considered the issue of an alternative remedy and stated the law as follows:

> **"58. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In that regard, the Petitioner has filed this Petition pursuant to the provisions of Articles 22, 23 and 165(3) (b) of the Constitution which grants every person the right to institute Court proceedings claiming that a right or fundamental freedom has been violated or is threatened with an infringement. That right, to access this Court, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in Belfonte (supra).**
>
> **59. What is in issue in this Petition? It is not, as suggested by the Respondents, whether the roll out of the Thin SIM technology is proper or not but whether that action would violate the Petitioner's rights under Articles 31 and 46 of the Constitution, (right to private and consumer rights, respectively). The mandate and jurisdiction to determine that question lies in this Court under Articles 22, 23(3) and 165(3)(d) of the Constitution. I say so because the Appeals Tribunal established under the Kenya Information and Communication Act does not have the jurisdiction to determine alleged violations of the Constitution - See Wananchi Group (Kenya) Ltd v The Communications Commission of Kenya Petition No.98 of 2012. To hold otherwise would leave the Petitioner without a remedy to ventilate his grievances. In fact, I do not hold this view alone because Majanja J in Isaac Ngugi v Nairobi Hospital and Another Petition No.461 of 2012 stated as follows;**
>
> > **"For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in questions. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly." (Emphasis added) I agree with the learned Judge wholly – See also Four Farms Ltd v Agricultural Finance Corporation (supra).**
>
> **I am satisfied therefore that for the above reasons that the Petition is properly before this Court."**

54. According to the Applicant, although the court was considering a case brought by way of a Petition, the legal principle involved is the one raised in this case hence that statement of law applies to this case.

55. It was contended that in making the impugned decision, the Respondent was acting in an administrative and indeed quasi-judicial capacity and its impugned decision had ramifications on the rights of the parties before it and reliance was placed on **R vs. Judicial Service Commission Ex. Parte Peter Nyakundi Morigori (2015) eKLR** where it is thus stated:

> **"The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in *Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HC MISC. Application No. 1235 of 1998:***
>
> > **"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to**

grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness."

56. It was therefore that the *Ex-parte* Applicant is properly before this Court in light of the manner of the Respondent's handling of the subject matter and indeed the nature of its impugned decision.

57. As to why the Applicant approached this Court by way of judicial review the Applicant based its decision on the following:

a. judicial review is used to supervise exercise of Public Power;

b. it is a means by which improper exercise of power can be corrected;

c. it is a good component of public administration as shown by the decision in **Republic- *versus*- PS/Secretary to the Cabinet and Head of Public Service and 2 Others *ex parte* Stanley Kamanga Nganga (2006) eKLR**.

d. it is for checking that public bodies do not exceed their jurisdiction to the detriment of the Public at large;

e. the ex-parte Applicant did not and has not received fair treatment by Respondent; see **Republic- *versus*- Judicial Service Commission *ex parte* Pareno (2004) eKLR**.

f. Judicial Review is available against a public body like the Respondent; its actions can be curtailed by Judicial Review;

g. the claims involved are based on Public Law Principles and not necessarily enforcement of Private Law Rights; The Respondent performs public functions without a doubt and hence amenable to Judicial Review;

h. The Respondent's source of power is in the Statute;

i. a body performing public duties or exercising power that can be characterized as 'Public' may be susceptible to Judicial Review even if the powers are not statutory;

j. statute may impose a duty on a public body but the duty may create private rights in favor of individuals as well imposing public law obligations enforceable by Judicial Review; The 2nd, 3rd and 4th interested parties falls here;

k. the Courts can superimpose on a private law question or an obligation to observe principles derived from Public law. See **Zakhem Construction (K) vs. P.S. Ministry of Roads and Public Works and another Civil Appeal no. 244 of 2006**.

l. the Public element gauge extends to Private bodies, clubs that perform functions which are important to the public, e.g. Safaricom, Airtel and Orange; the Public expects them to adhere to rules of good administration and Judicial Review can apply to them;

m. the case of the ex parte Applicant is a justiciable matter that constitutes a cause of action, there is an issue concerning proprietary and/or contractual rights of ex parte Applicant as between Respondent as well as 2nd, 3rd and 4th interested parties. See **David Mulei Mbuvi and 13 Others vs. Registrar General and 2 Others [2012] eKLR**.

n. Judicial review remedies are conferred by sections 8 and 9 of the ***Law Reform Act***, CAP 26; it is the High Court to grant it. See **R. vs. Public Procurement Administration Review Board and 2 Others (2008) eKLR**. The lower echelons of the courts and tribunals cannot grant prerogative orders as shown by the case of **Alex Malikhe and Wafula and 7 others vs. Elias Nambakha Wamita and 4 Others, Bungoma HCC Petition No. 7 of 2012.**

58. According to the Applicant, its case ought to be viewed against that broad historical and comparative perspective and relied on the Article by **Prof. Eli M. Noam** dealt with above which in the Applicant's view is an excellent article which discusses the rationale or philosophy of interconnection and both USA and the world at large on interconnection.

59. According to the Applicant, it was its legitimate expectation that at all material times in considering the complaint made before it, the Respondent, being a creature of the Constitution, in rendering the impugned decision, would uphold the applicable laws and regulations viz: The Constitution of Kenya (Articles 46 and 47 dealing with Consumer Rights and Fair Administrative Action; ***The Kenya Information and Communications Act*** (section 5); ***The Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010*** (Regulations 3, 4, 4(4), 5 (4), 5 (5), 5 (6), 5(7), 5 (8), 5 (10), 5(11), 8, 9, 9 (a) , 9 (b), 9 (d), 12, 13, 13 (5) and 15); ***The Kenya Information and Communications (Tariff) Regulations 2010*** (Regulation 4); ***The International Electronic Communications Gateway Services ("IGSS")*** license issued to the *Ex-parte* Applicant by the Respondent; ***The Interconnection Determination Number 2 of 2010*** being a determination of Interconnection Rates for Fixed and Mobile Telecommunications Networks, Infrastructure Sharing and Co-location and Broadband Interconnection Services in Kenya; and the principle of technology and service neutrality which underpins the Unified Licensing Framework adopted by the Respondent.

60. According to the Applicant in arriving at the impugned decision, the Respondent:

i. ignored pertinent facts;

ii. breached the *Ex-parte* Applicant's legitimate expectations;

iii. interpreted the law disproportionately and unfairly to the detriment of the *Ex-parte* Applicant;

iv. arrived at an Irrational and *Wednesbury* Unreasonable decision;

v. abdicated it's Constitutional and Statutory Duty thereby acted in profound Jurisdictional Error;

vi. acted on the basis of a fundamental error of Law, in its interpretation and application of the laws and regulations discussed above;

vii. acted *ultra vires* the Laws and Regulations discussed above;

viii. exhibited manifest bias against the *Ex-parte* Applicant;

ix. acted in abuse of its power to the detriment of the *Ex-parte* Applicant.

61. According to the Applicant, non-justifiability argument can't apply to ex parte Applicant's case and that this Court has jurisdiction to review the Respondent's decision. Whereas, the executive and Parliament have monopoly on issues of policy, the same are reviewable under Judicial Review by Courts of law as demonstrated in the case of **R. vs. Registrar of Societies and 5 Others ex parte Kenyatta and 6 Others (2008) eKLR.** To the applicant, utility of judicial review is available notwithstanding the existence of alternative remedy. See **Shah Vershi Devshi and Co. Ltd. vs. Transport Licensing Board (1970) EA 631.** Further, Judicial Review is available to challenge unconstitutional actions as demonstrated in the case of **R. vs. Kenya Roads Board ex parte John Harun Mwau Civil Application no. 1372 of 2000.**

62. It was the Applicant's case that the statute relevant to these proceedings has constitutional underpinnings under Article 34 of the Constitution of Kenya, 2010 and that the ex parte Applicant's case is about whether due process of the law has been followed in decision making. Judicial Review should be availed if found that the process was not followed and decision should be quashed. See **R. vs. Municipal Council of Nakuru ex parte Samuel Thuo Kagea 2006 eKLR**. To the applicant, the nature of the action is also looked at since it is the principal gauge for the reviewability of functions. If individual rights are affected by the decision or actions of an Authority, the action is Amenable to judicial control.

63. The Applicant contended that it is a legal entity and has sufficient interest in the matters in issue. See **R. vs. Ministry of Information and Broadcasting and Ahmed Jibril ex parte East African Television Ltd, Misc. Application No. 403 of 1998** and **Mureithi and 2 Others vs. AG and 4 Others (2006) eKLR**.

64. It was submitted that Judicial Review is an important pillar for vindicating the rule of law and constitutionalism and therefore whoever wishes to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power ought to be given a hearing by a court of law- being broad minded is the gist of the Courts should adopt. The ex parte Applicant's case is a public interest litigation supported by 5th interested party for the public good. See **Kenya Bankers Association vs. Minister of Finance and another (2002) 1 KLR 61**. It was submitted that Judicial Review has not reached the furthest or the last frontier expansion by the courts hence it continues to depend on circumstances of each case.

65. With respect to time limits, it was contended that the same applies to *certiorari* but not *Mandamus* and prohibition.

66. It was submitted that the court is the only one charged with the responsibility of interpreting the law and therefore the law is not subject to interpretation by any other organ of government or otherwise. See **Peter Anyang Nyong'o & 10 others - *versus*- Attorney General & another (2007) eKLR**. Further, whereas Judicial Review remedies are discretionary in nature and the courts can either grant or decline to grant, the Court controls the use and exercise of discretion. See **Kenya National Examination Council- *versus*- Republic *ex parte* Njoroge & Others (1997) eKLR.** It was contended that the Court is entitled to substitute its own opinion for that of a person to whom the decision making has been entrusted where the decision is so aberrant- that it cannot be classed as rational. See **Republic- *versus*- Judicial Commission of Inquiry into the Goldenberg Affair and 2 others *ex parte* George Saitoti (2006) eKLR; Edwards- *versus*- Barstow (1956) AC 14; Republic- *versus*- Inland Revenue Commissioners *ex parte* Preston (1985) AC 835, 862F**. Apart from that the court is also entitled to intervene for error of law including absence of any material on which the decision could reasonably be reached. See **Republic- *versus*- Judicial Commission of Inquiry into the Goldenberg Affair and 2 others *ex parte* George Saitoti (2006) eKLR**.

67. It was submitted that under *Wednesbury* decision of a body or bodies which perform public duty or

functions are liable to be quashed. If the decision is found to be one that when looked at against relevant circumstance and acting reasonably would not reach such decisions. See **Republic- *versus*- Judicial Service Commission *exparte* Pareno (2004) eKLR**. It was submitted that a decision reached without or in excess of jurisdiction, or in breach of rules of natural justice, or is contrary to the law is amenable to judicial review and ex parte Applicant's case falls in this category. To the applicant, the quashing order of Certiorari is for restoring situations that existed before the decision to be quashed was made. See **David Mulei & 13 Others vs. Registrar General & Others (2012) eKLR**.

69. To the Applicant, the grounds of opposition filed by the AG are based on a misapprehension of the law and generally the nature of the matters pleaded by the ex~parte Applicant. In its view, the matters arising in these Judicial Review proceedings relate to the failure by the Respondent to carry out its constitutional and legal mandate, which has wider Public impact and interest that the AG ought to be involved. Further, the matters arising in these proceedings are matters of public interest and transcend the interests of the ex~parte Applicant and hence the Attorney General's presence as the constitutionally ordained promoter, protector and defender of the public interest is imperative and necessary. It is therefore curious that the Attorney General would attempt to feign disinterest in a matter such as the present and we respectfully posit that he is a necessary and proper party in the same.

69. It was the applicant's position that the Respondent acted in abuse of its power to the detriment of the *Ex-parte* Applicant. In this case the Respondent is under duty under the Article 34 of the Constitution and the ***Kenya Information and Communication Act*** and the rules thereunder and a duty to require the 2nd, 3rd and 4th interested parties to undertake the interconnection described in the pleadings. Under the licenses which the Respondent has issued to the *ex*~parte Applicant, it is under a common law duty to require the 2nd, 3rd and 4th interested parties to undertake the interconnection described in the pleadings. It was submitted that the decision complained offends Article 27 of the Constitution which protects the Ex parte Applicant as it provides for equal protection and equal benefit of law in that it seeks to keep the Ex parte Applicant out of the Inbound (terminating) International Telecommunication market and seek to give 2nd, 3rd and 4th interested parties a monopoly of sorts or dominant position in the international telecom market. The dominance and/or monopoly that interested parties wish to retain in termination of international voice traffic is analogous to the one wielded in American telecom market between 1904 to 1984 by AT&T when it was eliminated following the breakup of the monopoly by the Courts. It was submitted that the *Wednesbury* principles have been offended and/or contravened in that the Respondent ignored all the evidence placed before it showing that it is under common law and statutory duties to compel the 2nd, 3rd and 4th interested parties to undertake the interconnection sought when it made the impugned decision of 21st of September 2015. The Respondent was accused of wholly ignoring the evidence to show that interested parties have since 2012 acted in a devious manner whenever requested by the ex-parte Applicant for interconnection with an object to keep the Applicant out of the Inbound International telecom market in Kenya in contravention of the law. Further it is allowing itself to be dominated by the interested parties' commercial interest in contravention of its mandate under Article 34 of the Constitution and relevant statute.

70. According to the Applicant, the 1st, 2nd, 3rd, and 4th Interested Parties have taken refuge in the matters pleaded by the Respondent in its defence by contending that the services offered under an IGSS license are not regulated; that *Interconnection Determination Number 2 of 2010* (being a determination on interconnection rates for fixed and mobile telecommunications networks, infrastructure sharing and co-location and broadband interconnection services in Kenya) does not apply to the Interconnection Agreements pursuant to an IGSS License; and that M/s Safaricom Limited, Airtel Networks Kenya Limited and Telkom Kenya Limited, are not obliged to enter into Interconnection Agreements with the *ex~parte* Applicant on the basis of its IGSS License. It was however the applicant's position that those assertions are wrong in law and are not predicated on any known facts since the Respondent has plainly failed, acted erroneously and inconsistent with the relevant regulations and that the Respondent has no duty to aid any of the competitors in the Telecom Market.

71. It was submitted that the telecommunication system of the whole world has undergone tremendous changes including in Kenya and the management and/or regulation of the relevant market segments is

therefore the responsibility of the Respondent, which duty the Respondent has not performed as required of it by law. As a result, the Respondent and 2nd, 3rd and 4th interested parties have greatly damaged the ex-parte Applicant's financial integrity through their actions of commission and omission, whilst 2nd, 3rd and 4th interested parties are making money and ex-parte Applicant does not. It was contended that the Ex~parte Applicant has since 2005 been endeavoring to provide voice and data service in Kenya as required of it by the licenses granted to it by the Respondent but has been frustrated by failure of the Respondent and other market players to adhere to the law and thereby affecting the Ex~parte Applicant financial integrity as required by ***The Kenya Information and Communications (Tariff) Regulations, 2010***.Further, the Ex~parte Applicant has been subjected to different application of law by the Respondent in a skewed manner as compared to 2nd, 3rd and 4th interested parties by failing to adhere to the Unified Licensing Framework (ULF) principles and consequently impacting the Applicant's rights under Article 27 of the Constitution and also Article 40 of the Constitution, not to be arbitrary restricted in enjoyment of property. To it, the adoption of the Universal Licensing Framework (ULF) principles have not been extended in its application to the Ex~parte Applicant as required by law but instead, the Respondent has continued to apply the law in that respect in a skewed manner contrary what the interconnection regulations demand of it. According to the applicant, the Network Neutrality espouses the principle of equal access for all lawful content, be it voice, data or text messages which benefits the Ex~parte Applicant has not received from the Respondent's inadvertent if not intentional misapplication of the law obtaining in Kenya and the introduction of flexibility in the use of various technologies by operators addressing the technology evolution and related regulatory challenges as opined by the Respondent is not borne out by the application of the law and regulations and hence the challenge of the impugned decision of the Respondent by the Ex~parte Applicant.

72. According to the Applicant, it has the same licenses like the 2nd, 3rd and 4th interested parties governed by the same laws and regulations, and yet the Respondent has failed to apply the law relating to interconnection in an impartial and non-partisan manner. To it, there should be no discrimination and the evolution of new technologies should be allowed to reign supreme as in the whole world there is a movement from monopolistic control of telecommunication markets to liberalization with the competition being the rule and this is what the 2nd, 3rd and 4th interested parties are obstructing from occurring in Kenya with the active assistance of the Respondent. Therefore the Respondent's failure to command the 2nd , 3rd and 4th interested parties to interconnect with the ex~parte Applicant is to act contrary to the law and the excuses given for not wanting to get involved in the interconnection issues are an illegality and anything tainted by illegality is a perfect candidate of Judicial Review orders. It asserted that the Respondent has exercise the power and full effect of the law to the detriment of the Ex-parte Applicant by deliberate and misguided and interpretation of the law and has failed to recognize the investment and compliance by the Ex~parte Applicant in operationalising its IGSS and NFP licenses. The Respondent was accused of failing to understand the regulations contained in the ***Interconnect Regulations,*** which clearly shows that there is no segment that has been left unregulated since clause 3 thereof applies the regulations t*o* all interconnect licensees and interconnecting licensees, including the form and content of interconnection agreements, access and facilities. It was further accused of attempting to make a claw back on *Determination no.2 of 2010,* which applies to all Mobile and Fixed operations unjustifiably the determination is not relevant only to local traffic and originating and terminating into the networks of Mobile and Fixed network operators in Kenya.

73. The Applicant explained that it has not requested the Respondent to regulate International calls originating (outbound) from Kenya as the Respondent has no jurisdiction power to do so and in fact only requested the Respondent to apply the regulatory powers on all telecommunication services within the Republic of Kenya donated to it by the Constitution, Statute and regulations fairly. The failure to act is malicious and in breach of the law.

74. It was submitted that it is a misnomer and a fallacy in law for the Respondent to justify the non-regulation arguments as it amounts to abdication of its Constitutional and statutory responsibilities. According to the license terms and conditions end-to-end connectivity between Ex~parte Applicants' customers and those of 2nd, 3rd and 4th interested parties can only be provisioned by ULF based NFP and ASP licenses, the two of which the Ex~parte Applicant has already operationalised. To the applicant the

cost of calls originating from other jurisdictions, outside the Republic of Kenya, is solely borne by the foreign international carriers and not by a local carrier as alleged. The contrary view held by the Respondent and 2nd, 3rd and 4th interested parties are not supported by any law. The 2nd, 3rd and 4th interested parties are solely responsible for local cost of moving an inbound (terminating) call from its termination point (IGSS) to its customers or customers of other network providers in Kenya, their contention otherwise is not supported by the law and practice. It was asserted that moving a call within the Republic of Kenya *is a local process* that *involves local cost*, which was the subject of the Network Cost Studies that cumulatively resulted in *Determination no.2 of 2010*whichsaid decision is binding on the Respondent and the 2nd, 3rd and 4th interested parties.

75. The applicant's case is that the Respondent's failure to regulate local IGSS as per the statute and interconnect regulations denies Ex~parte Applicant an opportunity to negotiate and get a better deal that maximizes benefits for Diaspora subscribers represented by the 5th interested party and has an impact on its financial integrity hence the Respondent's conduct is in breach of the interconnect regulation 12.1 (d) and (e) which provides guidelines for charges of interconnect services when a Network Cost Study is absent contrary to the view or position taken by the Respondent together with the 2nd, 3rd and 4th interested parties in these proceedings.

76. According to the Applicant it has been established beyond par adventure that it has operationalised its IGSS license system with a direct link to submarine cable operated by SEACOM and Satellite link from Nairobi to Teleport in London, UK operated by Avanti Communications Kenya Ltd as per the marked as PMM2X and PMM3X respectively and in the circumstance the Ex-parte Applicant is entitled to the orders sought. It explained that the contractual arrangement with Liquid Telecom Kenya Limited by the Ex-parte Applicant is primarily a co-location data facility and peering point where the majority of network providers (including the 2nd, 3rd and 4th interested parties) interconnect as the interconnect regulations requires contrary to the generalized and obviously wrong assertions by the Respondent. It disclosed it operates both traditional SS7 (Circuit Switched) and VoIP (Packet Switched) infrastructure, as per annexure PMM4X demonstrating operationalisation of NFP and ASP license which the Respondent and the 2nd, 3rd and 4th interested parties or displaced such occurrence.

77. In the applicant's view, the notion of a willing buyer willing seller is a creation of the Respondent, 2nd, 3rd and 4th interested parties as intended to close out new entrants to the telecom market in Kenya like the Ex~parte Applicant and indeed it is a violation of *Determination no. 2 of 2010* which sets out price ceiling or caps known as MTR and FTR, which envisage a situation where negotiations can only be taken for rates below the cap and in circumstances:- the Respondent and 2nd, 3rd and 4th interested parties are advocating a *les faire* approach at an age when regulation has come to change that situation. Since the great depression the common law of contract has been altered by statutes to prevent misuse by economically stronger parties of their power and the interconnection regulations were introduced to achieve this goal.

78. According to the Applicant, the issue before the Court is not who has superior resources but whether the interconnection should be undertaken between ex-parte Applicant and 2nd, 3rd and 4th interested parties. To it, the electronic communication can only be successful if two interconnecting networks are using similar International Telecommunication Union's (ITU) approved telecommunication technology standards, which by all intents and purposes should have similar costs, in other words an electronic switch owned by 2nd, 3rd and 4th interested parties and those owned by the Ex~parte Applicant should have similar cost, and hence the application costs based principles that guide interconnect charges as per *Determination no.2, 2010,* interconnect regulation 12.1(d) and (e) and IGSS license condition 3.3, which applies equally to all network providers irrespective of the level or scale of investment. The Respondent was accused of showing naked bias in favor of 2nd, 3rd and 4th interested parties as against the Ex~parte Applicant by purporting to assume the role of a referee and a lead striker in the theatre of telecommunication business and innovation unjustifiably so. Indeed the Respondent appears to have forgotten that it is a regulator not player in the market. Its actions create a vacuum in the regulation of the industry as it is acting as a player, the Respondent has placed itself into an acute conflict of interest and is

purporting to "regulate" the industry for the benefit of the 2nd, 3rd and 4th interested parties, which is out right violation of the law, thus inviting invocation of Judicial Review Remedies.

79. The Applicant denied that it has sought to have a regulatory framework skewed in its favor but asserted that it is seeking the enforcement of the ULF principles to counter the skewed regulatory management adopted by the Respondent. It further contended that it is not seeking from this Court to create a regulatory framework skewed in its favor but is seeking the intervention of this Court for orders to have the enforcement of the law in an equitable manner. The behavior of 2nd, 3rd and 4th interested parties is like the behavior of AT&T, which was found to be outdated and illegal as the decisions of both Federal Court of Appeals and the US Supreme Court in the United States Court of Appeals Decision: in **Hush-A-Phone Corporation -v- U.S.A** and **MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (District of Columbia Circuit Court 1977), 434. U.S. 1040.**

80. It was submitted that the 2nd, 3rd and 4th interested parties in concert with the Respondent have demonstrated by their actions a refusal to interconnect with the Ex~parte Applicant as necessary notwithstanding the clarity of the law and that the said interested parties have failed to enter into interconnection agreement with the Ex~parte Applicant while the Respondent has also failed to follow up its purported directives for interconnection as required by the law and relevant regulations.

81. Since the *Determination no. 2 of 2010* decrees the rates payable in respect to all interconnections, it was submitted that no further negotiations are anticipated in that respect and any suggestions in that direction is a smoke screen intended to obscure the true position in law about interconnection and rates payable. To the applicant, the Respondent's position is at variance with regulations 12.1 (d) and (e) of the interconnect regulations, and is therefore an attempt to mislead this Honorable Court.

82. It was the applicant's case that the physical and logical interconnections of 3rd interested party's network to ex~parte Applicant's network are completed save that the 3rd interested party's commercial department is yet to authorize the flow of voice traffic. As much as this may be true there is a demand by the 3rd interested party for a bank guarantee that is not supported by the governing regulations and which demand is an illegal affront intended to obstruct the entry of the Ex-parte Applicant in Kenya and it is without merit as it violates *Determination no. 2 of 2010* and interconnect regulations and Tariff regulations of 2010. It contended that it has never failed to comply with any license terms and conditions and hence does not lack capacity to operate international voice traffic systems and also the Ex~parte Applicant is not anti-competition, if anything it is attempting to break into the market and ensure that fair trading and competition is benefiting telecommunication consumers in Kenya in accordance to the law. Based on **Keroche Industries Limited vs. Kenya Revenue Authority and Others (2007) eKLR**, **JR Civil Appl 350 of 2012 R vs. Kenya Revenue Authority and Anor Ex. P Tradewise Agencies**, **Anisminic Limited vs. Foreign Compensation Commission (1969) 2 AC 147,** and **PLO Lumumba** in ***Judicial Review in Kenya***2nd Edition the applicant submitted that the failure by the Respondent to ensure that the rights and obligations on the matter of Interconnection between the parties is attained, and its failure to act on its mandate in what amounts to a profound jurisdictional error.

83. It was therefore submitted that the remedy left to the Court is the grant of the Orders sought in the Notice of Motion.

5th Interested Party's Case

84. The case for the 5th Interested Party, **Kenya Diaspora Alliance,** (hereinafter referred to as "the Alliance") was that it is duly registered in the under the Laws of Kenya as a Trust. It was averred that by a Memorandum of Understanding (hereinafter referred to as the "MOU") dated 5th November 2015 but commencing on 25th October 2015, GeoNet Communications Limited (hereinafter referred to as "GeoNet") and Diaspora Investments Club Limited (hereinafter referred to as "DICL") which is wholly owned by the Kenya Diaspora Alliance entered into an agreement that provided general guidelines for proposed joint projects between GeoNet and DICL. The proposed project wholly involves matters to do

with communications that target the Kenyan Diaspora generally facilitating communication between them and their mother country.

85. According to the Alliance, the major aim of the Alliance's collaboration with the *Ex parte* Applicant would enable Kenyans living in the Diaspora to make cheap affordable telephone calls to their loved ones. In its view, the dispute between the *Ex parte* Applicant and the 2nd, 3rd and 4th Interested Parties is a tariff dispute which would facilitate the interconnection of the *Ex parte* Applicant party's facilities with those of the 2nd, 3rd and 4th Interested Parties facilities for the aim of providing a telecommunication services to the Kenyan Diaspora on the basis of Mobile Tariff Rates (MTR) set out in the ***Kenya Information and Communications (TARIFF) Regulations 2010*** and ***Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations 2010***.

86. Its case was that it was seeking the enforcement of the law and regulations on tariff and interconnection as per the provisions of the ***Kenya Information and Communication Act*** Cap 411A which would ultimately provide benefit that align with the interests of the Kenyan diaspora. In its view, the ***Kenya Information Communication (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations of 2010*** provide for all matters relating to the interconnection of communication in Kenya as guided by the Constitution and the ***Kenya Information and Communications Act*** Cap 411A. It relied on Regulation 2 which defines interconnection as *"the physical and logical linking of telecommunication networks used by the same or different service licensees in order to allow the users of one licensee to communicate with users of the same or another licensee or to access services provided by another licensee"*. It was its position that the under the abovementioned Regulations the 2nd, 3rd and 4th Interested Parties can be said to fall under Regulation 2's definition of which entities constitute the term "*interconnect licensee"* which is interpreted to mean *"a provider of a telecommunications service who, in accordance with a licence issued by the Commission, is required to provide interconnection service to other telecommunications licensees"*.

87. It was therefore averred that it stands to reason then that the 2nd, 3rd and 4th Interested Parties are under an obligation to interconnect service to other telecommunications licensees by virtue of the issuance of the licence issued by the Respondent herein since by Regulations 4(3) and 4(4) of the ***Kenya Information Communication (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations of 2010***, a right is owed to the interconnecting licensee by the interconnection licensee. The said Regulation 4(3) states that:

> ***"An interconnection licensee shall have the right and, when requested by an interconnecting licensee, an obligation, to negotiate the interconnection of its telecommunications system, facilities and equipment with the telecommunications system, facilities and equipment of the interconnecting licensee, in order to provide end-to-end connectivity and interoperability of services to all customers".***

88. It was the Alliance's case that the Regulations when read together with sections 84Q, 84R, 84S and 84V give the result that negotiations are guided by the need to rid the process of uncompetitive practices and conduct with the aim of ensuring fair competition. However, the Interested Parties acting in concert with the Respondent have refused and / or failed to interconnect with the *Ex Parte* Applicant.

89. The Alliance confirmed that it supports the Application of the *Ex Parte* Applicant in so far as this matter concerns the interconnection rates to be charged which directly affect the retail price of making international calls to and from the Republic of Kenya and that by retail price, this means the price charged to a customer of any of the telecommunication service providers that charge Mobile Termination Rates and Fixed Termination Rates for purposes of interconnection being inclusive of charges levied to customers for use of their infrastructure and networks which together facilitate communication. The Alliance averred that the prices proposed by the *Ex Parte* Applicant are far lower than those charged by the 1st, 2nd, 3rd and 4th Interested Parties in terms of making calls from Kenya to other countries and that for someone who lives abroad, the *Ex Parte* Applicant provides a service known as GeoSafari which is a

mobile based application which allows making of calls through an application that connects to the internet and which application and the technology therein has allowed the *Ex Parte* Applicant to provide the services that it has proposed to provide but at a rate that will be cheaper than using the current commonly used technology provided by the 1st, 2nd ,3rd and 4th Interested Parties.

90. It was contended that the transmission of voice data through Packet Switched Technology enables the functioning of Voice over Internet Protocol (hereinafter referred to as "VoIP") which technology to work as intended, there should ideally be conditions which allow for the transfer and movement of data from packet switched connections to be carried over to the dedicated circuit switched connections of the public switched telephone network.

91. It was the Alliance's case that this will enable someone for example in the United States of America who has the *Ex Parte* Applicant's mobile application to place a call to Kenya to someone who has a device that does not have the ability and / or functionality to enable such mobile applications and that though this is admittedly a grossly over simplified explanation of the *Ex Parte* Applicant's contention in this suit, it is one which should fit the purpose of the claims that the *Ex Parte* Applicant is trying to show. From the perspective of the Alliance, it would be easier for someone from the diaspora to make calls to a rural village for example where the ordinary individual might not have devices which enable them access the services of Application Service Providers (ASP) in this sense apps and such there would be need to provide some sort of interconnection between the ASP's services to those of MNO's to allow for interconnection with such individuals. Such access would be of great benefit to those living abroad as it would make communication easier and most importantly cheaper for citizens who live abroad.

92. The Court was therefore urged to create conditions that favour the creation of a competitive environment for the benefit of Kenyans since the issues raised in this suit touch on matters that concern the interests of the public in general.

93. It was disclosed that by the Respondent's own public admission in local dailies dated 1st December 2015, there have been a growing number of cases where international calls are illegally terminated locally by use of a SIM box commonly called SIM box fraud and that the Ex Parte Applicant's services can help reduce such cases from occurring as they only occur because the SIM box fraud is a cheaper way of making calls to Kenya. It was averred that **t**he SIM box is a device housing numerous SIM cards that route away traffic from an operator's network to one operated by a fraudster and denies Mobile Network Operators revenue they should obtain for charging the MTR and / or FTR for termination of calls on their network. In this case however, the *Ex Parte* Applicant is seeking interconnection subject to payment of MTR and / or FTR at the rates already in place so as to enable Kenyans use their network both at home and abroad for the purpose of making and receiving calls. To the Alliance, the regulatory framework is already in place to provide for such interconnection as proposed by the *Ex Parte* Applicant and that the Respondent's statutory mandate will still remain in force as the Respondent can still monitor network quality for consumers of the *Ex Parte* Applicant's services. However, if the status quo is allowed to remain in place, the effect would be that an uncompetitive environment would be enforced, going against the spirit of the ***Competition Act***.

94. The Alliance asserted that the Respondent cannot be said to have enforced competition since it has constantly sided with the MNOs in an effort to hedge and protect their interests instead of being impartial and all this has consequently been a disservice to Kenyans yet the Respondent has the power under statute to bring the 1st, 2nd , 3rd and 4thInterested Parties to negotiate with the *Ex Parte* Applicant for the purpose of having a reasonable interconnection tariff between the aforesaid parties.

95. The Court was therefore urged to exercises its inherent powers to facilitate an expedient resolution to the tariff dispute.

Respondent's Case

96. According to the Respondent (hereinafter referred to as "the Authority"), it is the successor-in-title and function to the Communications Commission of Kenya (*the "defunct Commission")* by virtue of

Article 34 of the Constitution of Kenya and the ***Kenya Information and Communications (Amendment) Act, 2013***. According to the Authority, prior to the year 2004, the defunct Commission's licensing framework was modelled on the basis of the technology which an operator was using to provide communication services to end-users. In the year 2004, with a view to introducing flexibility in the use of various technologies by operators, addressing technology evolution-related regulatory challenges and reducing the investment costs incurred by the industry players in terms of acquisition of the myriad licenses and further to open up the market to new players, the defunct Commission announced its intention to implement a unified (technology-neutral) licensing regime within the information and communications technology ("*ICT*") sector and this idea of a technology-neutral licensing regime was in response to the growth and convergence of computing, telecommunications and information technologies which made it possible for multiple services to be offered to end-users by operators from a single platform and ideally rendered the traditional regulatory framework in place as at that time untenable. The Authority averred that the implementation of a unified (technology-neutral) licensing regime was considered a good measure to harness opportunities presented by technological advancement in ICT and to address the regulatory challenges associated with convergence.

97. It was averred that pursuant to the foregoing, the defunct Commission in February, 2008 commenced an extensive consultation process with the industry players including Mobile Network Operators (MNOs) and other stakeholders on the implementation of a *Unified Licensing Framework* ("*ULF*") and that the contributions from the consultative process were consolidated and adopted at a Stakeholder's Forum held on 19th March 2008 under the auspices of the defunct Commission at the Kenya College of Communications and Technology("*KCCT*"). Arising from the said consultations, it was proposed that the unified licensing and regulatory model would have the following main segments of the market structure and for which appropriate licenses would now be issued:

a. Network Facilities Provider *("NFP")* – to cater for operators that own and operate any form of communications infrastructure (based on satellite, terrestrial, mobile or fixed technologies);

b. Applications Service Provider *("ASP")* – to cater for operators that provide all forms of services to end-users using the network services of a facilities provider;

c. Contents Services Provider *("CSP")* – to cater for operators that provide content services such as broadcast (TV& Radio) material and other information services and data processing services, etc.

98. It was explained that in summary, the aforesaid licence categories have the following distinctive characteristics:

a. The NFP licence allows a licensee to construct, install and operate *electronic communications systems*. These systems comprise the fibre infrastructure, radio communication network, satellite hub facilities and even copper based infrastructure. The holder of this licence is expected to lease their infrastructure to ASP providers for purposes of providing the applicable services such as voice, data and internet. The ASP licensee on the other hand allows the licensee to provide *electronic communication services* but through the infrastructure/Systems of NFPs and/or the International Gateway Systems and Services operators. An ASP licensee cannot construct infrastructure of their own for provision of services but rather lease the infrastructure of NFP licensees.

b. The ASP licence holders provide such services as data, voice, Voice Over Internet Protocol (VoIP) and internet services that also include all the related Over The Top (OTT) services like WhatsApp, Viber, imoetc including other social networking applications like Facebook, Twitter, Instagram, LinkedIn etc.

c. The CSP licence allows licensees to provide *contents services material* such as SMS on health, education, agriculture, mobile banking information, ring tones, energy service providers and other regulatory service providers and other information and data processing services. The content is accessed by means of facilities of licensed NFPs and/or services offered by ASPs.

99. It was averred that from the foregoing categories of licenses, it is important for this Court to note that MNOs have constructed and operate telecommunication infrastructure (also known as *electronic communications systems)* by virtue of their NFP licenses. They then provide telecommunication services (also known as *electronic communications systems)* through their respective or interlinked infrastructure and by virtue of their CSP licence, they provide *content services material* such as SMS on Mobile Banking, ringtones, health services among others. It is also important to note that the ASP licensee is able to provide Voice over Internet Protocol telephony services which allows international calls to be delivered in Kenya over the internet. Further and in relation to the foregoing, it is also imperative that this Court notes that unlike traditional telephony services which use *Circuit Switched* or *Signalling No 7 (SS7) technology*, *Voice over Internet Protocol* services on the other hand use *Packet Switched Technology* (PST) which works as follows:

a. It allows transmission of data by using small packets that are well labelled in terms of origin and destination. The labelling of the packets allows the packets to be transmitted over the connected networks. The labelling of the packets allows the data to be transmitted to their destination address with ease.

b. One such Packet Switched Technology is Internet Protocol (IP). IP simply refers to rules and procedures used to enable interconnected networks and computers to exchange information over the networks. When this technology is used to transmit voice, like telephone conversation, then it is referred to as Voice Over Internet Protocol commonly referred to as VoIP.

c. Because the packets have their destinations labelled on them, they can travel using different paths of the interconnected computers and networks and still reach the final destination at the same time and in the correct order before being reassembled to reconstruct the original word that was sent.

d. This means that one word spoken, say in Europe and destined to Kenya, can be broken into two packets, one packet can reach Kenya via Asia while another packet may reach Kenya via west Africa but they will finally reach Kenya at the same time and reconstructed to form the original word to be received by the recipient of the call.

e. It means no specific recourse is reserved for a call unlike in SS7 technology. It is used on a shared resource basis, making it cheaper.

f. The technology is therefore cheaper for making calls or sending data to any part of the world. It is this technology that has now made both local and long distance calls that used to be charged differently by the former Kenya Post and Telecommunications Corporation (KPTC) to now cost the same and much cheaper. It has equally made International calls to be cheaper as well.

100. The Authority averred that as a component of the ASP licence, VoIP technology as above stated, allows international calls to be delivered in Kenya from foreign countries or calls to be originated in Kenya to foreign countries at cheaper rates. This technology is cheap because its users use shared resources and therefore benefit from economies of scale and a host of many other factors. Holders of this licence would typically invest little compared to the other licensees who construct, install and operate electronic communications systems such as NFPs.

101. It was averred that for the regulation of VoIP, the defunct Commission issued the *Guidelines for the Implementation and Provision of Voice over Internet Protocol (VoIP) Services.* As regards services at the international level, the operational landscape and the licensing framework under the ULF would be as follows:

a. Submarine Cable Systems: This is an Optical Fiber infrastructure that is laid under the sea to connect two or more different countries at their respective coastline. It is a facility that connects two different countries for exchange of communication. Under this arrangement, any operator in Kenya that has subscribers who make or receive international calls can connect its systems through submarine cable systems operators. This connection effectively delivers outgoing international calls

to foreign countries or channels incoming international calls to local operators through a submarine cable system to any operator locally that has subscribers. The transmission occurs through fiber cables laid under the sea to foreign countries like in Asia and Europe from where any part of the world can be reached. The licence issued for this service is referred to as a *Submarine Cable Landing Right ("SCLR")* licence. Holders of this licence must invest a lot of capital in laying down the infrastructure required to operationalize this licence.

b. Satellite Earth Station System: This is a satellite ground facility that is connected to the local telecommunication infrastructure which communicates to satellite facilities stationed in space for purposes of transmitting and receiving international outbound and inbound calls respectively. Operators, with subscribers who make or receive international calls, can also set up an international satellite earth station, which allows outgoing international calls to foreign countries or incoming international calls to be channelled through the satellite earth station to any operator locally that has subscribers. The transmission occurs from the earth station to the satellite station situated in space then back to another satellite earth station in another country in any part of the world. The licence issued for this service is referred to as *International Gateway Systems and Services* (IGSS also interchangeably referred to as IGS) licence. Holders of this licence must also invest a lot of capital in laying down the infrastructure required to operationalize this licence.

c. Terrestrial Cross-Border Station Systems: These are systems that are used to transmit telecommunication calls, data etc across to neighbouring/contiguous countries by using fibre or radio communication frequency across the common boundaries. The licence issued for this service is the *International Gateway Systems and Services* (IGSS also interchangeably referred to as IGS) licence. As indicated above, holders of this licence must invest a lot of capital in laying down the infrastructure required to operationalize the licence.

102. It was contended by the Authority that for the provision of Satellite Earth Stations and Terrestrial Cross-Border Station Systems, a licensee would require the IGSS licence which bears the following characteristics:

a. It allows a licensee to *construct, install* and *operate* an International Electronic Communications Gateway *System(s)* and to provide International Electronic communications Gateway *Services.* Therefore a licensee in this category must not only provide international electronic communications gateway services but also deploy communication systems/infrastructure to provide the said services.

b. The *Systems* can be Satellite Earth Station to link its systems and services to the rest of the world through satellite or Terrestrial Cross-Border Station Systems like Fiber or Radio Communication Network to link Kenya with its neighbouring countries across the common borders.

c. The *Services* would be the voice or data communications originating or terminating either from or into a licensee's own network or the networks of other licensees with whom the licensee has entered into commercial agreements on termination of calls.

103. It was affirmed that by way of an analogy, the Systems component in the IGSS License is similar in characteristics to the NFP license while the *servic*e component of the IGSS license is similar to the ASP license.

104. According to the Authority, it is therefore against the above backdrop that the defunct Commission adopted the ULF in the year 2008 and currently, there are three Mobile Network Operators (MNOs) in Kenya which are privately owned or substantially privately owned enterprises and all of whom, hold the NFP, ASP, CSP and IGSS licenses. However, other operators in the telecommunications industry have opted for either the ASP or CSP licence or a combination of both and these operators can only provide their services through the infrastructure of an NFP licensee.

105. The Authority explained that though each MNO and/or fixed line operators operates its own network

and has its own customers on its network, callers/subscribers in totality, are spread across networks and as a result of the spread of subscribers over the licensed networks and who must as a matter of necessity, communicate across networks, it is imperative that there must be interconnection between the various licensed MNOs and/or fixed line operators in order to facilitate communication between their respective customers. Accordingly without external regulation, each MNO and/or fixed line operator who terminates a call would want to maximize the interconnection rate paid to it by its counterpart network operator from which a call is originated hence the term "*Termination Rate"* refers to the amount charged by an operator on whose network a call, originating from a different network, is being terminated.

106. It was disclosed that upon being licensed by the Authority, the MNOs experienced difficulties with the high wholesale interconnection rates charged by the other MNOs operating in Kenya which led to prohibitive retail prices for making and receiving local calls across all networks in Kenya which circumstances prompted the defunct Commission, in exercise of its mandate, to carry out a Network Cost Study in 2006 *("the First Network Cost Study")* whose objective was to determine through a review of the available institutional, regulatory and financial information, the appropriate costs and prices of various telecommunications services. That First Network Cost Study covered mobile and fixed telecommunications services in the Republic of Kenya and the interconnection envisaged therein and its final Report was presented to the defunct Commission on 16th February 2007. Based on the said First Network Cost Study Report, and in the pursuit of its mandate, the defunct Commission made a Determination of the interconnection rates to be applied among the fixed and mobile telecommunication operators in the Republic of Kenya (hereinafter *"Determination No. 1 of 2007").*

107. However following the market developments in the communications industry including the entry of new operators, the introduction of the ULF, the landing of three undersea cables and the rollout of a terrestrial cable network, and the exponential growth in both subscriber numbers as well as call and data volumes, the defunct Commission decided to carry out a detailed review of the termination rates set in *Determination No. 1 of 2007*andin the intervening period, the defunct Commission carried another Network Cost Study (hereinafter "the Second Network Cost Study") in which it adopted as participatory methodology wherein all the telecommunications operators and other stakeholders were involved and culminating into the Report dated 16th July 2010. Having considered all the factors reviewed during the Second Network Cost Study, the defunct Commission made a Determination on the Interconnection Rates for Fixed and Mobile Telecommunications Networks, Infrastructure Sharing and Co-Location and broadband interconnections Services applicable in the Republic of Kenya *(hereinafter "Determination No. 2 of 2010").* Pursuant to *Determination No. 2 of 2010*, all mobile and fixed telecommunications operators in the Republic of Kenya are under obligation to implement the mobile and fixed interconnection rates *(hereinafter "MTR and FTRs")* specified therein effective from the dates indicated therein and are at liberty to negotiate lower interconnection rates subject to the capped rates provided in *Determination No. 2 of 2010.* The Authority however emphasised that MTR and FTRs were set out for and are in respect of National interconnection among the local Mobile and Fixed Network Operators hence the said *Determination No. 2 of 2010* is relevant only to local traffic originating from and terminating into the networks of the said Mobile and Fixed Network Operators in the Republic of Kenya.

108. It was averred that with regard to international telecommunications traffic, where the IGSS licence applies, the following parameters do apply for want of jurisdiction.

a. In order to deliver an international call from Kenya to foreign countries say, like in Europe, an IGSS licensee in Kenya would negotiate with an international carrier (also known as a "*Teleport company*") licensed for that purpose in another country in any part of the world to receive its calls from Kenya and route them to the countries concerned in Europe. The choice of the carrier to be used is largely dependent on commercial considerations such as the rate for carriage and transmission for the international calls originating from Kenya, quality of service and experience etc. The negotiations therefore have to be commercially driven and negotiated given that there are many players who could be competing to receive and distribute the calls originating from and terminating in Kenya at competitive rates.

b. The arrangements between a local IGSS and an international carrier are therefore not regulated

by telecommunication regulator in Kenya for the following reasons:

i. The International Carrier is not based in Kenya and therefore regulatory oversight by a Kenyan Authority cannot apply.

ii. Regulating who a local IGSS licensee would connect to and at what price would deny the local operators an opportunity to commercially negotiate and get a better deal that maximizes benefit for local subscribers with regard to international calls.

iii. It is impractical for the Authority to conduct Network Cost Studies for originating, carriage and termination of calls to and from all the countries in the world due to a host of reasons such as the cost for the project, access to relevant information among others, and as such, in the absence of such study, no termination rate can be scientifically arrived at.

109. It was averred that from a general point of view with regards to the matter at hand, it is important for this Honourable Court to appreciate from the outset that:

1. Liquid Telecom Kenya Limited, an entity with a bearing on this matter (though not a party) holds an IGSS license and related infrastructure which it has operationalised.

2. In order to provide the above services, Liquid Telecom Kenya Limited has contracted the services of SEACOM (also an entity with a bearing on this matter though not a party), an undersea cable infrastructure provider company with an SCLR license from the Authority.

3. The *ex parte* Applicant on its part, using its ASP license, has leased bandwidth from Liquid Telecom Kenya Limited and it is through this medium that it proposes to route/land international calls at its switching facilities based in Nairobi prior to interconnecting the same, if at all, to the MNOs.

4. The collaborative and contractual arrangement between the *ex parte* Applicant, Liquid Telecom Kenya Limited and SEACOM does not in any way involve the use of the *ex parte* Applicant's IGSS license.

5. The collaborative arrangement between the *ex parte* Applicant and Liquid Telecom Kenya Limited is by virtue of the *ex parte* Applicant's ASP license and not its IGSS license.

6. On the other hand, the collaborative and contractual arrangement between SEACOM and Liquid Telecom Kenya Limited is by virtue of Liquid Telecom Kenya Limited's IGSS license and not the IGSS license held by the *ex parte* Applicant.

7. To all intents and purposes, the *ex parte* Applicant has not operationalised the use of its IGSS license for the Systems component and at no time relevant to these proceedings has it constructed, installed, and/or operated its IGSS system and/or provided services relevant thereto.

8. To the foregoing extent, the *ex parte* Applicant cannot seek to enforce the terms of a licence it has not operationalised or is not utilizing for the services it proposes to provide.

9. Even without the IGSS license, which in any event the *ex parte* Applicant has not operationalised, the *ex parte* Applicant has been, and is able to deliver the proposed services through the collaborative arrangement it has with Liquid Telecom Kenya Limited and SEACOM without the need for an IGSS licence.

10. From the foregoing, it should be clear to this Honourable Court that the *ex parte* Applicant is seeking to hinge the present dispute on a license that it has not operationalised and is not utilizing for the purpose of providing the proposed service.

11. The present dispute, if any, falls under the terms and conditions of the ASP license operationalised by *ex parte* Applicant for the purposes of services it intends to provide.

12. It is in the context of the above stated matters that the Authority made the impugned decision dated 21st September 2015.

13. The above stated decision was arrived at after intensive and extensive interaction between the Authority and the *ex parte* Applicant on one hand and the Authority and the MNOs on the other hand.

14. From the foregoing matters, this Court was urged to note that the Authority vigilantly took all steps to facilitate a mutual agreement between the *ex parte* Applicant and MNOs in relation to the proposed interconnection. As such, it is unfair to accuse the Authority of bias, unreasonableness, irrationality or failing to accord the *ex parte* Applicant fair administrative action or such other grounds on the Application herein.

15. As can be seen from the documents leading to the Authority's decision dated 21st September 2015, the sole reason why the interconnection between *ex parte* Applicant and the MNO's could not materialize is solely attributable to the *ex parte* Applicant's insistence of the application of the interconnection rates contained in *Determination No. 2 of 2010*, which in any event is not applicable.

16. As explained herein earlier, the rates in *Determination No. 2 of 2010* cannot and do not apply to the proposed services to be provided by the *ex parte* Applicant for 3 main reasons:

1. The Network Cost Studies of 2006 and 2009 were solely based on a study of the infrastructure and services offered by the MNOs pursuant to the various licences they held at the respective study periods. To this end, it is important for this Honourable Court to note that the MNOs have deployed the infrastructure.

2. The international services proposed to be provided by the *ex parte* Applicant are in relation to the ASP license held by it and as such, any interconnection rate would have to be mutually agreed between the *ex parte* Applicant and the MNOs. Further, the proposed services being VoIP based services must be guided by the Guidelines for the Implementation and Provision of Voice over Internet Protocol (VoIP) Services which also require mutual agreement for termination rates.

3. Even if the *ex parte* Applicant was to provide the proposed services under the guise of its IGSS licence (and which to all intents and purposes it has not operationalised), the provision of the said services do not fall under services to be regulated by the Authority. In stating that the service is not regulated, the word *"regulated"* must be understood in the following context:

17. IGSS is regulated in the context of actual licensing, monitoring of compliance, sanctioning for non-compliance and enforcement. However, for purpose of setting of tariffs between IGSS licensees and NFP licensees such as the MNOs, it is not a regulated service as anticipated by the *Kenya Information and Communications (Tariff) Regulations, 2010.*

18. Similarly, *Determination No. 2 of 2010* neither prescribes the interconnection rates between MNOs and ASPs in respect of the *ex parte* Applicant's proposed services nor between international telecommunications operators e.g. a teleport company and MNOs for purposes of teleporting international traffic from Kenya to other jurisdictions, for none of these services qualifies as a regulated service for purposes of tariff regulation. Accordingly, the rates are mutually agreed to between the MNO and Teleports.

110. According to the Authority, in its decision dated 21st September 2015, it made the final

determination with the intention that the matter be resolved through interparty negotiations within a period of four weeks. The Authority further directed that the MNOs interconnect with the *ex parte* Applicant using non-discriminatory rates similar to those given to other ASPs offering similar services. However, instead of trying to reach an agreement as directed by the Authority, the *ex parte* Applicant filed the present Application. To the Authority, the jurisdiction of this Honourable Court in relation to the impugned decision of the Authority, can only be invoked upon a decision of the Authority after the Authority has been notified of the conclusion or otherwise of negotiations between the *ex parte* Applicant and the MNOs on an Interconnection Agreement following its directive contained in its decision of 21st September 2015. The Court was therefore urged to note that there has been no negotiation between the *ex parte* Applicant and MNOs has been conducted after the Authority's decision dated 21st September 2015 and therefore, the jurisdiction of this Honourable Court has been invoked prematurely owing to the fact that, no other decision was made by the Authority as a result of further negotiation between the *ex parte* Applicant and the MNOs. Accordingly, it was contended that these proceedings by the *ex parte* Applicant are not only bad in law but are premature.

111. It was averred by the Authority that the Authority is not responsible for development of policy since this is reserved for the relevant parent Ministry. In its view, ULF does not equate international services to national services and does not purport to regulate or bring international telecommunications operators into national regulation with regard to tariffs since such services are offered on a willing-buyer, willing-seller basis. It reiterated that the subject of the present Application is not the International Gateway Systems and Services Provider (IGSS) licence held by the *ex parte* Applicant as the *ex parte* Applicant has not operationalised the IGSS licence issued to it by the Authority to bring international traffic to Kenya. The *ex parte* Applicant is renting infrastructure and leasing bandwidth from Liquid Telecom Kenya Limited, which holds an IGSS licence to bring the said traffic to Nairobi, while on the other hand Liquid Telecom Kenya Limited is riding on the backbone of SEACOM to bring its international traffic from overseas to Kenya. Effectively therefore the *ex parte* Applicant has only operationalised its ASP licence to provide the proposed services it seeks to provide.

112. It was the Authority's case that IGSS is a licence and not a technology and that the licensed system comprises Satellite Earth Stations, Submarine Cable Landing Stations and/or Terrestrial Cross-Border Stations for the transmission of and reception of telecommunications traffic from (a) point(s) in the Republic of Kenya to points outside the Republic of Kenya. The licence requires that Switching/Routing and the Network Control/Operation Centre shall be situated in the Republic of Kenya. IGSS enables a licensee to not only develop and operate telecommunications infrastructure but also provide related services. According to it, in its capacity as the Telecommunications Sector Regulator, it issues licences to entities to provide telecommunications services under the specified terms and conditions of the various licences issued and that the context within which the Authority regulates telecommunications is as follows:

> (i). The Authority sets up the regulatory framework on licensing, monitoring and compliance and standards, and enforcement for any operator operating a communications system or providing any communications services within Kenya.
>
> (ii). On the other hand, while the Authority issues the IGSS licence to all the local IGSS providers, it has no jurisdiction over international players not based in Kenya in terms of setting their tariffs. It is for this reason that the Authority has no control over prices on international communications or the chain of business beyond the borders of Kenya. These must be commercially agreed among the service providers involved.

113. According to the Authority, the issue the subject of the present Application is not compliance but whether the service proposed to be offered by the *ex parte* Applicant under the IGSS licence falls for Regulation under *Determination No. 2 of 2010*since *Determination No. 2of 2010* regulates telecommunication traffic originating from and terminating in Kenya. While contending that it is a stranger to the allegation that the *ex parte* Applicant has an International Telecom licence from the Federal Communications Commission of the United States of America, it nevertheless contended that the said licence is not relevant or material to the dispute at hand and should be disregarded.

114. The Authority held the view that the Application of *Determination No. 2 of 2010* to tariffs between MNOs and the *ex parte* Applicant as sought by the *ex parte* Applicant would be discriminatory to other ASPs whose licence terms are similar to the terms of the *ex parte* Applicant's licence and have entered into negotiated interconnection agreements with the MNOs. While it admitted that Safaricom Limited, Airtel Networks Kenya Limited and Telkom Kenya Limited (hereinafter *"MNOs")* control a large percentage of the connected Kenyan population, it averred that the said MNOs have, and continue to, heavily invest in Systems and Services and network unlike the *ex parte* Applicant who would like to enter the market without a similar or equivalent investment thereby seeking to create a regulatory framework skewed in its favour. To the Authority, the *ex parte* Applicant has no customers of its own in Kenya and seeks to access customers of the three MNOs on preferential terms without incurring expenditure corresponding to the investment done by the MNOs. Therefore, by seeking the prayers set out in its Application, the *ex parte* Applicant is merely seeking the assistance of this Honourable Court to create a regulatory framework skewed in its favour.

115. The Authority asserted that no MNO has failed and/or refused to enter into interconnection Agreement with the *ex parte* Applicant. Further, the Authority has been supportive of the establishment of such Interconnection Agreements, and, while the MNOs are under a general obligation to interconnect, the terms and conditions thereof should be negotiated commercially and agreed upon since the tariffs set out in *Determination No. 2 of 2010* do not apply in the circumstances of this matter hence the MNOs are under no obligation to apply it in respect of the said service. To the Authority, the insistence on the application of *Determination No. 2 of 2010* therefore negates the *ex parte* Applicant's averments that the interconnection rates are a product of negotiation and agreement as there can be no meaningful negotiations where one party is insistent on a set of terms and is not willing to bulge. While not denying there is an obligation by the MNOs to accept all reasonable requests, it was averred that the terms thereof must be reasonable and as a result of negotiation and agreement.

116. According to the Authority, MNOs are ready and willing to negotiate and enter into Interconnection Agreements with the *ex parte* Applicant and the MNOs are within their rights to take time to consider proposals for interconnection Agreement proffered by the *ex parte* Applicant or any other. However, the MNOs are within their rights to negotiate terms, conditions and rates favourable and commercially viable to their businesses in which they have invested heavily. As variously stated hereinabove, the rates set out in *Determination No. 2 of 2010* are not applicable to the services sought to be provided by the *ex parte* Applicant and while the MNOs may, out of negotiation and agreement, accept the same or similar rates as those set out in *Determination No. 2 of 2010*, they are under no legal obligation whatsoever to apply the rates in *Determination No. 2 of 2010*. As such, not even the Authority can legally compel them to do so since it has no legal backing. Accordingly, an order of *mandamus* cannot issue to compel the Authority to apply *Determination No. 2 of 2010* since no law or legal instrument allows the Court to make such compulsion.

117. It was the Authority's case that since it has no power to regulate the *ex parte* Applicant's proposed market segment in relation to the setting of tariffs, it cannot impose on the MNOs the levies preferred by the *ex parte* Applicant. Any levies must be negotiated and agreed between the MNOs and the *ex parte* Applicant and the latter's insistence on the application of *Determination No. 2 of 2010* is an attempt by the *ex parte* Applicant to propagate its commercial interests and if the Authority were to accede to the *ex parte* Applicant's demands, it would be contrary to the provisions of Section 5Aof the ***Kenya Information and Communications (Amendment) Act, 2013*** which provides that the Authority shall be free of any control or commercial interests in the performance of its functions.

118. It was asserted that this Court has no jurisdiction to substitute the decision of the Authority with that of its own and this Honourable Court should decline that invitation by the *ex parte* Applicant to do so. Further, in effect the *ex parte* Applicant is asking the Court to make an agreement/contract between itself and the MNOs, and the Court ought not to do so especially where the law provides that the terms of such an agreement be by mutual agreement.

119. It was the Authority's case that it received complaints from the *ex parte* Applicant and that responded to them appropriately hence this Court should note the conduct of the *ex parte* Applicant

through the intransigence and the tone of its letters and emails. Further, the Authority encouraged negotiations between the MNOs and the *ex parte* Applicant but the same were not successful primarily because of the *ex parte* Applicant's insistence on its own inapplicable terms. It contended that Licence conditions have staggered timelines for compliance with all the licence terms is not always instantaneous in the telecommunications sector and that the annual compliance certificate issued to the *ex parte* Applicant was in respect of the specific formality requirements listed at the time. Further, the averments therein do not derogate from the fact that the *ex parte* Applicant has not operationalised it IGSS licence and as such, the averment that the *ex parte* Applicant has established the same is out rightly false. It was contended by merely having an agreement with Liquid Telecom Kenya Limited, it does not mean that the *ex parte* Applicant has operationalised its IGSS license. If that were the case, there would be no need for the IGSS licence category and it would mean that other ASP licensees with similar arrangements would by virtue of such arrangements be operating IGSS, and which would be absurd. It was averred that the relationship between the *ex parte* Applicant and Liquid Telecom Kenya Limited is not established by virtue of the *ex parte* Applicant holding an IGSS license.

120. It was the Authority's view that the orders sought against it do not lie, for the following reasons:

a. Certiorari. The practical effect of issuing this order would be to quash the decision of the Authority and will not by itself assist the *ex parte* Applicant to get interconnection with the MNOs. Accordingly, an order of *certiorari* will not force the parties to interconnect as this Honourable Court cannot substitute the Authority's decision for that of its own.

b. Mandamus. By issuing the said order, this Honourable Court will be substituting the Authority's decision with that of its own. Further, this Honourable Court cannot compel the application of *Determination No. 2 of 2010* in the dispute between the *ex parte* Applicant and the MNOs since there is no law or legal instrument mandating the Authority to set tariffs for international telecommunications services of any kind including that intended by the *ex parte* Applicant.

c. By seeking the prayers set out in its Application, the *ex parte* Applicant is merely seeking the assistance of this Court to create a regulatory framework skewed in its favour.

d. The Authority's decision dated 21st September 2015 is a sound decision and should not be interfered with by this Honourable Court.

121. In its submissions the Authority appreciated that the **Constitution of Kenya, 2010 (*"the Constitution")* recognizes the right to fair administrative action as a fundamental right under Article 47 of the Constitution and in line with the provisions of Article 261(1) of the Constitution on enactment of legislation governing particular matters provided for in the Constitution, Parliament enacted *the Fair Administrative Action Act, 2015 ("FAAA")* to give effect to Article 47 of the Constitution under which Part III provides that:**

> ***"The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted"***

122. It was submitted that the import of the foregoing is that judicial review being a remedy of last resort can only be commenced upon exhausting all other available remedies unless the party so applying for judicial review orders has been granted specific exemption from the requirement for exhaustion of other available remedies in terms of section 9(4) of the *FAAA*. It was submitted that the *ex parte* Applicant has not complied with this requirement of exhausting available remedy and neither has it demonstrated that it is exempted from such requirement by this Honourable Court. It was averred that the *ex parte* Applicant filed a complaint the subject matter of the *impugned* decision of the Respondent on the 17th June 2015. The said complaint was brought in accordance with Regulation 13(6) & (8) of the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010 ("*Interconnection Regulations").* The Respondent gave the impugned decision on the 21st September

2015 and part of the directions made by the Respondent in the impugned decision included:

> **a. a** directive that the 2nd, 3rd and 4th Interested Parties (*"the MNOs")interconnect* with the *ex parte* Applicant using non-discriminatory rates given to other ASPs who are offering similar services; and
>
> b. a directive that the *ex parte* Applicant and the MNOs must conclude the interconnection agreement negotiations within 4 weeks of the date of the decision, a mandate granted to the Respondent under regulation 5(8)(b) of the Interconnections Regulation.

123. Rather than engaging the MNOs in the mandated interconnection negotiations in terms of paragraph 13 and 14 of the *impugned* decision, the *ex parte* Applicant vide a letter dated 23rd September 2015 sought the intervention of the Cabinet Secretary in charge of ICT with a view to having the decision of the Respondent reversed. To the Authority, the determination by the Respondent was done within its regulatory mandate which is not undertaken under the direction of any other organization or person. It is in that respect that the concerned ministry noted that the issues raised by the *ex parte* Applicant are regulatory issues and rightly referred the same to the Respondent for resolution. Subsequently, the *ex parte* Applicant commenced the present proceedings on 21st October 2015 over 4 weeks after the directive by the Respondent requiring the parties to negotiate an interconnection agreement within 4 weeks of the impugned decision. The *ex parte* Applicant has not demonstrated to this Honourable Court that indeed it attempted within that period of 4 weeks to engage in negotiations as directed by the Respondent. It was therefore submitted that having not complied with the directives of the Respondent as the industry regulator before approaching this Honourable Court, these proceedings have been instituted prematurely.

124. This is more so apparent considering that part of the reliefs sought by the *ex parte* Applicant in Order 2 of the Application is an order of mandamus to compel the Respondent to direct the MNOs to enter into interconnection agreements with the *ex parte* Applicant. A directive that the Respondent has already given in paragraph 13 of the impugned decision. The Authority's position was that since it had within its mandate given, in the impugned decision, a directive for an interconnection agreement to be agreed upon by the MNOs and the *ex parte* Applicant within a specified time, an order quashing the said impugned decision will quash the said directive of interconnection. It was therefore contended that the *ex parte* Applicant cannot be seen to approbate and reprobate by seeking similar order as what has already been conferred by the Respondent in the impugned decision. In support of this position the Authority relied on Okiya Omtatah Okoiti vs. Communications Authority of Kenya & Others, Constitutional Petition 45 of 2016 and Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 2 Others, Constitutional Petition No. 359 of 2013.

125. It was submitted that the principle of exhaustion of alternative remedies has now been codified in the *FAAA*. Additionally, this Honourable Court has equally recognised that judicial review orders are a matter of discretion and is regarded as a remedy of last resort and reliance was sought from Attorney General vs. Inspector General Of Police & Another Exparte: Raphael Mungai Goko Nginya [2014] eKLR and John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003.

126. It was reiterated that the Respondent has given directions which directions have the effect of resulting in an interconnection agreement as sought by the *ex parte* Applicant and it has not been shown by the said *ex parte* Applicant that the directive of the Respondent is less *convenient or otherwise less appropriate* or even that the process initiated by the Respondent cannot offer a *more convenient, beneficial and effectual remedy*. To the Authority, in **International Centre for Policy and Conflict and 5 Others -vs- The Hon. Attorney-General & 4 Others [2013] eKLR** the Court recognized the need to let relevant statutory bodies deal with matter within their mandate fully before interfering in manner sought in these proceedings by holding that a Court of law:

> **"…must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to**

> **act in haste, it would be presuming bad faith or inability by that body to act...Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted…"**

127. It was submitted that the *ex parte* Applicant has, in not proceeding to follow the directive of the Respondent and reporting the outcome of the interconnection agreement negotiations to the Respondent as required, not exhausted the other alternative redress mechanisms in terms of section 9(2) of the ***FAAA***. Consequently, the jurisdiction of this Court has been invoked prematurely especially in light of the similarity of the orders sought by the *ex parte* Applicant and the directives of the Respondent. The Court was therefore urged to strike out the application with costs.

128. Based on **Republic vs. Kenya Revenue Authority** *Ex parte* **Yaya Towers Limited [2008] eKLR**, **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**and **Peninah Nadako Kiliswa vs. Independent Electoral & Boundaries Commission (IEBC) & 2 Others [2015] eKLR**, it was submitted that the *ex parte* Applicant is obliged to demonstrate that the impugned decision was illegal and/or irrational and/or procedurally improper which the applicant failed to do. Based on the Supreme Court decision in **Peninah Nadako Kiliswa** (supra) it was submitted that the Court relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300-301,**that:

> **"…illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.**

129. It was submitted that the *ex-parte* Applicant had not put into issue the jurisdiction of the Respondent to deal with the dispute and/or to render the impugned decision. According to the Authority, Regulation 22 of the interconnection regulations provides that all disputes arising over any provisions of interconnection regulations are to be resolved in accordance with the ***Kenya Information and Communications (Dispute Resolution) Regulations 2010*** ("*dispute resolution regulations"*). Under the said dispute resolution regulations the Respondent has the power to resolve disputes between a service provider and another service provider or any other persons as may be described under KICA (Regulation 3). It was submitted that in that regard, the Respondent demonstratively acted within its jurisdiction in rendering the impugned decision hence the Respondent's jurisdiction to consider the dispute placed before it and to make a decision thereon has not been impugned.

130. As to whether the Respondent has, in making of the impugned decision, acted contrary to the provisions of the law or its principles, it was submitted that the issue in dispute as enumerated in the present proceedings and eclipsed by the Respondent from the complaint and various communications with the *ex parte* Applicant was the applicable interconnection rate; the law and principles applicable and to which the Respondent deferred to was the KICA, interconnection regulations and the licenses issued by the Respondent; and the impugned decision was made on the basis of the above stated laws and principles. In making the impugned decision, the Respondent took into consideration the KICA; the Interconnection Regulations; the applicability of Determination Number 2 to traffic that is not generated and terminated within the Republic of Kenya; the provisions of the IGSS license condition in particular the requirements on operationalisation of the IGSS License which include the requirement for a holder of the license to construct, install and operate an International Electronic Communications System; the nature of services offered by the *ex parte* Applicant being Voice Over Internet Service and involved international Traffic and the License in use was the ASP license and the Applicable guidelines are the "*Guidelines for the Implementation and Provision of Voice Over Internet protocol (VOIP) Services" (VOIP guidelines");* and the ***Kenya Information and Communications (Tariff) Regulations, 2010***.

131. It was emphasised that what the *ex parte* Applicant, as submitted by itself and also as it emerged from its complaint, seeks is interconnection with the MNOs for the purposes of terminating international traffic. International Traffic refers to calls and/or SMSs originating outside the Republic of Kenya and terminating within the Republic of Kenya. On the other hand local traffic i.e. calls and SMSs originating

and terminating within the Republic of Kenya. Determination Number 2 which the *ex parte* Applicant sought to rely on, only applies to local traffic and not international traffic that the *ex parte* Applicant seeks to terminate on the MNOs networks. There is no law and/or regulation that grants the Respondent power to determinate and/or set the applicable termination rates for international traffic. More so as the Respondent has no regulatory mandate beyond the borders of Kenya and therefore cannot exercise an oversight function over the network originating the International traffic. Based on **Nyamu J'**s decision **Ex parte Marshalls (East Africa) Limited Misc Civil Application No. 757 of 2008**it was submitted that where it has not been demonstrated that there is a failure to perform any public or statutory duty an order of mandamus cannot issue. To the Authority, it took into consideration the relevant laws, provisions, regulations and policies in arriving at its decision and in that regard, acted legally and within its powers and the fact that the impugned decision did not yield the result sought by the *ex parte* Applicant does not become a ground for judicial review. The *ex parte* Applicant seeks to have the Court come to a different conclusion to what the Respondent have and such a course would amount to a merit review of the impugned decision. It was submitted that this Court has severally held that where what is sought is a substitution of the impugned decision then the same will be akin to the Court sitting in Appeal of the impugned decision contrary to the general principles guiding the grant of judicial review and reference was made to **Republic vs. National Transport & Safety Authority & 10 Others *Ex parte* James Maina Mugo [2015] eKLR** and **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR**, **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR for the position that** the complaints by the *ex parte* Applicant in the present proceedings being that the Respondent did not make the decision in terms of what it, the *ex parte* Applicant, wanted and/or demanded amounts to an invitation to this Court to conduct a merit review of the impugned decision. Further reliance was placed on **Bernard Murage vs. Fineserve Africa Limited & 3 Others [2015] eKLR** where the Learned Judge opined as follows:

> **"I must also state that the 3rd Respondent as the regulator of MNOs and MNVOS and the 4th Respondent as the regulator of mobile banking in Kenya are the best judges to determine the merits pertaining to the complaint made now by the Petitioner and not the Court. Parliament has set out the law and the power of formulating policy in respect to regulating communication and has conferred such power to the 3rdRespondent and mobile banking to the 4th Respondent and it would be wrong, in my view, for this Court to intervene as to the merits of the decision already made by the 3rd and 4th Respondents as the Regulators."**

132. It was submitted that as what the *ex parte* Applicant seeks is a merit review of the decision taken by the Respondent as part of its regulatory function, judicial review cannot issue. More so as the regulatory function of the communication industry is specifically assigned to the Respondent, the Respondent should be allowed the opportunity to undertake its function.

133. On irrationality it was submitted that according to ***Petition No. 24 of 2014,*** (supra) which adopted the holding in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300-301.**

> **"Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...."**

134. To the Authority, the test of irrationality applicable to the Respondent in the present proceedings is whether the impugned decision is *Wednesbury* unreasonable and the *locus classicus* for the Wednesbury test being **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation[1948] 1KB 223**, having already demonstrated hereinabove that the Respondent acted within its regulatory powers and took into consideration all relevant laws and principles in rendering its decision, the impugned decision is rational.

135. It submitted that the *ex parte* Applicant has not shown that the decision made by the Respondent was so absurd that no reasonable body could have made it, to justify a finding of unreasonableness on the part of the Respondent.

136. With respect to procedural impropriety, it was submitted that Article 47 of the Constitution of Kenya, 2010 on fair administrative action requires that before an action is taken against any party the said action must be exercised within reasonable advance notice, reasonable opportunity and the subject party being given a chance to be heard. This, according to the Authority, is what is referred to as the rules of natural justice and it is the constitutional backbone of rule on procedural impropriety. Similarly reliance was placed on ***Petition No. 24 of 2014***, *(Supra)* in adopting the holding in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300-301** that:

> **"Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere [to] and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision ..."**

137. In this case, it was contended that it is not in dispute a matter of fact that the impugned decision was taken by the Respondent after consideration of submission by all parties involved. Further, the procedure employed by the Respondent was in the terms laid down by both the interconnection regulations and the dispute regulations more particularly as follows:

a. The Respondent received the *ex parte* Applicant's complaint in writing in accordance with Regulation 4 of the dispute resolution regulations;

b. On receipt of the said complaint, the Respondent sent the said complaint to the persons complained against inviting them to respond in accordance with Regulation 5 of the dispute resolution regulations;

c. Additionally the Respondent heard all the parties in accordance with regulation 7 of the dispute resolution regulations; and

d. In line with said regulation, the Respondent rendered a decision giving reasons thereof.

138. It was therefore submitted that the *ex parte* Applicant had not demonstrated that the procedure laid down by the relevant law was breached by the Respondent. Neither has the *ex parte* Applicant demonstrated that the Respondent breached the rules of natural justice enumerated under Article 47 of the Constitution.

139. On the allegations of bias, it was submitted that the test of bias has already been settled and pronounced in prior matters before this Court and reliance was sought from **Kipkoech Kangongo & 62 Others vs. Board of Governors Sacho High School & 5 Others [2015] eKLR** where *the Court of Appeal upheld the test of bias as stated in* ***Attorney General of the Republic of Kenya vs. Prof Anyang' Nyong'o and Others (5/2007) [2007] EACJ 1*** *(6 February2007)* as follows:

> ***"…the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the [person sitting as a] judge did not (will not) apply his mind to the case impartially."***

140. It was submitted based on the dissenting opinion of **Gicheru, J** in ***Kimani vs. Kimani (1995-1998) 1 EA 134*** *that the ex parte Applicant is mandated to demonstrate that the Respondent has treated any other player in the same circumstances bearing the same license differently and/or has given such other player preferential treatment to show reasonability of its bias contention. To the Authority, it has to be noted*

that the email of 27th July 2015 is an internal report on the progress of the analysis of the complaint pointing out that the Respondent had sought legal advise on the application of the interconnection regulations to the interconnection sought by the ex parte Applicant and the intention of the Respondent to further analyse documents provided to it and further intention to hold meeting with all parties in order to find a final solutions. Accordingly, the ex parte Applicant's alleged proof of bias is unfounded as the Respondent as a sector regulator is mandated to consider all requests made to it and provide its opinion on the same and on the basis of the laws, regulations, principles and policy frameworks in place. It was its view that deliberations within the Respondent and reliance on legal advise do not amount to bias or create a reasonable apprehension of bias by a reasonable person and in this respect the Authority relied on ***Anyang' Nyong'o*** *case (supra) as cited with approval in* **Republic & 3 Others vs. Cabinet Secretary for Transport & Infrastructure & 5 Others Ex-Parte Kenya Country Bus Owners Association & 8 Others [2014] eKLR***to show that dissatisfaction with the outcome of case cannot justify the allegations of bias as held hereunder:*

> **"A reasonable man would not perceive that a Judge, whose conduct is under investigation, would risk conducting an unfair adjudication against the very authority investigating his conduct. A reasonable and informed person, knowing that the Judge sits in a panel of five Judges, trained and sworn to administer justice impartially, would not perceive that the Judge would skim to single-handedly deny the applicant a fair hearing or justice. A reasonable, informed and fair-minded member of the public, appreciating the subject matter and nature of the reference, would credit the Judge with sufficient intelligence not to indulge in futile animosity... While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour. The nature of the judicial function involves the performance of difficult and at time unpleasant tasks but judicial officer are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law". To this and they must resist all manner of pressure, regardless of where it comes from. This is the Constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself."**

141. In the foregoing regard, it was contended that the allegations of bias are unfounded and judicial review orders cannot be issued on the ground of bias.

142. As to whether there was breach of legitimate expectation, it was submitted that the cornerstone of legitimate expectation is unambiguous promise made to a party by a public body that it will act or not act in a certain manner. To the Authority, the law on legitimate expectation has been pronounced by this Court in **Coastal Bottlers Limited vs. Commissioner of Domestic Taxes [2008] eKLR** where the Court relied on **Lord Diplock**'s opinion in **Council of Civil Service Unions vs. Minister for Civil Service (1985) AC 375** *(page 406)* and stated that:

"If the decision made unreasonably departs from the publicly stated policy or customary practice or reneges on an earlier decision or undertaking thus confounding the Applicant's legitimate expectation from the decision maker, then it can also be argued that there has been a breach of the duty to act fairly. A legitimate expectation is said to arise "from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue…We also find that any ruling that violates any specific statutory provisions could not satisfy the requirement of the principle of legitimate expectation."

143. Further, in **Republic vs. Kenya Revenue Authority & Another Ex-Parte Krones LCS Centre East Africa Limited [2012] eKLR**, the court stated as follows:

> **"...Legitimate expectation can only operate inside and not outside the law. One can only rely on legitimate expectation when the law has been complied with.**

144. It was submitted that the foregoing principles on legitimate expectation have been summarized as follows by the Supreme Court in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR** at paragraph 269 for a party to found a claim on the basis of legitimate expectation:

i) there must be an express, clear and unambiguous promise given by a public authority;

ii) the expectation itself must be reasonable;

iii) the representation must be one which it was competent and lawful for the decision-maker to make; and

iv) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

145. In the present proceedings, the *ex parte* Applicant states in its Statement of Facts under paragraph 10.0(3) that the impugned decision breached its legitimate expectation that the Respondent would uphold its complaint. However, the *ex parte* applicant does not state when the Respondent gave it an assurance to uphold its complaint or to give it a pre-determined decision. Further, such an assurance would be outside the law and in breach not only the Constitutional provisions on fair hearing and but also on the dispute resolution framework formulated under the KICA and as overseen by the Respondent. *On the foregoing, it was submitted that that the treatment meted out to the ex parte Applicant was in accordance with the Rules applicable to other like industry players and the ex parte Applicant's expectation that it will be treated more favourably than like industry players cannot be termed legitimate at all. In this respect, the Authority cited* **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR** in which the Supreme Court at paragraph 293 of the agreed with the finding of **Musinga, JA** that massive investments cannot found a legitimate expectation as claimed by the *ex parte* Applicant herein.

146. On the delay in rendering the decision, it was submitted that the **time taken by the Respondent was within the stipulated timelines provided for in the interconnection Regulations. Therefore, the assertions that the Respondent took years to render a determination on the *ex parte* Applicant's complaint is unfortunately a misdirection and blatantly untrue. It was submitted that on the basis that judicial review is a discretionary remedy, it is required that the party seeking it should come to Court with clean hands and should ensure that facts as presented are at all times true or based on truth. Simply, the *ex parte* Applicant has lied and does not deserve the exercise of discretion in its favour.**

147. According to the Authority, based on the principles enunciated in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996the orders sought by the applicant re not merited.

148. On foreign authorities, it was submitted that foreign precedents hold persuasive value before this Court. However the question before a Court sitting in review is whether in making the impugned decision the Respondent would have relied on such foreign precedents. However, the mandate of the Respondent is as provided in the empowering provisions that is the KICA and the regulations thereto and therefore its decisions can only be made within the confines of that set mandate and reliance was placed on **Republic vs. Business Premises Rent Tribunal &Another & Exparte Davies Motor Corporation Limited [2013] eKLR** where the Court opined that bodies such as a Tribunal created by statute do not have powers beyond that assigned by parent statute. Thus, for the precedents relied by the *ex parte* Applicant to be applicable in the present proceedings the *ex parte* Applicant must demonstrate that indeed the mandate of the Respondent is the same as the one held by a foreign regulatory to found a reliance on such foreign regulatory body's actions.

149. It was however contended that the said foreign decisions on AT&T is used by the *ex parte* Applicant for the purposes of imploring the Court to come to a different conclusion from the Respondent's by adopting the alleged expansive interpretation given by the US Federal Court. To the Authority, such a

recourse cannot be had on review as it is a kin to asking the court to look at the merit of the decision rather than the procedure in coming up with the decision. The Authority however attempted to distinguish the said foreign decisions from the instant case.

150. On the authority of the Supreme Court decision in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR**, the Respondent urged the Court to find that the Application herein lacks merit and dismiss the same with costs to the Respondent.

1st Interested Party's Case

151`. On the part of the 1st Interested Party, **the Attorney General**, the following grounds of opposition were filed:

> **1. That the 1st Interested Party has wrongly been enjoined to the proceedings as no orders are sought against the Cabinet Secretary responsible for Information, Communications and technology and neither is the constitutionality of any of the sector's laws and regulations being challenged.**
>
> **2. That that application as drawn does not raise issues of public interest but rather those of a commercial nature which are beyond the scope of judicial review.**
>
> **3. That the application is an attempt to challenge the merits of the decision of the respondent and therefore an appeal disguised as a judicial review application.**
>
> **4. That the application offends the provisions of Rule 8(6) of the Kenya Information and Communications (Dispute Resolution) Regulations 2010 and accordingly should be dismissed with costs to the 1st Interested Party.**

2nd Interested Party's Case

152. The 2nd Interested Party herein, **Safaricom Limited**, similarly opposed the application. According to **Safaricom**, on 3rd July 2012, it received the initial proposal from the Applicant with respect to partnering in the Wholesale Carrier Business, in which proposal the Applicant requested **Safaricom** to consider partnering with it to allow for interconnection and termination of International Calls through **Safaricom's** network and to further purchase **Safaricom's** International traffic from Kenya at competitive prices. In support of this proposal, the Applicant supplied **Safaricom** with copies of its licenses issued by the Authority which licenses were the International Gateway Systems and Services Provider (IGSS) Licence, Application Service Provider (ASP) Licence, Network Facilities Provider (NFP) – Tier II Licence and Content Service Provider (CSP) Licence. According to **Safaricom,** each of these Licenses bears terms and conditions of operation from the regulating authority, the Communications Authority of Kenya.

153. According to **Safaricom,** the International Gateway Systems and Services Provider (IGSS) Licence is by definition a license for the construction, installation and operation of international gateway services and it allows the licensee to connect their customers to the rest of the world and *vice versa* by transmission and reception of telecommunications traffic from points in Kenya to points outside the Republic of Kenya vide the said international gateway systems. The licensed systems under the IGSS Licence as provided in Term 2 of the licence comprise of Satellite Earth Stations, Submarine Cable Landing Stations and/or Terrestrial Cross-Border Stations and the switching/routing and network control and operation centre should be situated in Kenya as per the conditions in the Licence. It was further averred that the licensed services under the IGSS Licence are international connectivity for voice, data and other applications provided by the Licensee under the NFP and ASP Licences and any other services provided that does not require a separate licence. However, the Application Service Provider (ASP) Licence is issued to allow the Licensed operator to provide electronic communications services which are normally provided at a fee and consist wholly of mainly in the conveyance of signals on electronic communications networks and include telecommunications and transmission services over electronic

communications networks including those used for broadcasting. The Network Facilities Provider (NFP) Licence, on the other hand allows the licensee to operate transmission systems, switching or routing systems and other resources which permit the conveyance of signals either by wire, by radio, by optical or by other electromagnetic means and under it, the systems may be used to establish satellite networks, terrestrial fixed and mobile networks. The Content Service Provider (NFP) Licence, it was allows the licensee to provide any content services provided the licensee has filed the details of the particular service to be provided and obtained approval from the Communications Authority and any other relevant government authority.

154. It was averred that the International Telecommunications Union (ITU) which is a specialised agency of the United Nations for Information and Communication Technologies (ICT's), has the role of *inter alia* allocating global radio spectrum, develop technical standards and ensuring that networks and technologies seamlessly interconnect worldwide, which it does through its membership of 193 countries. Further, the ITU sets standards and global policy on ICTs which it then allows its member states to customise dependent on their respective unique circumstances and also dependent on their respectively determined market structures. It was further averred that the ITU defines an international gateway as any facility through which electronic communications can be sent between the domestic networks of one country and another, with the gateways being established to provide links through either an international (submarine) cable system or to a Satellite through an earth station.

155. To **Safaricom**, the purpose of international gateways whether terrestrial or space based is to aggregate and distribute incoming and outgoing international voice and data traffic. It was therefore averred that the claimed definition of an international gateway by the Applicant is in fact misleading since it is not merely "any facility which provides an interface to send and receive electronic communications like voice, data or video" but rather it is comprised of established gateway systems through an international cable system or satellite within which resides the interface equipment to provide electronic communications. It averred that the Unified Licensing Framework set in place by the Respondent was intended to create technology and service neutral licenses and that the New Market Structure under the Unified Licensing Framework provided for six broad categories including *inter alia* Network Facilities Providers, International Network Facilities Providers and Non-Infrastructure Based Service Providers. It was contended that the IGSS license is categorised as an International Network Facility Provider, which allows the licensed entity to set up gateway systems and also offer electronic communications gateway services.

156. It was averred that the claim by the Applicant they have established licensed systems in order to offer the envisaged services is in fact misleading as it is really a switching facility for purposes of offering services under their ASP license and not intended for purposes of offering electronic communications gateway services. This would explain why the Applicant has connected its "licensed systems" to a licensed IGSS licensee and a Submarine Cable Landing Rights Licensee. To the **Safaricom**, the Applicant is in fact in breach of its IGSS license which required the Applicant to construct, install and operate International Electronic Communications Gateway Systems in order to provide International Electronic Communications Gateway Services, yet it is a requirement in all the licenses that interconnection shall be in accordance with the ***Kenya Information and Communications Act*** and ***Interconnection and Provision of Fixed Links, Access and Facilities Regulations, 2010***. Further, the ***Kenya Information and Communications (Tariff) Regulations 2010*** provides a framework for determination of tariffs and tariff structures and defines a regulated service as a service offered or supplied by a licensee in a market that is uncompetitive which uncompetitive market is itself defined by the same Regulations as a market in which consumer choice of service provider or service is either absent, limited, impeded, obstructed or constrained.

157. To **Safaricom**, the current IGSS market set-up is fully liberalised and fully competitive such that any applicant for an IGSS license is likely to be granted the said licenses subject to meeting the application criteria. Safaricom disclosed that as at 30th June 2014 there were 14 IGSS licensees in Kenya not including the Applicant, an indication of the fully competitive international gateway systems and services market.

158. To Safaricom, whereas the Respondent has the mandate to license and regulate international gateway systems and services, it does not have the mandate nor the jurisdiction to control the activities of the operators beyond the borders of Kenya under the IGSS Licence including most importantly the issues of pricing under the International Accounting Rate. The IGSS licenses are expected to enter into individual negotiated arrangements with service providers from outside Kenya in order to allow for the respective termination of international calls and data at competitive rates within their respective networks. However, due to technological development there are a number of alternative calling procedures that are designed either directly or indirectly to avoid the normal operation of international termination of calls and by extension the international accounting regime which ultimately results in a breach of national laws and regulations.

159. It was accordingly contended that the Respondent's decision against the Applicants complaint was in fact not reversal or a review of the Interconnection Determination No. 2 of 2010 because in fact it had nothing to do with the substance of the Applicant's Complaint. The said Determination was a review of the Network Cost (Process) Study which led to a decision on the mobile and fixed interconnection rates with a corresponding glide path. It was therefore a price cap on the interconnect rates between mobile and fixed operators and the Applicant's claims that the rates that were being offered by the 2nd Interested Party for purposes of conveying the Applicants local traffic to North America were not in keeping with the rates provided in the Respondents Interconnection Determination no.2 of 2010 were completely misguided and misapprehended as the said Determination of the Respondent had absolutely no bearing on international termination rates which are in fact the subject of negotiations between the 2nd Interested Party and its counterpart international licensees to terminate international calls/data. Suffice it to say that the market for the exchange of international traffic between international entities is highly competitive with the rates being determined also by the model of pricing adopted and the volume of minutes exchanged.

160. It was averred that the said Determination only took into account the cost elements of terminating local calls on the fixed and mobile network and that the claim by the Applicant that the Respondents Decision against the Applicants complaint was a ratification of restrictive trade practices by the 2nd Interested Party is unfounded because in fact the said decision ensured that there was maintained fair competition as per the Respondents mandate under section 84R of the ***Kenya Information and Communications Act***. The Respondent's very act of investigating the complaint made by the Applicant against the 2nd Interested Party was in keeping with a statutory obligation under section 84S and 84T to ensure that any complaint about anti-competitive conduct was investigated and resolved.

161. It was consequently contended that the claim by the Applicant that the Respondents Decision against the Applicants complaint unilaterally and unlawfully altered the licenses conditions and obligations of licensees in the telecommunications industry was deliberately false because section 82 of the ***Kenya Information and Communications Act*** provides a specific procedure for modification of licenses conditions which the said decision did not do. Whilst the ***Interconnection and Provision of Fixed Links, Access and Facilities Regulations, 2010*** under Regulation 4 places an obligation on interconnection licensee such as the 2nd Interested Party to negotiate the interconnection of its telecommunications system, facilities and equipment with the telecommunications system, facilities and equipment of the interconnecting licensee, in order to provide end-to-end connectivity and interoperability of services to all customers upon request by an Interconnection Licensee such as the Applicant, there exists conditions to mandate the interconnection process.

162. It was contended that the ***Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations 2010*** allows parties to negotiate and agree on interconnection agreements freely and only in the event of a disagreement would the dispute be referred to the Respondent. In its view, it considered the proposal by the Applicant for interconnection in accordance with the said Interconnection Regulations and assessed the quality of service, creditworthiness, worldwide network and coverage and cannibalization of existing traffic before making a decision. It considered that the Applicant is a licensed entity and had obtained the IGSS Licence in order to enable it to construct, install and operate international gateway systems and thereafter provide

aggregation and distribution of incoming and outgoing international voice and data traffic between its customers and international customers but had not complied with the conditions of the IGSS Licence under the Licence Term 2 to put in place either Satellite Earth Stations, Submarine Cable Landing Stations and/or Terrestrial Cross-Border Stations and the switching/routing and network control and operation centre within Kenya. According to **Safaricom**, it considered that currently, all the IGSS licensees provide international connectivity for their respective customers while allowing international customers to terminate calls on their network. It is not feasible, practical nor indeed is it best practice or even part of the envisaged Unified Licensing Framework market structure to require the 2nd Interested Party's to terminate on its network the international voice/data traffic of another IGSS licensee. According to it, licensees in the same jurisdiction can have a local interconnection agreement between themselves to terminate their respective network traffic but the same cannot be applied to aggregated international traffic of the respective licensees.

163. Safaricom disclosed that it already has in place mechanisms and agreements with international mobile operators outside Kenya to provide its customers with international call services and has no desire to enter any additional agreements which do not make business sense or provide value addition.

164. It was averred that the Respondent regulates the local interconnection charges to protect the interest of users of telecommunication services in Kenya with respect to the prices charges for and the quality and variety of services provided; to maintain and promote effective competition between telecommunication service providers in order to ensure efficiency and economy in the provision of the services; to promote research and development in relation to telecommunication services; to encourage private investment in the telecommunication sector; to promote the provision of international transit services by telecommunication services providers in Kenya and to enable telecommunication services providers or producers of telecommunication apparatus to compete effectively in the provision of such services and apparatus in Kenya. It averred that it already has in place international calling rates that have been approved by the Respondent. Having considered all the issues as averred above, the 2nd Interested Party, found that it was not in a position to enter into an International Interconnection Agreement with the Applicant and accordingly informed the Applicant of this position. However, following a directive from the Respondent after the Applicants complaint, **Safaricom** expressed willingness to enter into a Local Interconnection Agreement with the Applicant that Safaricom and the Applicant are at an advanced stage in the negotiation to execute a Local Interconnection Agreement.

165. In its submissions, **Safaricom** reiterated the foregoing and substantially submitted along the lines submitted by the Respondent. It prayed that the application be dismissed with costs.

3rd Interested Party's Case

166. The 3rd Interested Party, **Airtel Limited,** (hereinafter referred to as "Airtel"), opposed the application. According to Airtel, the application is an attempt by the Exparte Applicant to defeat the general doctrine of negotiation and consent before entering into business transactions. It was averred that the issues raised in the Notice of Motion are matters of a business transaction that ought to be negotiated between the parties and be guided by the matter of freedom to do business, to contract and proceed through requirements of supply and demand. In this case, it was contended that the dispute in question arose from the Exparte Applicant's unsuccessful request for international interconnection (namely, to interconnect the international gateways) of the Exparte Applicant and the Interested Parties. At the point when the Exparte Applicant approached the Court on 27th October 2015, the 3rd Interested Party and the Exparte Applicant were in the process of negotiations and the issue pending was the question of pricing for the services.

167. It was contended that the Exparte Applicant had requested for national interconnection with the 3rd Interested Party and the same was negotiated between the parties, prices and technicalities for the interconnection were agreed on and parties have since entered into a contract for national interconnection. It was therefore Airtel's position that if parties are to negotiate a contract for international interconnection, the same procedure would be followed. At the time when the Exparte Applicant made a

complaint to the regulator, which complaint was held to have no merit, the issue that the 3rd Interested Party and the Respondent had deadlocked on was the issue of pricing.

168. It was disclosed by Airtel that whereas it applies a Tariff of USD 0.20 international connection, the Ex parte Applicant on the other hand has always insisted on a rate of KES0.99, which is the equivalent of the national tariff recommended for local interconnection by the Respondent. The 3rd Respondent considers this request by the Exparte Applicant to apply the local rate for international services untenable because the rate of USD 0.20is the standard rate offered to all international and local carriers terminating International traffic on the third respondent's network and has required the Exparte Applicant to pay the requisite going rate in the market for the services, which the Exparte Applicant has declined. Therefore, for Airtel to offer the Ex parte applicant the rate of Kshs 0.99 per minute would amount to discrimination and will jeopardise the existing interconnect agreements with existing international and local carriers.

169. To Airtel, the regulator lacks jurisdiction to entertain any Application for international interconnection as regards the commercials and terms of interconnection because this Agreement will be performed in different territories around the world and therefore the matter ceases to be of a municipal nature. The Exparte Applicant is therefore misguided in bringing this current suit in this Court since this is not the proper forum. It was averred that this is a dire attempt to thwart the free will of the parties and even though Judicial Review remedies have been sought against the regulator, the regulator has no power whether under Municipal Law or International Law to force parties to enter into contracts they do not intend to enter into, more so, matters of International Law. Airtel maintained that the local interconnection tariffs are regulated under Addendum No. 3 to the Interconnection *Determination No. 2 of 2010*, and the regulatory authority making the said provision is the Communications Authority of Kenya. These determinations are made pursuant to the ***Kenya Information and Communications Act***, CAP 411A and the ***Kenya Information and Communications Regulations, 2010***. It was averred that under the ***Kenya Information and Communications Act***, the law appreciates the need to promote effective competition between persons who engage in commercial activities connected with telecommunication services in Kenya and to ensure efficiency in the provision of the said services. Further, the Respondent has the mandate of issuing licenses to operators within Kenya to enable the said operators conduct business in the industry within Kenya. It has been disclosed by the Respondent that the Exparte Applicant has failed to comply with the terms and conditions of its license for international gateways and therefore, as it were, incapable of entering into international interconnection in Kenya without breaching the terms and limits of its license. To Airtel, the allegations by the Exparte Applicant that the failure of the Respondent to force the Interested Parties to enter into international interconnection agreements is anti-competitive is untrue and unfounded. To the contrary, what would create anti-competitive behaviour is the Exparte Applicant asking to be granted rights and facilities on a silver platter.

170. It was contended that the ex parte applicant has not optimized the IGSS licence issued to it by the Regulator to bring international traffic in Kenya but is instead renting infrastructure and leasing bandwidth from Liquid telecom, a fact that the Exparte Applicant has also admitted. This is lacklustre conduct coming from a party who creates an impression to the court that it is ready, able and willing to provide services, save for failure by the Respondent to facilitate the same. This is therefore obviously untrue, for the Exparte Applicant of their own choice have failed to construct, install and operationalize International Gateway Systems which would enable it to comfortably negotiate on a commercial basis and offer the services for which it seeks interconnection.

171. It was contended that the Exparte Applicant has not optimized the IGSS licence issued to it by the Regulator to bring international traffic in Kenya but is instead renting infrastructure and leasing bandwidth from Liquid telecom, a fact that the Exparte Applicant has also admitted. This is lacklustre conduct coming from a party who creates an impression to the court that it is ready, able and willing to provide services, save for failure by the Respondent to facilitate the same.

172. This is therefore obviously untrue, for the Exparte Applicant of their own choice have failed to construct, install and operationalise International Gateway Systems which would enable it to comfortably negotiate on a commercial basis and offer the services for which it seeks interconnection. It was averred

that as it is now and in accordance with the License terms issued to it by the Respondent on 18th March 2013, even if the 3rd Interested Party were to successfully negotiate the International interconnection agreements with the Exparte Applicant, the Exparte Applicant would be incapable of carrying on operations without first creating systems required under the Agreement and seeking further incenses from the Respondent to offer the said services. Therefore such agreements would be in vain. It follows therefore that no intervention of this honourable Court will save the Exparte Applicant from their own lethargy or incapacity.

173. It was therefore contended that the Exparte Applicant is seeking from this Court orders incapable of being granted by this Court and the Court was urged to dismiss the Motion with costs.

174. Airtel's submissions were substantially similar to the submissions made on behalf of the Respondent.

The 4th Interested Party's Case

175. The 4th Interested Party, **Telkom Limited** (hereinafter referred to as "Telkom"), similarly opposed the application.

176. According to **Telkom**, the Ex-parte Applicant's case is hinged on the erroneous premise that the International connectivity service offered through the International Electronic Gateway System (IGS) is a regulated service for which there should be fixed tariffs imposed by the Respondent which should govern agreements between the Applicant and the three MNO's. To the contrary and as deposed to by the Respondent, the service sought to be offered by the Ex parte Applicant is not a regulated service within the meaning of the ***Kenya Information and Communications (Tariffs) Regulations, 2010*** and as such the Application herein is based on a misapprehension of the role of the Respondent in intervening in the parties' freedom to negotiate commercial contracts.

177. Based on legal advice, **Telkom** averred that under Section 2 of the ***Kenya Information and Communications (Tariffs) Regulations,2010***, a regulated service is a service offered or supplied by a licensee:-

> *a) in a market or market segment that is uncompetitive that is a market where there is no competition in the provision of service or in which consumer choice of service provider or service is either absent, limited, impeded, obstructed or constrained; or*
>
> *b) subject to price controls by the Commission on the basis that the provider of the service has been found to be dominant in the relevant market and the Commission has judged that the price control is appropriate, pursuant to both the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010 and regulation 4 of the Regulations.*

178. To **Telkom**, international connection is not regulated by the Respondent because calls run through different territories and different rates would be imposed by different countries and the Respondent does not have jurisdiction with regard any other territory other than Kenya. In this case, the ex- parte Applicant's proposal is to offer voice call and data services internationally with the termination point in Kenya which in essence this is a liberalized and fully competitive service in which the MNO's are at liberty to freely negotiate the terms of engagement with a contracting party such as the Applicant herein and the tariffs to be charged are determined on a case by case basis depending on the jurisdiction where the call originates hence the Respondent is not empowered under the Act to regulate this sector.

179. It was averred that the Ex-parte Applicant's complaint with the Respondent is that the rates for such international interconnection should be fixed as is the case with national rates pursuant to *Determination No. 2 of 2010* on Mobile Termination Rate (MTR) and Fixed Termination Rate (FTR). However, the Respondent in finding that it lacked jurisdiction to fix rates for international interconnection correctly determined that the service sought to be provided by the ex-parte Applicant was wholly unregulated and

rates had to be negotiated between operators. To Telkom, *Determination No. 2 of 2010* on Mobile Termination Rate (MTR) and Fixed Termination Rate (FTR) relates only to national connection (local voice traffic termination) and does not apply to international connections as sought by the Ex-parte Applicant. The rationale for the creation of fixed tariffs under the said Determination was to prevent unfair competition and consumer exploitation of local calls' retail prices and the report was based on findings involving a network cost study in Kenya involving the Three (3) MNO'S.

180. Telkom confirmed that at the moment, it has independently negotiated rates with international operators including Orange, KPN and Liquid Telkom and such rates are not regulated but vary depending on the territory originating the call and are negotiated with each operator separately hence the rates between the MNOs and the Ex-parte Applicant with regard to international connection should equally be commercially negotiated. The Ex-parte Applicant should therefore not claim preferential treatment with regard to this particular service.

181. It was therefore Telkom's case that the decision arrived by the Respondent cannot be faulted as unfair, irrational or unreasonable and that there is no basis to claim discrimination or bias on the part of the Ex-parte Applicant.

182. Telkom averred that the Respondent's decision that the applicant is not operating an IGSS facility notwithstanding that it had an IGSS licence was made after a physical inspection at the Ex-parte Applicant's sites which showed that the Ex-Parte Applicant did not have the necessary infrastructure to operate an IGSS facility. There is therefore nothing irrational in that holding as the Ex-parte Applicant has not demonstrated to the contrary. It was therefore Telkom's position that this Court cannot substitute the finding of the Respondent with its own in an application for judicial review as the Court can only fault the procedure and conduct by which the decision was arrived at. However, the Ex- parte Applicant has not demonstrated any breach of the process by the Respondent.

183. To Telkom, the Respondent's decision was arrived at judiciously for the following reasons:

1) A perusal of the impugned Respondent's decision shows that upon receiving the Applicant's Complaint, the Respondent gave opportunity to the Applicant through correspondence and meetings to be heard on its complaint;

2) The Respondent gave opportunity to the three MNO's to respond to the complaint;

3) The Respondent conducted a site inspection of the Ex parte Applicant's facility before making its findings.

4) All parties were given opportunity to be heard.

184. Telkom averred that in any event, the Ex-parte Applicant did not even attempt to negotiate with the MNO's including the 4th Interested Party as directed by the Respondent hence the available dispute resolution channels had not been exhausted before this motion was filed. To Telkom, the Respondent's direction to negotiate on interconnection rates is within legislated framework as appearing in the ***Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010*** [L.N. 30/2010]. Regulation 5 which provides as follows:-

1) An interconnect licensee shall provide interconnection information to an interconnecting licensee upon receipt of written request.

2) An interconnecting licensee's request for interconnection shall be given reasonable priority over customer orders of the interconnect licensee.

3) Parties to an interconnection agreement shall negotiate in good faith and reasonably endeavour to resolve disputes relating to the form and subject of an interconnection agreement that may arise

4) Parties to an interconnection agreement shall negotiate freely between themselves and each negotiating party shall not—

a) intentionally mislead the other party;

b) coerce the other party into making an agreement that it would not otherwise have made; or

c) intentionally delay or obstruct negotiations.

185. According to Telkom, the argument on public policy that the Ex-parte Applicant wishes to facilitate cheaper calls for Kenyans in the diaspora cannot hold for the reason that there is no mechanism to determine that only Kenyans in the diaspora (and to the exclusion of other callers) would originate calls using the Ex-parte Applicants service. It was therefore Telkom's position that the totality of the above is that the Ex-parte Applicant has failed to demonstrate that the Respondent breached any of its rights while making the decision challenged. Accordingly, the application lacks merit and ought to be dismissed.

Determinations

186. I have considered the issues raised in these proceedings. The substantial issues for determination in this matter are the role of the Authority with respect to application by a licensee for interconnection; whether the Authority carried out its mandate under the Constitution, the Statute and the relevant Regulations; and whether the decision of the Authority was in the circumstances justifiable.

187. In order to understand the issues in this application, it is important to revisit the various constitutional and legislative provisions relating to the dispute herein. Article 34(1) to (4) of the Constitution provides as follows:

(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not—

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

(3) are necessary to regulate the airwaves and other forms of signal distribution; and

(a) are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

188. The rationale for right to access information was explained by **Majanja, J** in **Nelson O Kadison vs. The Advocates Complaints & Another NBI HC Petition No. 549 of 2013** as follows:

> **"The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information."**

189. I also wish to defer to the decision of **Ngcobo, J** in **Steffans Conrad Brummer vs. Minister for Social Development & Others Constitutional Court of South Africa Case No. CCT 25/09** where the learned Judge expressed himself as follows:

> **"...section 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short period within which a person seeking information must launch litigation. The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."...Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. As the present case illustrates, Mr Brummer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public."**

190. In **Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others Nairobi HCCC (Civil Division) No. 513 of 2011** this Court pronounced itself as follows:

> **"Freedom of expression is one of the fundamental freedoms pertaining to the citizens as a human being. Freedom of the press is a special freedom within the scope of freedom of expression. The freedom of press is considered as the right to investigate and publish freely. It covers not only the right of the press to impart information of general interest or concern but also the right of the public to receive it. Freedom of expression and freedom to impart and disseminate opinions and ideas is a right recognised internationally and is protected not only by all democratic states but by International instruments as well. What constitutes freedom of expression, it is generally accepted, entails the freedom to hold opinions and to seek, receive and impart information and ideas of all kinds, either orally, in writing, in print, in the form of art, or through other chosen media, without interference by public authority and regardless of frontiers. This recognition underpins the important role played by the media in the development of a society. It is difficult to imagine a right more important to a democratic society than freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and put forward opinions about the functioning of public institutions. The vital importance of the concept cannot be over-emphasised. Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that very citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a**

choice, free and general discussion of public matters is absolutely essential. When men govern themselves it is they and no one else who must pass judgement upon unwisdom and unfairness and danger, and that means that unwise ideas must have a hearing as well as wise ones, fair as well as unfair, dangerous as well as safe. These conflicting views must be expressed, not because they are valid, because they are relevant. To be afraid of ideas, any idea, is to be unfit for self-government. Freedom of expression is recognised and protected by many international conventions and declarations as well as national Constitutions. The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable. Democracy is a fundamental constitutional value and principle in this Country. Kenya like many other countries in the world have chosen the path of democratic governance and hence the importance of the freedom of expression as being the cornerstone of every society that is democratically governed. Having chosen the path of democratic governance we have a duty to protect the rights regarding the free flow of information, free debate and open discussion of issues that concern the citizens of this country. In order to exercise these rights there must be an enabling regime for people to freely express their ideas and opinions as long as in enjoying these rights such people do not prejudice the rights and freedoms of others or public interest. As long as in expressing one's opinion even if it is false, the person doing so does not prejudice the rights and freedoms of others there would be no harm done. Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that they are in line with *Rousseau's* version of the Social Contract theory. In brief the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d'etre* of the State is to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity. Protection of the fundamental human rights therefore is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones. The Preamble to the Constitution, as already stated declares that the people of Kenya aspire for a government based on democracy and in fact the entire Constitution reflects a commitment by the people of Kenya to establish a free and democratic society. The breadth and importance of the right of free speech is inherent in the concept of a democratic and plurist society. Our 2010 Constitution has ushered into this country a new constitutional order whose one of the objectives is to build democracy. No society can build democracy and strong institutions to defend that democracy if there is no free flow of information even if some of that information is false. Democracy by its very nature comes at a price." See also***Obbo and Another vs. Attorney General [2004] 1 EA 265 (Scu).***

191. Therefore the right to impart, receive and exchange information is important in the facilitation of the other rights in the Bill of Rights and is an important tool in the realisation and actualisation of the democratic ideals espoused in the Constitution. Without such actualisation the democratic ideals would largely remain a mirage. To drive this point home Regulation 5 of the Interconnect Regulations provides that:

1) An interconnect licensee shall provide interconnection information to an interconnecting licensee upon receipt of written request.

2) An interconnecting licensee's request for interconnection shall be given reasonable priority over customer orders of the interconnect licensee.

3) Parties to an interconnection agreement shall negotiate in good faith and reasonably endeavour to resolve disputes relating to the form and subject of an interconnection agreement that may arise

4) Parties to an interconnection agreement shall negotiate freely between themselves and each negotiating party shall not—

a) intentionally mislead the other party;

b) coerce the other party into making an agreement that it would not otherwise have made; or

c) intentionally delay or obstruct negotiations.

192. It is in this respect that the law enjoins the State to facilitate the actualisation of such rights so that the same is not placed at the disposal of those whose only interests is the maximisation of profits in the advancement of their commercial interests. In this age and era, the players in the communications sector must realise that information sharing needs to be realised so as to ensure that the consumers thereof reap the maximum benefits accruing from the liberalisation of the sector in terms of maximum access to communication technology and affordability of the same.

193. In my view this is way in which section 5 of the ***Kenya Information and Communications Act*** ought to be understood. That section provides that the object and purpose for which the Authority is established, is to license and regulate postal information and communication services in accordance with the Act. That the Authority has wide powers is clearly spelt out in section 2 which provides that the Authority shall have all the powers necessary for the performance of its actions under that Act. Accordingly, the Authority is expected to take such actions as would ensure that communication services are regulated and in so acting section 5A(1) of the Act provides that the Authority be independent and free of control by the government, political or commercial interest in the exercise of its powers and in the performance of its functions. It is further required by section 5A(2) to be guided by the national values and the principles in Articles 10 and 232 of the Constitution. Article 232 requires the Respondent to be responsive, prompt, effective, impartial and equitable in provision of services to promote fair competition and merit as the basis of its provision of services.

194. The Authority therefore in making its decision must do so in a manner that is responsive to the parties concerned; such a decision must be prompt in the sense that it has to be made expeditiously; the decision itself must be an effective decision in the sense that it ought not to be merely academic but must be geared towards achieving the objectives for which the Authority is established. Further the decision must not be seen to favour particular persons or interests but must promote the principles of equity in the provision of services. In order to achieve the maximum benefit to the consumers of communication services the Authority is enjoined to promote fair competition and merit

195. It is therefore clear that the role of the Authority in the provision of communication services is not just that of a disinterested observer but it is expected to be actively involved in the process with a view to achieving its objects.

196. In order to facilitate the Authority in meeting its objectives under the Act, section 84(W) of the Act gives the Minister in charge of Telecommunications, power to make regulations with respect to access including Regulations of interconnection by licensees under the Act and their subscribers to each other's network. The said provision reads as follows:

Without prejudice to the generality of the foregoing, the Minister in consultation with the Commission may make regulations with respect to –

1. ***access including rules of inter connection by licensees under this Act and their subscribers to reach other's network.***

197. Pursuant to the said section, the ***Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010***, were made. Under the said regulations "Interconnection" is described as:

> ***"The physical and logical linking of telecommunication networks users by the same or different service licensees in order to allow the users of one licensee to communicate with users of the same or another licensee or to access services provided by another licensee".***

198. Regulation 3 thereof provides that:

> ***These Regulations shall apply to all interconnect licensees and interconnecting licensees, including the form and content of interconnection agreements, access and facilities.***

199. It is therefore clear that all interconnect licensees and interconnecting licensees are subject to the aforesaid rules in terms of form and content of interconnection agreements, access and facilities. In other words the agreements arrived at between the Parties can only valid if they conform to the Regulations. In other words, in arriving at interconnection agreements, the parties do not have a free hand in hammering out their terms which do not conform to the Regulations. In my view therefore, the Respondent cannot claim that certain interconnection agreements can be arrived at purely on the basis of the terms arrived at between the parties notwithstanding the provisions of the Regulations.

200. Regulation 4(1) proceeds to provide as follows:

> ***An interconnecting licensee shall, subject to compliance with the provisions of the Act and any guidelines on interconnection of telecommunications systems and services that the Commission may from time to time publish, have the right to choose its interconnection licensee to route its data traffic and calls towards customers of another licensee.***

201. What this provision provides in my view that that once an interconnecting licensee such as the ex parte applicant herein complies with the provisions of the Act and the guidelines on interconnection of telecommunications systems and services as published by the Commission, the interconnecting licensee is then entitled to choose its interconnection licensee to route its data and calls towards customers of another licensee. In other words, an interconnection licensee cannot bar such an interconnecting licensee from entering into an agreement to route its services through the systems put into place by the interconnecting licensee to the customers of other licensees.

202. Paragraph (2) of regulation 4 on the other hand provides that:

> ***Notwithstanding paragraph (1), an interconnecting licensee shall route its data traffic and calls towards international destinations through a licensee who has been licensed to provide the service.***

203. What this paragraph provides is that where an interconnecting licensee seeks to route its data traffic and calls towards international destinations, it can only do so through a licensee licensed to provide such service. In other words, in such event, the routing can only be done via a service provider licensed to route such data traffic and calls internationally. This position clearly appreciates that in such cases, the Authority may not have the legal authority to regulate such services due to jurisdictional issues.

204. Paragraph (3) of the same Regulation provides that:

> ***An interconnection licensee shall have the right and, when requested by an interconnecting licensee, an obligation, to negotiate the interconnection of its telecommunications system, facilities and equipment with the telecommunications system, facilities and equipment of the interconnecting licensee, in order to provide end-to-end connectivity and interoperability of services to all customers.***

205. What comes out from the foregoing is therefore that the interconnection licensee has no option when an interconnecting licensee requests the former to negotiate the interconnection of its telecommunications system, facilities and equipment with the telecommunications system, facilities and equipment of the interconnecting licensee, in order to provide end-to-end connectivity and interoperability of services to all customers. In such negotiations, paragraph (4) of the same Regulation states that:

> ***An interconnection licensee shall accept all reasonable requests for access to its telecommunications system at the network termination points offered to the majority of the interconnecting operators.***

206. In other words as long as the request for access to its telecommunications system is reasonable, the interconnection licensee is under a legal obligation to accept the same. In other words in such circumstances the issue of freedom of contract does not arise. However under paragraph (5) an interconnection licensee may be exempted from this obligation where an interconnection agreement is prohibited by law; or where the license issued to a licensee does not permit a licensee to offer the services for which the interconnection is requested; or where the requested interconnection is rendered impossible as a result of technical specifications; or where the interconnection would endanger the life or safety or result in injury of any person or harm to the interconnect licensee's property or hinder the quality of the services provided by the licensed service provider. The rider however is that the Authority is enjoined to publish any such exemption. It is however clear that the details of the agreement must be hammered between the parties as long as the terms remain within the confines of the law. Accordingly, Regulation 5(5) provides that that:

> ***"the terms and conditions for interconnection of telecommunications networks shall be based on the agreement reached between the parties to an interconnection agreement and promote increased access and efficient use of telecommunications systems, services and facilities".***

207. The terms must however be geared towards the achievement of the objective of interconnection since Regulation 5 (6) provides that;

> ***"All interconnection agreements shall facilitate end to end connectivity by ensuring that calls originated on the telecommunications system of an interconnecting operator can be terminated at any point on the telecommunications systems of any other telecommunications service provider on a non-discriminatory basis"***

208. In the process of arriving at the agreement, the parties are however subject to the supervision of the Authority since Regulation 5(8) empowers the Authority to:

> ***i. intervene in negotiations on agreements for interconnection where no agreement is reached between the negotiating parties within six weeks of the commencement of negotiations.***
>
> ***ii. set time limits within which negotiations on interconnection are to be completed, which time limits shall not exceed six weeks unless the Commission considers that a longer period is necessary.***

209. What then is the role of the Authority where an agreement has either been reached or not reached? Regulation 5(11)(a) and (b) reads as follows:

Where a telecommunications service licensee—

> ***(a) enters into an interconnection agreement with another telecommunications licensee, the Commission may review the agreement to ensure that it conforms with the Act, Regulations and any guidelines on interconnection of telecommunications networks issued by the Commission; or***
>
> ***(b) has not interconnected its facilities upon request by another licensee, the Commission shall***

require the licensee concerned to interconnect its facilities in order to protect essential public interests and may set the terms and conditions of the interconnection.

210. The above regulation emphasises the power of the Authority as a regulator to oversee agreements entered into between telecommunications licensees in order to ensure that they conform with the Act, Regulations and any guidelines on interconnection of telecommunications networks issued by the Commission. Where however the interconnection licensee does not act on the request of the interconnecting licensee as discussed hereinabove, the Authority is empowered to intervene and require the licensee concerned to interconnect its facilities in order to protect essential public interests and may set the terms and conditions of the interconnection. Therefore the first avenue is for the parties to negotiate their terms of interconnection and where an is agreement entered into it can review the same to determine whether the same conforms to the provisions. On the other hand where no negotiations are entered into as a result of a default on the part of the interconnection licensee, the Authority is empowered to direct the interconnection licensee to connect the same in the public interest. It is however clear that the negotiations are not open-ended. Regulation 11 gives the timeline for such negotiations as 6 weeks. However the Authority has the power to abridge the said period and where no agreement is forthcoming within the said period of six weeks it can intervene.

211. In arriving at the interconnecting charges, the Regulations prescribes a guideline and provides at Regulation 12(1) as follows:

All charges for interconnection services shall—

(a) be objective, independently verifiable and fair;

(b) be charged for each type of telecommunications service related to interconnection;

(c) not be designed to facilitate cross-subsidies by an interconnect provider of its network;

(d) be below the retail charges levied by the interconnect provider for the provision of any retail service that makes similar use of those network elements that are required by both the retail and interconnection service; and

(e) be sufficiently below retail service charges to allow for recovery of the incremental retail costs associated with provision of the retail service supported by the interconnection service that the interconnect service provider would have to incur in order to compete effectively with the interconnect provider at the retail level.

212. Under Regulation 5 above, the Authority is empowered to intervene and review the agreement entered into to ensure that Regulation 12 is complied with. This power is further reinforced by the interconnection procedures provided for under Regulation 13 which stipulates as follows:

(1) All requests by an interconnecting licensee for any form of interconnection shall be in writing and shall provide the interconnection licensee with information relating to—

1. The form of interconnection;

2. The date for the commencement of negotiations;

3. The approximated area the interconnection is required;

4. And an estimate of the capacity required.

(2) A copy of the request for interconnection in paragraph (1) shall be forwarded to the Commission by the requesting party within seven days of the request by the requesting party.

(3) The interconnect licensee shall inform the interconnecting operator in writing within fourteen days of receipt of the request for interconnection of its ability and willingness to supply the form of interconnection requested within the time frames requested by the interconnecting licensee and its ability to commence negotiations on the date requested.

(4) Where the parties do not agree on the date to commence negotiations, the Commission shall facilitate negotiations to an interconnection agreement on a date specified by the Commission.

(5) Where the Commission is of the view that parties to an interconnection agreement have taken longer than necessary to negotiate and conclude an interconnection agreement, and the proposed charges to an interconnection agreement are unreasonable and do not promote effective competition the Commission shall make a determination to be applicable during the time when negotiations are going on and the time within which negotiations on interconnection are to be completed.

(6) Where a party or any other person alleges that there has been a contravention or failure to comply with the provisions of the Act, Regulations and any guidelines on interconnection or an interconnection agreement, the Commission shall investigate and make a decision.

(7) Where the interconnect licensee has informed the interconnecting licensee that it is able to provide interconnection, it shall ensure that the system conditioning and provisioning procedures required to provide such interconnection are undertaken within the time required by the interconnecting licensee.

(8) Disputes that relate to the timely provision of interconnection or notice of planned changes shall be submitted to the Commission for determination.

213. It is therefore clear that in terms of procedural actions in respect of the interconnection, the Authority is given very wide powers to supervise, regulate and facilitate the interconnection agreements.

214. What provoked these proceedings was the Authority's decision dated 21st September, 2015 in which the Authority made the following determinations:

a. Despite having an IGSS License, the *Ex-parte* Applicant is not operating an IGSS facility.

b. There are only two ways in which an IGSS Licensee can deploy infrastructure to enable connectivity beyond borders. These include; satellite connectivity or terrestrial connectivity beyond Kenya's borders by means of a submarine cable which requires the provider to hold a submarine cable landing rights license.

c. The *Ex-parte* Applicant does not hold a submarine cable landing rights license and is not operating their own satellite facility for the provision of international connectivity.

d. The *Ex-parte* Applicant has not deployed its own infrastructure to the Kenyan borders for connectivity with neighbouring countries infrastructure at the borders. It is instead getting international gateway services through Liquid Telecom, who is connected to the existing SCLR Licensees.

e. In summary, the *Ex-parte* Applicant was operating a switching facility that can only be offered under its ASP Licence, and connection to the Internet through Liquid Telecom's arrangements with the Licensed Submarine Cable Operators. Therefore, their soft-phone service was designed to run as a VOIP service, which can ride on Liquid Telecom, Seacom and TEAMS infrastructure.

f. The current Mobile Termination Rate (MTR) and Fixed Termination Rate (FTR) were determined in 2010 after a detailed Network Cost Study done purely on the local voice and

SMS economic markets. The study at the time considered the market structure as it were and used network and financial specific information relevant to local traffic originating and terminating from and into MNOs networks.

g. The service that the *Ex-parte* Applicant is proposing to offer does not fall in the economic markets for which the current MTR and FTR were envisaged. As such those rates are not suitable for use as the basis for interconnect rates between GeoNet and the MNOs. The rates are only applicable to the local voice traffic termination.

h. IGS is not a regulated service in the context of KICA, 1998.

i. Clause 3.3 of the IGS License are not applicable to the *Ex-parte* Applicant's case.

j. The *Ex-parte* Applicant should seek interconnection with MNOs under its ASP License without insisting on MTR's and MNOs will be expected to Interconnect with it using non-discriminatory rates given to other ASPs who are offering similar services.

k. The Authority hereby gives the *Ex-parte* Applicant and MNOs not longer than four (4) weeks to conclude the interconnection agreement negotiations from the date of this letter (21st September 2015).

215. It is therefore clear that in so far as the applicant seeks an order **of mandamus to compel the Respondent to direct the MNOs to enter into interconnection agreements with the ex parte Applicant, the Respondent had in fact made the same decision. In fact a**ccording to the Applicant these proceedings are meant to compel the Authority to undertake its obligations under the Act and the Regulations thereunder.

216. It is clear these findings were mainly factual findings and it is contended that they were arrived after a physical inspection at the Ex-parte Applicant's sites which showed that the Ex-Parte Applicant did not have the necessary infrastructure to operate an IGSS facility. To this extent I associate myself with the decision in **Bernard Murage vs. Fineserve Africa Limited & 3 Others [2015] eKLR** where the Learned Judge opined as follows:

"I must also state that the 3rd Respondent as the regulator of MNOs and MNVOS and the 4th Respondent as the regulator of mobile banking in Kenya are the best judges to determine the merits pertaining to the complaint made now by the Petitioner and not the Court. Parliament has set out the law and the power of formulating policy in respect to regulating communication and has conferred such power to the 3rdRespondent and mobile banking to the 4th Respondent and it would be wrong, in my view, for this Court to intervene as to the merits of the decision already made by the 3rd and 4th Respondents as the Regulators."

217. These findings call to an examination of the role of a judicial review Court as opposed to an appellate Court. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR,** that:

"**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision**…**I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs.**

Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter..."

218. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

219. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

220. However, it is my view that the common law and practice by the High Court of England on judicial review still recognize and apply the conventional grounds for judicial review except within enlarged categories of intervention by the Court. In Kenya such expansion on a case to case basis is permitted by the Constitution as a way of ensuring a complete remedy is availed by the Court as a Court of law. Matters of fair trial and administrative action under Article 47 and 50 of the Constitution are proper grounds for judicial review and are a codification of what is generally known as principles of natural justice.

221. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

222. However, it is important to remember that Judicial Review is a special supervisory jurisdiction

which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

223. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

224. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282**, at P. 285.

225. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See **Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155**.

226. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

227. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective**

standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

228. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR,** that:

> "**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision**…**I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...**"

229. A similar position was adopted in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J**. quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** as follows;

> **"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates**."

230. However, in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** the Court of Appeal held at paras 55-58:

> **55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that**

consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act,* there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

231. In Kenya, Courts in handling such decisions in constitutional petitions have utilized the test of proportionality in addition to the traditional grounds of review. This position is the one prevailing in

England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532 where it was held that**: ***(1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.***

232. The Respondent is under statutory obligation to regulate communication. As a statutory body, it is enjoined to ensure that Kenyans enjoy communication services at the rates that are reasonable and cost effective. It is obliged to take steps to eradicate monopolistic and discriminatory practices in the sector which may hinder the smooth and efficient provision of communication services to the public. It cannot abdicate this role to other entities especially to players in the telecommunications sector. The Respondent's role is that of a referee and where dispute arises it must take steps to resolve the same in accordance with the law. It cannot leave it to the players themselves to decide for him what is the best decision to take. This is why the law empowers the respondent even on own motion to take steps to rectify missteps taken by the players in the telecommunications industry.

233. The law appreciates the crucial role that communication plays in all sectors of the society be it in the economic, social or political spheres hence the need to regulate the sector so as not to allow cartels to control the flow and receipt of information. This is in tandem with the constitutional rights to information that recognises the right to impart and receive information.

234. It is therefore my view that the Respondent is not permitted to state that it cannot take certain regulatory steps because there are no legal mechanisms in place in respect of certain existing communication services which a person has been licensed by the Respondent itself to provide. To do that in my view amounts to irrationality. Where there are no provisions in place to regulate certain services, it behoves the Respondent to put into place the necessary regulatory framework to ensure such services which if beneficial to the public are made use of by the public to their maximum benefit. To fail to do that amounts to the failure to adhere to the provisions of Article 129 of the Constitution under which executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

235. Therefore by telling the Applicant that despite being licensed to render telecommunication services by the Respondent, the Respondent is powerless when it comes to ensuring that the Applicants enjoy the benefits conferred by the said licences for which the Applicants have paid and continue to pay dues to the Respondent, the Respondent is guilty of the failure to undertake its constitutional and statutory obligations.

236. It was however the Authority's position that Mobile Termination Rate (MTR) and Fixed Termination Rate (FTR) were set out for and are in respect of National interconnection among the local Mobile and Fixed Network Operators hence the said *Determination No. 2 of 2010* is relevant only to local traffic originating from and terminating into the networks of the said Mobile and Fixed Network Operators in the Republic of Kenya.

237. It was averred that with regard to international telecommunications traffic, where the IGSS licence applies, in order to deliver an international call from Kenya to foreign countries say, like in Europe, an IGSS licensee in Kenya would negotiate with an international carrier (also known as a "*Teleport company*") licensed for that purpose in another country in any part of the world to receive its calls from Kenya and route them to the countries concerned in Europe. The choice of the carrier to be used is largely dependent on commercial considerations such as the rate for carriage and transmission for the international calls originating from Kenya, quality of service and experience etc. The negotiations therefore have to be commercially driven and negotiated given that there are many players who could be competing to receive and distribute the calls originating from and terminating in Kenya at competitive rates. The arrangements between a local IGSS and an international carrier are therefore not regulated by

telecommunication regulator in Kenya for the reasons that the International Carrier is not based in Kenya and therefore regulatory oversight by a Kenyan Authority cannot apply and that regulating who a local IGSS licensee would connect to and at what price would deny the local operators an opportunity to commercially negotiate and get a better deal that maximizes benefit for local subscribers with regard to international calls. It was therefore averred that it is impractical for the Authority to conduct Network Cost Studies for originating, carriage and termination of calls to and from all the countries in the world due to a host of reasons such as the cost for the project, access to relevant information among others, and as such, in the absence of such study, no termination rate can be scientifically arrived at. In my view this position cannot be termed irrational. In fact the applicant appreciated this position when it asserted that it had not requested the Respondent to regulate International calls originating (outbound) from Kenya as the Respondent has no jurisdiction power to do so and in fact only requested the Respondent to apply the regulatory powers on all telecommunication services within the Republic of Kenya donated to it by the Constitution, Statute and regulations fairly.

238. It was further averred by the Authority that Liquid Telecom Kenya Limited, holds an IGSS license and related infrastructure which it has operationalised and that in order to provide the above services, Liquid Telecom Kenya Limited has contracted the services of SEACOM (also an entity with a bearing on this matter though not a party), an undersea cable infrastructure provider company with an SCLR license from the Authority. The *ex parte* Applicant on its part, using its ASP license, has leased bandwidth from Liquid Telecom Kenya Limited and it is through this medium that it proposes to route/land international calls at its switching facilities based in Nairobi prior to interconnecting the same, if at all, to the MNOs. However, the collaborative and contractual arrangement between the *ex parte* Applicant, Liquid Telecom Kenya Limited and SEACOM does not in any way involve the use of the *ex parte* Applicant's IGSS license but is by virtue of the *ex parte* Applicant's ASP license and not its IGSS license as opposed to the collaborative and contractual arrangement between SEACOM and Liquid Telecom Kenya Limited which is by virtue of Liquid Telecom Kenya Limited's IGSS license and not the IGSS license held by the *ex parte* Applicant. It was therefore contended that to all intents and purposes, the *ex parte* Applicant has not operationalised the use of its IGSS license for the Systems component and at no time relevant to these proceedings has it constructed, installed, and/or operated its IGSS system and/or provided services relevant thereto hence it cannot seek to enforce the terms of a licence it has not operationalised or is not utilizing for the services it proposes to provide which in any event it is able to deliver without the need for an IGSS licence. Again I cannot in these proceedings find fault with the reasoning of the Authority in this respect.

239. It is however, when it contends that it is helpless in regulating the terms of engagement between the Applicant and the MNO's that I depart ways with it. According to the Authority, it vigilantly took all steps to facilitate a mutual agreement between the *ex parte* Applicant and MNOs in relation to the proposed interconnection and that the sole reason why the interconnection between *ex parte* Applicant and the MNO's could not materialize is attributable to the *ex parte* Applicant's insistence of the application of the interconnection rates contained in *Determination No. 2 of 2010*, which, in the Authority's view, is not applicable. The first ground for the inapplicability of the said *Determination No. 2 of 2010* was that the rates therein cannot and do not apply to the proposed services to be provided by the *ex parte* Applicant firstly as the Network Cost Studies of 2006 and 2009 were solely based on a study of the infrastructure and services offered by the MNOs pursuant to the various licences they held at the respective study periods and to this end, it is important to note that the MNOs have deployed the infrastructure. In my view this ground clearly falls foul of the objective of interconnection as discussed hereinabove. The mere fact that the MNOs deployed infrastructure cannot be the basis upon which the Authority cannot prescribed a fresh determination to take into as it properly appreciates, "*market developments in the communications industry including the entry of new operators, the introduction of the ULF, the landing of three undersea cables and the rollout of a terrestrial cable network, and the exponential growth in both subscriber numbers as well as call and data volumes.*" Whereas it may not control the arrangements between the ex parte applicant and International Carriers, it is under an obligation to regulate the arrangements between the interconnect licensees and interconnecting licensees. In this case, the Authority cannot in light of the express statutory and regulatory provisions abdicate its role of regulating the terms of engagement between the Applicant and the MNOs.

240. It is on this basis that I similarly fault the position adopted by the Authority that since the international services proposed to be provided by the *ex parte* Applicant are in relation to the ASP license held by it, any interconnection rate would have to be mutually agreed between the *ex parte* Applicant and the MNOs and that the proposed services being VoIP based services must be guided by the Guidelines for the Implementation and Provision of Voice over Internet Protocol (VoIP) Services which also require mutual agreement for termination rates. To accept this position would be to render regulation 3 of the ***Kenya Information and Information Act*** which provide that the regulations *"shall apply to all interconnect licensees and interconnecting licensees including the form and content of interconnection agreements, access and facilities***"** inoperative. That Regulation does not exclude any interconnection agreements between interconnect licensees and interconnecting licensees in terms of their form or content from the ambit of the Interconnection Regulations. It is therefore my view that it is erroneous for the Authority to arrive at a decision that certain arrangement between the interconnect licensees and the interconnecting licensees are the preserve of the contracting parties. To do so would amount to opening up the telecommunications sector to dominance by commercial cartels to the prejudice of the public for whose benefit I am of the view the Act and the Regulations were promulgated.

241. It was further contended that even if the *ex parte* Applicant was to provide the proposed services under the guise of its IGSS licence, the provision of the said services do not fall under services to be regulated by the Authority and that the word *"regulated"* must be understood in the context of it being actual licensing, monitoring of compliance, sanctioning for non-compliance and enforcement. However, for purpose of setting of tariffs between IGSS licensees and NFP licensees such as the MNOs, it is not a regulated service as anticipated by the *Kenya Information and Communications (Tariff) Regulations, 2010.* That calls into the issue of who is supposed to put into motion the process by which such undoubtedly useful services to the public ought to be regulated. Section 84 (W) of the Act gives the Minister in charge of Telecommunications, power to make regulations with respect to access including Regulations of interconnection by licensees under the Act and their subscribers to each other's network. However the section is very clear that such power is to be exercised in consultation with the Authority. Accordingly, the Authority cannot just sit back and abdicate from its obligations on the ground that the necessary regulations are not in place to enable it undertake its statutory obligations Authority. To do so would amount to a violation of Article 232(1)(c) of the Constitution under which the values and principles of public service include responsive, prompt, effective, impartial and equitable provision of services.

242. Accordingly, I disabuse the Authority from the notion that *Determination No. 2 of 2010* does not prescribe the interconnection rates between MNOs and ASPs in respect of the *ex parte* Applicant's proposed services as a reason not to carry out its mandate.

243. It is however clear from the Authority's impugned decision of 21st September 2015 that it directed that the matter be resolved through interparty negotiations within a period of four weeks and further directed that the MNOs interconnect with the *ex parte* Applicant using non-discriminatory rates similar to those given to other ASPs offering similar services. Instead of that route being followed to its conclusion, the *ex parte* Applicant filed the present Application. I agree with the position taken by the Authority that in light of the said decision, the jurisdiction of this Honourable Court in relation to the impugned decision of the Authority, can only be invoked upon a decision of the Authority after the Authority has been notified of the conclusion or otherwise of negotiations between the *ex parte* Applicant and the MNOs on an Interconnection Agreement. It is clear that there has been no negotiation between the *ex parte* Applicant and MNOs and this Court cannot speculate as to what would have been the outcome of the said negotiations. In fact according to the 2nd Interested Party, **Safaricom**, following a directive from the Respondent after the Applicants complaint, the 2nd Interested Party expressed willingness to enter into a Local Interconnection Agreement with the Applicant and that the 2nd Interested Party and the Applicant are at an advanced stage in the negotiation to execute a Local Interconnection Agreement.

244. In **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** the Court held that availability of other remedies can be an important factor in exercising the discretion whether or not to grant the relief. In **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980**

the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order. The rationale for this position was stated by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

245. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

246. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. This requirement is even more stringent in applications for orders of mandamus. In the English case of **R (Regina)vs. Dudsheath**, ex parte**, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

> ***"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "***

247. In the case of **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194,** in which **Chesoni, J** (as he then was) stated:

> **"Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial**

department with the executive arm of the government…All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist."

248. In considering whether the alternative remedy or the pending remedy ought to be resorted to, the determinant factor is whether that other remedy is less convenient, beneficial, effectual or less appropriate. In Ex parte **Waldron [1986] 1QB 824 at 825G-825H,Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly. This was in fact the position adopted by this Court in **Bernard Murage –v- Fine Serve Africa Ltd & Others, Petition No. 503 of 2014**, which the applicant relied on and in which the Court expressed itself as follows:

"I entirely agree and confronted with a question as to which remedy a litigant ought to seek, *a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance*. In that regard, the Petitioner has filed this Petition pursuant to the provisions of Articles 22, 23 and 165(3) (b) of the Constitution which grants every person the right to institute Court proceedings claiming that a right or fundamental freedom has been violated or is threatened with an infringement. That right, to access this Court, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in Belfonte (supra)."

249. What are these circumstances in ***Belfonte***? Those circumstances were set out by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** where the Court held:

"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship's words:

> **"*Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process*. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights".** [Emphasis added].

250. Accordingly, confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance.

251. This position has now acquired statutory underpinning by the enactment of the ***Fair Administrative Action Act***, No. 4 of 2015 which is an Act of Parliament enacted pursuant to Article 47 of the Constitution. Section 9(2), (3) and (4) thereof provides:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

252. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case the applicants have not shown why the Court ought to exempt them from the remedy provided under the law. None has been alluded to in this case.

253. It ought to be appreciated that:

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders." See ***Halsbury's Laws of England*** **4thEdn. Vol. 1(1) para 12 page 270.**

<u>Finding</u>

254. Having considered the parties' cases as presented in these proceedings I make the following findings:

1). The Respondent has clearly adopted an ambivalent position with respect to its obligations under the ***Kenya Information Communications Act*** and the Regulations made thereunder.

2) The 2nd to 4th Interested Parties, the MNOs herein seemed to have taken unnecessarily too long in responding to the Applicant's request for interconnection.

3) The Applicant ought to have complied with the Respondent's direction that the *Ex-parte* Applicant and MNOs do conclude the interconnection agreement negotiations within a period of not longer than four (4) weeks from the date of the decision of 21st September 2015.

4) It is my view that the ex parte applicant and the MNOs, the 2nd to the 4th Interested Parties herein ought to comply with the directions of the Respondent first before invoking this Court's supervisory jurisdiction.

Order

255. Consequently, the Notice of Motion dated 26th October, 2015 fails and is dismissed but with no order as to costs.

Dated at Nairobi this day 19th September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kurgat and Miss Kamau for the Applicant

Miss Okimaru for the Respondent

Mr Kiptinness and Miss Mweu for the 2nd Interested Party

Miss Leli for Mr Gikera for the 3rd Interested Party

Miss Mweu for Mr Munyu for the 4th Interested Party

Miss Kouna for the 5th Interested Party

Cc Mwangi