REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 281 OF 2011

INTERACTIVE GAMING & LOTTERS LIMITED …..... PLAINTIFF

VERSUS

FLINT EAST AFRICA LIMITED ..... 1ST DEFENDANT

AIRTEL NETWORKS KENYA LIMITED ..... 2ND DEFENDANT

R U L I N G

1. This matter comes before the Court on a Notice of Motion under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules 2010 issued on 16th October 2014 and seeking the following Orders:

"i) THAT the amount of Kshs. 12,518,270.24 held by the 2nd Defendant be distributed between the Plaintiff and 1st Defendant in terms of the Judgment in HCCC No. 115 of 2011 delivered on 30th April 2014.

ii) THAT each party to bear it's own costs of the suit.

The Application is supported by the Affidavit of Mr. Adil Bashir.

2. This suit was stayed pending the outcome of Suit No. 115 of 2011. Despite the similarity in subject matter, the present suit was not consolidated with Suit No. 115 of 2011. There are two other associated and connected Suits Nos. 313/2011 and Judicial Review Case No. 370/2011.

3. The Notice of Motion sets out in its Grounds, inter alia, that the same issues arise between the same parties ie. the Plaintiff and the First Defendant that were the subject of, and determined by, Civil suit No. 115 of 2011, following a trial on the merits before Hon. Mr. Justice Odunga. That Judgment was delivered on 30th April 2014.

4. Although neither the Notice of Motion nor the Affidavit expressly mention the doctrine of res judicata, consideration of the applicable principles go to the heart of this Application. Section 6 of the Civil Procedure Act CAP 21 provides:

"6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim,

litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Section 7 provides:

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been, and has been heard and finally decided by such Court".

5. In addition, paragraph 3 of the Supporting Affidavit sets out that in Civil Suit 115/2011 on 20th February 2014 the Court gave directions, inter alia, that:

   "The proceedings in HCCC No. 313 of 2011 between Interactive Gaming & Lotteries Ltd vs. Flint East Africa Limited & Another; HCCC No. 161 of 2011 between Flint East Africa vs. Safaricom Limited and HCCC No. 281 of 2011 between Interactive Gaming & Lotteries Limited vs. Flint East Africa Limited shall be and are hereby stayed pending the hearing and determination of this suit and/or further orders".

6. Those Directions were necessitated by the fact there were four matters pending before various courts of this Division, i.e. **Suit, HCCC NO. 313 OF 2011 between Interactive Gaming & Lotteries Ltd vs. Flint East Africa Limited & Another; HCCC NO. 161 OF 2011 between Flint East Africa vs. Safaricom Limited and HCCC NO. 281 OF 2011 between Interactive Gaming & Lotteries Limited vs. Flint East Africa Limited** which have common features in respect of the Parties involved and/or with the licences and/or contractual arrangements under consideration and in particular in respect to the issues in dispute. In order to avoid delivering conflicting decisions in matters where the issues may in the end be similar or the same, the Court deemed it fit to give appropriate directions on the manner in which they were to be determined.

7. The Parties also refer the Court to Civil Suit No. 115/2011 as a "test case" suggesting that the findings and rulings therein will impact upon the other two matters, namely HCCC No. 313/2014 and 281/2011. That arrangement has been reached through an element of consensus. That suggests an acceptance that the issues in dispute are similar at the very least.

8. Mr. Nganga appears for the Plaintiff/Applicant, Interactive Gaming & Lotteries Ltd, Mr. Kabugu appears for the First Defendant Flint East Africa Limited and Mr. Ogunde appears for the Second Defendant/Interpleader, Airtel Networks Kenya Ltd.

9. The Plaintiff and the First Defendant's Counsel both adopt their submissions in HCCC No. 313/2011. The position of the Interpleader is that they have no claims in the main suit and have no opinion on whether the matter is res judicata. Their only interest is costs. The Interpleader asks to be duly authorised to make payment as relevant. Mr. Ogunde did not distinguish in his submission between the costs of this litigation and the costs and expenses within the contractual arrangement.

10. There is also the issue of interest on the funds held which seems to have been dealt with in the Judgment of Odunga J. where he directs that the interest be apportioned in the ratios decided. Mr. Ogunde informs the Court that the Interested Party is not claiming the Interest, but the First Defendant is claiming the interest.

11. However, it was submitted that this matter is different from the test case (115/2011) because in 115/2011 the funds were held by Safaricom and in 313/2011 and 281/2011 the funds are in an interest bearing account in Diamond Trust Bank with a call date and roll over therefore there is interest to account for since 2011.

12. Mr. Kabugu invites the court to wait until after the res judicata issue has been decided upon before proceeding with the Notice of Motion.

13. The Parties agreed that the Court could deliver a combined ruling for both matters (313/2011 and 281/2011), but the Interpleaders wish for their issues to be dealt with separately within such single Ruling.

14. I have read through the Judgment of Hon. Mr. Justice Odunga in HCCC No. 115 of 2011 and the rationale for the apportionment. He has ordered:

"1. That the Plaintiff is entitled to Kshs. 139,132,851.94 less costs and charges due to Safaricom.

2. That from the net proceeds, Flint is entitled to Kshs. 2/= per SMS of Kshs. 50/=.

3. That the interests accrued as a result of the sum having been deposited is to be apportioned on a pro rata basis.

4. The parties to appear before the Deputy Registrar of the Commercial Division of this Court for the determination of the actual figures due to each party.

5. Liberty to apply granted.

6. Apart from the costs due to Safaricom each party shall bear own costs of these proceedings.

7. That the order staying related suits is hereby vacated. For avoidance of doubt since this suit was not consolidated with the said matters, this court cannot purport to determine the said suits in this case and the parties are left to take appropriate steps in light of the decision arrived at herein".

15. The principal ground on which the Plaintiff relies in support of its Application is that the substantive issue for determination between the two suits is substantially the same.

16. These proceedings had been stayed by an order in ***HCCC No. 115 of 2011*** on 20th February 2012 that stay was only lifted on the giving of Judgment on 30th April 2014. The terms were are as set out in paragraph 14 above.

17. In ***HCCC No. 115 of 2011*** the learned Judge heard oral evidence on behalf of the Parties.

18. When the trial Judge ordered a stay, he formed the view that the *"four matters pending which have common features either in respect of the parties involved and/or with respect to the issues in dispute. In order to avoid delivering conflicting decisions in matters where the issues may in the end be similar, the court deemed it fit to give appropriate directions on the manner in which the same are to be determined"*.

19. The main differences between ***HCCC No. 115 of 2011*** and this matter is that in that case the network used was provided by Safaricom Ltd. and in this case it was provided by Airtel Networks. Secondly, that the sums are held in an Interest bearing account with Diamond Trust Bank in this matter.

20. The Issues that appear similar between both suits are, inter alia:

1. Whether there was an agency agreement;
2. Whether the Plaintiff authorised the 1st Defendant to use the short code platform on its own

behalf;

3. Whether the Second Plaintiff holds the sums collected/ revenue generated on behalf of the Plaintiff or the First Defendant;
4. Was the Lottery carried out under Public Lottery No. 1052 issued on 27th September 2010 by the Betting Control & Licencing Board to the Plaintiff?
5. Did the Plaintiff pay any sums to the First Defendant in relation to obtaining a Bank guarantee, and if so, is the Plaintiff entitled to reimbursement of these funds following termination of the Lottery?

21. In addition, the basis of the Claim, the Memorandum of Understanding dated 7th December 2010 between the First Defendant and the Plaintiff is the contract that was also considered by the Learned Judge within Civil Suit No. 115/2011 to ascertain the rights and duties of the Parties hereto and arises for consideration here.

22. The amount said to be in dispute in this matter is said to be Kshs. 12,518,270.24 as set out in the Second Defendant's Notice of Motion dated 10th August 2011 as well as the Affidavit of Ivy Ngana of the same date. No doubt, the amount has increased over the last three years due to the accrual of interest. I have not seen an upto date statement of account as none seems to have been filed.

23. In its Notice of Motion dated 11th December 2011 the Defendant states at paragraph (1) of the Grounds, that:

"The Plaintiff has a similar case against the First Defendant to wit HCCC No. 115 of 2011 and the result of this case may have an impact on the said other case".

24. This matter deals with Licence No. TL/CSP/00196 granted to Defendant by the Communication Commission of Kenya. Flint East Africa Limited had the 6969 Short Code from Airtel rather than Safaricom.

25. It seems to me that those issues set out above are identical to both proceedings (Civil Suit No. 115 and 281 of 2011) and therefore fall within the remit of res judicata. The learned Judge has heard the evidence of the parties and determined those Issues. As stated above the doctrine of Res Judicata is set out in Section 6 of the Civil Procedure Act (CAP 21) and provides.

"6. No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantial in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claim.

Section 7 provides:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been, and has been heard and finally decided by such Court".

26. Although, it is clear that the Parties within Civil Suit No. 115 of 2011 and Civil Suit No. 281 of 2011 are only different or distinguishable to the extent that the mobile providers was Safaricom Ltd. in one and Airtel Networks Ltd in the other, the issues and the underlying facts between the Plaintiff and the First Defendant are the same.

27. Having decided the question of res judicata, I must also consider whether it is in the interests of

justice to have a second trial on the same issues. Aside from the stated risk that one court may come to a different decision from another, an outcome which I think is unlikely given the documents and recorded evidence in the proceedings there are considerations of the proper and appropriate administration of justice to consider.

28. I look first at the Oxygen principle in other words, the overriding objective as set out in Sections 1A and 1B of the Civil Procedure Act (Cap 21 of the Laws of Kenya).

"1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:

a. **the just determination of the proceedings;**

b. **the efficient disposal of the business of the Court.**

c. **The efficient use of the available judicial and administrative resources;**

d. **The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**

e. **The use of suitable technology".**

29. Although the Interpleaders are different, they don't in fact claim any position within the dispute and simply hold the funds to the Order of the Court and/or the Party found entitled to some or all of those funds pursuant to the Agreements and licences.

30. Furthermore, the Parties having taken clear and strong positions with 115/2011are estopped from raising a difference case see – **Section 120 of the Civil Evidence Act**.

"120. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

31. The Second Defendant in these proceedings is not the same provider as in Civil Suit No. 115/2011 but as the issues in dispute are identical, I find therefore, the Judgment in Civil Suit No. 115/2011 applies Mutatis Mutandis and in addition applying the oxygen principles I find it is in the interests of justice and the proper administration of justice that the same issues is not repeatedly re-litigated. I have neither been directed to, no garnered any reason why there should be an additional trial of those issues.

32. For these reasons I allow the Application and adopt order made in so far as it relates to this case and in particular in relation to:

1. The apportionment of the funds.

2. Interest; and
3. Costs.

It follows that, the principal sum is and should be paid to the Parties in the proportions decided in Civil Suit No. 115/2011. In Order words as set out in that order (see paragraph 14 above).

33. In relation to interest, as the ownership must inevitably be consistent with ownership of the principal sum. I direct that it be shared in accordance with the ratio decided by the Hon. Mr. Justice Odunga.

34. In relation to costs, applying the principal that costs follow the event and also taking into account the First Defendant's persistence in not conceding the issues that have already been litigated between April 2014 and October 2014, I consider it responsible for the additional costs incurred by the other Parties. I therefore consider that there is sufficient reason for the First Defendant to pay the costs of the Plaintiff and Second Defendant of the suit. However, the Plaintiff is not seeking an Order for payment of its costs (see Notice of Motion paragraph 11). Therefore, I order that the First Defendant pay the costs of the Second Defendant of the Suit.

35. However, as there was consensus within the Application at the hearing on 20th November 2014, it is right that each party pays its own costs of the Application.

36. I therefore Order that:

ORDER:

1. That the Plaintiff is entitled to the sum of Kshs. 12,518,270.20 held by the Second Defendant less the Costs and Charges due to Airtel Networks Ltd.
2. From the net proceeds, Flint is entitled to Kshs. 2/= per SMS of Kshs. 50/=.
3. The Parties to appear before the Deputy Registrar of this Court for the determination of the actual figures due to each party.
4. Liberty to apply on implementation.
5. Each Party to pay its own costs of the Application dated 15th October 2014.
6. The First Defendant shall pay the costs of the Second Defendant of the Suit.
7. As between the Plaintiff and First Defendant each Party shall pay its own costs of the Suit.
8. The matter be listed before Deputy Registrar, Madam Nyambu on 30th January 2015 for a mention.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2015.

FARAH S. M. AMIN

JUDGE

In the presence of:

Mr. Collins – Court Clerk.

Mr. Nganga for the Plaintiff.

Mr. Kabugu for the First Defendant.

No appearance for the Second Defendant.