REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 811 of 2003

UUNET KENYA LIMITED ……..……. PLAINTIFF

VERSUS

TELKOM KENYA LIMITED ……..……..……. 1ST DEFENDANT

WANANCHI ONLINE LIMITED ……..…… 2ND DEFENDANT

J U D G E M E N T

1. This case involves references of a highly technical basis involving the telecommunications sector of the Kenya economy, which has proved illuminating to the court. Before I commence on this judgement, I would like to thank both the parties and their counsel for the not inconsiderable assistance lent and patience demonstrated explaining matters as necessary for the court\'s edification. The Plaintiff filed this suit following the termination of a Memorandum of Network Service Agreement (the "Agreement") dated 29 August 2002 which was entered into between the Plaintiff of the one part and the second Defendant on the other. Under the Agreement, the Plaintiff undertook to provide to the second Defendant a Network Service as regards the latter\'s Dial Access business in Kenya on a non-exclusive basis. Following the termination of the Agreement, the Plaintiff filed this suit and Claimed the relief as follows as set out in the Amended Plaint dated 16 September 2005 and filed on 29 September 2005 as follows:-

a. General Damages as against the first Defendant for fraudulent transfer of the circuit lines as per paragraphs 9 and 9A of the Amended Plaint;

b. Special Damages as against the second Defendant for breach of Contract in the sum of Shs. 36,616,777/-as per paragraph 12 of the Amended Plaint;

c. the costs of the suit plus interest;

d. Any other or further relief that this Honourable Court may deem fit to grant.

2. The first Defendant filed its amended Statement of Defence on 27 September 2005. As per its original Defence, it noted that it was not a party to the Agreement and denied that at any material time, it knew of the Agreement or any other agreement between the Plaintiff and the second Defendant. As a result of not being involved in the Agreement or any agreement, the first Defendant denied that it induced, procured or assisted in the breach thereof by the second Defendant. The first Defendant specifically pleaded that it had no knowledge that either party to the Agreement was in breach thereof, and if so, what remedies were

available to the respective parties. However, the first Defendant admitted in paragraph 5 of its Amended Defence that the Plaintiff had applied to it to hire 8 EI circuit lines under the number 69055. It denied any knowledge of any agreement between the Plaintiff and the second Defendant as to the utilization of the said lines as had been alleged in paragraph 5 of the Amended Plaint. It further admitted, that it had received a letter dated 29 October 2002 from the Plaintiff in which it had requested the first Defendant to transfer to the second Defendant the said 8 EI circuit lines under number 69055. The first Defendant stated that it had acted upon the request contained in the said letter and had transferred the said lines to the second Defendant. It denied that it had acted in any way unilaterally, wrongfully, improperly, unprocedurally or unlawfully as had been alleged in various paragraphs in the Amended Plaint. Indeed, it detailed the opposite – in acting upon the Plaintiff\'s said letter, the first Defendant had acted properly, procedurally, lawfully, in good faith and pursuant to its own and public interest. It certainly had not in any manner transferred the said lines without the authority of the Plaintiff. In a fresh paragraph 8A in its Amended Defence the first Defendant denied that it transferred the circuit lines in disregard of the express terms of the Plaintiff\'s said letter dated 29th of October 2002.

3. In further answer to the Amended Plaint (paragraph 9A), the first Defendant denied the various allegations of fraud, collusion or other malpractices alleged as well as the alleged effect thereof. The first Defendant stated that it had no knowledge that the Plaintiff had suffered loss and damage and that it was not liable in damages to the Plaintiff as alleged or at all. As regards the Plaintiff\'s claim for special damages, the first Defendant stated that it had no knowledge of the basis of the computation of the special damages claim and maintained that the Plaintiff cannot claim for general damages as well as special damages and that the prayers requested in paragraph (b) were a sufficient and adequate remedy for the alleged breach of the Agreement between the Plaintiff and the second Defendant. At paragraph 11 of its Amended Defence, the first Defendant pleaded further, that the Plaintiff did not have at any material time or even at the present time, any proprietary rights or interests in the 8 EI circuit lines under number 69055, save as the lessee of the same, which right was extinguished upon delivery to the first Defendant of the Plaintiff\'s said letter dated 29 October 2005, instructing the first Defendant to transfer the said circuit lines to the second Defendant. As a result, the Plaintiff was not entitled to any equitable or legal relief as detailed in its Amended Plaint or otherwise. Finally, the first Defendant insisted that the Plaintiff\'s suit was bad in law and that the Amended Plaint is incurably defective due to the simultaneous gross misjoinder of the parties as well as misjoinder of the causes of action.

4. The second Defendant also maintained that the Plaintiff\'s suit was bad in law, an abuse of the process of the court and primarily intended for mischief, scandal, frivolity and vexatious purposes and ought to be struck out costs. The second Defendant filed its Amended Defence and Counterclaim on 30 September 2005. In paragraph 3 thereof, the second Defendant admitted that it entered into the Agreement with the Plaintiff for the provision of a network service which service was supplementary to the second Defendant\'s existing network so as to enable the second Defendant to better serve its customers. The second Defendant maintained that the Plaintiff\'s undertaking under the Agreement included an overriding principle of the provision of a cost efficient network service taking into account all the technical and operational requirements of the second Defendant\'s business. In challenging the contents of paragraph 5 of the Amended Plaint, the second Defendant averred that under the Agreement, the lines and access circuits obtained belong to the second Defendant and were for the exclusive use of the second Defendant\'s customers. It maintained that the same were applied for in the name of the Plaintiff purely for management and administrative purposes and upon termination of the Agreement for any reason, the Plaintiff was obliged to transfer the said lines to the second Defendant for the purposes of continuance of the latter\'s business. The second Defendant noted that upon termination of the Agreement, the Plaintiff had delivered to the second Defendant a letter dated 29th of October 2002 authorising the first Defendant to transfer the said lines to the second Defendant. It maintained that the said letter was to be used by it upon termination of the Agreement so as to effect the transfer of the lines to it. It maintained that the said lines and circuits belonged to it and all payments made to the first Defendant for the same were actually made by the second Defendant through the Plaintiff. It was the Plaintiff that issued invoices to the second Defendant to which the first Defendant\'s invoices were attached.

5. In reply to paragraphs 6 and 7 of the Amended Plaint, the second Defendant noted that provisions for termination of the Agreement were to happen in three separate instances: (a) by the giving of 12 months'

notice (b) termination from breach of the Agreement or (c) on account of a force majeure event. The second Defendant averred that it duly terminated the Agreement in terms of its letter dated 3 October 2003 on account of the licensing of the Public Data Network Operators ("PDNO") by the Communications Commission of Kenya as well as on account of the Plaintiff\'s breach of its obligations under the Agreement to provide a cost efficient network service. The second Defendant further averred that the Agreement between it and the Plaintiff was void as the Plaintiff\'s licence to provide services to the second Defendant was irregularly obtained in contravention of the mandatory requirements for the issuance of such Licence. As regards paragraphs 8, 9 and 9A of the Amended Plaint, the second Defendant denied the same and in particular:

(a) That the second Defendant breached the Agreement as alleged or at all;

(b) That the lines and circuits under the Agreement were transferred to the Plaintiff\'s competitor as alleged;

(c) That the second Defendant did not own the subject lines as alleged;

(d) That the transfer of the subject lines was conditional upon a valid termination of the Agreement as alleged;

(e) That there was no collusion between the Defendants as alleged or at all;

(f) The transfer of the circuit lines contravened the Plaintiff\'s instructions as alleged or at all;

and the second Defendant denied all the particulars numbered i) to v) in paragraph 9A of the Amended Plaint. Further, in reply to paragraph 9B of the Amended Plaint the second Defendant denied that the transfer of the said circuit lines was fraudulent and moreover that the termination of the Agreement was dependent on the transfer of the lines as alleged.

6. As regards paragraph 12 of the Amended Plaint, the second Defendant denied that the Plaintiff had suffered any loss and damage as alleged. It maintained that the particulars of these detailed in that paragraph were false and exaggerated and denied that the Plaintiff was entitled to claim any such sums from the second Defendant. As regards its counterclaim, the second Defendant averred that upon the termination of the Agreement, the Plaintiff was obliged to to return to it, all its equipment installed at the Plaintiff\'s premises. The Plaintiff had failed, refused and/or neglected to return to the second Defendant its DEL Server containing software and data used for user authentication and billing which data constitutes part of the second Defendant\'s confidential information. The second Defendant detailed its replacement value for such equipment at US$46,000.00. Rather than deleting this paragraph of the Counterclaim, the second Defendant added a further paragraph being 19 A, which detailed that pursuant to a demand letter from the second Defendant to the Plaintiff dated 13 January 2004, the latter had returned the aforementioned equipment to the Plaintiff on 13 February 2004. Accordingly, the second Defendant claimed the loss of use of the said equipment for the period that the same remained with the Plaintiff. Further, subsequent to the termination of the Agreement and the transfer of the said lines and circuits to the second Defendant, the Plaintiff attempted to compel the first Defendant to re-transfer the said lines thereby causing disruption to the second Defendant\'s business resulting in loss and damage. In that regard, the second Defendant claimed damages for such loss and damage covering the use of the said lines and circuits. In its prayers to the Counterclaim, the second Defendant in fact deleted its prayer for the re-placement value of the said Server together with its software, in the sum of US$46,000.00, leaving its claim as being damages for loss of the use of the lines and circuits under number 69055.

7. The Plaintiff did not file an Amended Reply to the second Defendant\'s Amended Defence and Counterclaim seeking, presumably, to rely upon its original Reply to Defence and the Defence to Counterclaim as filed on 28 January 2004. Therein, the Plaintiff averred that the proprietary rights in the lines and circuits vested in the Plaintiff before a formal transfer upon a valid termination of the Agreement. It also maintained that the payments made by the second Defendant were in pursuit of the latter\'s obligations under the Agreement and were not made in pursuit of any rights over the subject lines

and circuits. As regards the second Defendant\'s equipment, the Plaintiff denied that it was under any obligation to the return the same or at all. In the alternative, the Plaintiff averred that its only obligations upon a valid termination of the Agreement was to transfer the circuit lines to the second Defendant\'s premises and no more. It disputed the second Defendant as having given a valid termination notice in terms of the Agreement and thus, the transfer of the said lines in terms of the letter dated 29 October 2002 directed to the first Defendant, could not be effected. Finally, the Plaintiff denied that the second Defendant has suffered loss of use of the said lines and circuits and maintained that its claim for loss of use was misconceived and bad in law for want of particulars.

8. The hearing commenced on 21st of March 2012. Mr. Munyu on behalf of the Plaintiff opened by stating that the Plaintiff was relying upon the Amended Plaint filed on 29 September 2005 in which the Plaintiff claimed the amount of Shs. 36,606,777/-. The particulars were set out in the Amended Plaint and the claim arose out of the termination of the Agreement as between the Plaintiff and the second Defendant. Mr. Munyu stated that the Plaintiff would demonstrate that the termination was unlawful and, as a consequence of which, the second Defendant was bound to pay for a notice period as detailed in the Agreement as well as the last month\'s rental fee for November 2003. He maintained that the unlawful termination was made possible through the assistance of the first Defendant by transferring service lines contrary to instructions and the Plaintiff was claiming general damages against the first Defendant for such fraudulent transfer. Thereafter, Mr. Munyu called **PW1, Mr. Peter Mwondi** who stated that he held the position of Project Manager -Technical Operations with the Plaintiff and that his duties included implementation of the company and customer communication infrastructure projects. As part of his duties, he routinely dealt with the first Defendant in the allocation and transfer of ISDN lines to the Plaintiff. He also knew the second Defendant with whom the Plaintiff Company entered into a Network Service Agreement on 29th of August 2002. PW 1 produced the Agreement before court. He went on to say that under the Agreement, the Plaintiff undertook to provide a Network Service to the second Defendant in respect of its Dial Access business in Kenya on a non-exclusive basis. In pursuance of the Agreement the Plaintiff applied for and obtained from the first Defendant 8 EI circuits under Number 69055 and paid the requisite fees for the lines. Mr. Mwondi referred to a letter that he had written to the Regional Manager, Nairobi South of the first Defendant dated 22nd of July 2002. The Plaintiff indicated that it would prefer if the two lines applied for were available on 69055 and 69066. The Plaintiff having been allocated the same by the first Defendant, assigned the lines to the second Defendant in performance of the Agreement. PW 1 then produced to court a number of letters that he had written on the Plaintiff\'s behalf to the first Defendant concerning the provision of lines and the payment of the connection charges on various dates from 7 August 2002 to 29 April 2003. PW 1 then detailed that, to ensure continuity of business for the second Defendant and the facility that it continued to use of the dedicated line, it was agreed that the Plaintiff would issue a pre-signed letter transferring No. 69055 from the Plaintiff\'s premises in Parkside Towers, Mombasa Road to the second Defendant\'s premises in Loita House, Loita Street, Nairobi. Mr. Mwondi confirmed that he had executed a letter dated 29 October 2002 and forwarded the original to the second Defendant on 13 August 2003. He produced a copy of the letter to court. He detailed that the intention was that the letter would be utilised following a valid termination of the Agreement and the transfer of the line was specifically intended to be from the Plaintiff\'s offices to the second Defendant\'s offices. As the said letter dated 29 October 2002 is the bone of contention so far as this suit is concerned, I detail the same as follows, it being addressed to the Regional Manager, Nairobi South, Telkom Kenya Limited. Attn. Mr. John O. Onyango:–

"Dear Sir,

Ref: Transfer of 69055 number

UUNET Kenya Limited wishes to transfer its 69055 ISDN PRA DID/DOD on 2nd floor Parkside Towers, Mombasa road to Wananchi Online Ltd, 1st floor Loita house in Nairobi.

Kindly assist as this is extremely urgent.

Yours faithfully,

UUNET Kenya Ltd.

Peter Mwondi
Manager – Projects

cc Robert Mugo - Director, Technical Operations - UUNET Kenya

Joseph Mucheru - Operations Director –

Wananchi Online Ltd."

9. PW 1 made it clear in his witness statement that the said letter dated 29 October 2002 was to be utilized following a valid termination (presumably of the Agreement) and the transfer of the line was specifically intended to be from Parkside Towers to Loita House. The witness went on to say that the second Defendant was no longer a customer of the Plaintiff. The connection, he said, was severed when the second Defendant forwarded the pre-signed letter dated 29 October 2002 to the first Defendant and unilaterally transferred the subject line as is to the Plaintiff\'s competitor Messrs. Kenya Data Networks Limited, whose offices were also housed at Parkside Towers, Mombasa Road, Nairobi, on or about 3 December 2003. The witness also stated that the first Defendant was not right in transferring the line to Parkside Towers since the pre-signed letter clearly provided that the line was in any event to be transferred to Loita House. Mr. Mwondi detailed that the purpose of specifying the building to which the transfer of the line was to go, was so as to ensure that the Plaintiff was involved in the transfer as some of the equipment in use in the service provided to the second Defendant was rented. In the witness' opinion, the first Defendant acted improperly, unprocedurally and unlawfully in transferring the subject lines owned by the Plaintiff to a third party on the instructions of the second Defendant. He stated that in the result, the first Defendant had assisted the second Defendant to transfer the line in breach of the said letter of 29th of October 2002. The witness summed up by stating that the specific breaches as caused by the first Defendant were as follows:

i) Failing to adhere to the Plaintiff\'s letter dated 29 October 2002;

ii) Transferring the circuit lines to a destination outside the Plaintiff\'s letter of instructions;

iii) Effectively transferring the lines to the Plaintiff\'s competitor;

iv) Altering the Plaintiff\'s instructions in terms of the said letter of instructions without authority and prior consent;

v) Working in cohort with the second Defendant to, in effect, technically terminate the Network Service Agreement."

As a consequence of the above, the witness stated that the Plaintiff claimed general damages against the first Defendant for improper and irregular transfer from the first Defendant of the circuit line, thereby aiding the second Defendant to unilaterally terminate its connection with the Plaintiff before it had issued a valid notice terminating the Agreement.

10. Finishing his examination in chief in open court, PW 1 explained that the renter of the line was the Plaintiff. Normally, the line would remain with the Plaintiff. Owning the number is considered Intellectual Property. He reiterated that the transfer of the line was to be from the second floor, Parkside Towers to the second Defendant\'s offices in Loita House. This is not what happened. The lines were transferred from the second floor of the Parkside Towers to the fifth floor Parkside Towers to the offices of Kenya Data Network, a competitor of the Plaintiff. He detailed that such meant that the customer was no longer using the Plaintiff\'s services, it had moved on to the Plaintiff\'s competitor. Under cross-examination, PW 1 confirmed that that the first Defendant was not a party to the Agreement dated 29th of August 2002. He also confirmed that in the letter dated 29th of October 2002, there is no reference to the

Agreement. That letter was only to be used upon the termination of the Agreement. The witness agreed that the first Defendant had no way of knowing about the termination of the Agreement. He also agreed that the second Defendant should never have used the letter before it terminated the Agreement. He confirmed that the Plaintiff was paying the rental for line no. 69055 and that he had no way of knowing to whom that number was transferred. He confirmed, however, that after the lines were removed, there was no further need for the Plaintiff to continue paying the rental, as the service was not available. As far as the moving of the lines was concerned, PW 1 stated that normally the first Defendant would confirm in writing the instructions to move the lines that it received from the Plaintiff. Upon a query from the court, Mr. Mwondi confirmed that the telephone number referred to was a physical landline which allowed 30 simultaneous calls at one time. The service is provided on a physical line so that to transfer it to another address requires a physical removal of the line. It is in the sole discretion of the first Defendant how it would affect such transfer. The line is physically "held" at the first Defendant\'s Nairobi South Exchange.

11. Under cross-examination from Mr. Oyatta, appearing for the second Defendant, PW 1 confirmed that he was not involved in the production of the Agreement. However, however he was aware that it had been prepared by the Plaintiff and that the Plaintiff had several of these agreements for customers. He noted that after the execution of the Agreement, he had to implement the service to the second Defendant involved. He was however aware that the second Defendant had approached the Plaintiff for the provision of the service that it required for its own customers. He had no idea how many customers the second Defendant had, as such fact was not relevant to the service provided. As regards the Agreement, PW1 agreed that he had given evidence that the termination of the Agreement by the second Defendant was invalid. He could not however recall which clause it was in the Agreement that was breached. He confirmed that such information had been passed to him by the Plaintiff\'s Chief Executive Officer, Henry Njoroge, who had since left the company. PW1 agreed that he had been informed of the position after the lines had been moved from the Plaintiff\'s premises. It was his job to check the position in regard to the physical removal of the lines. He confirmed that it was the Plaintiff\'s in-house computer which informed him on the technical side, that the connection was no longer there. Physically, he had to go to the basement of the Parkview Towers building to carry out a physical check. Upon doing so, he found that the cables had been removed from the distribution frame. He took up the matter with the first Defendant over the phone and the first Defendant\'s officer confirmed that that the said lines had been removed. He noted however that the distribution frame is situate in a secured place restricted to the first Defendant\'s personnel. He confirmed that he had very limited access thereto and, in any event, had to be accompanied thereto by the owner of the facility – then it was Kencell. PW1 then confirmed that he was not aware that the Plaintiff had come to Court seeking an injunction for the lines not to be moved. However he was aware that damages were being sought from the Defendants.

12. Mr. Mwondi continuing his cross-examination, confirmed that the agreement that the Plaintiff had with the first Defendant was that the owner of the lines would be the Plaintiff. The lines were being used for the Plaintiff\'s customers. However the witness confirmed that the number 69055 was only being used for the second Defendant. He confirmed that the Plaintiff already had the line before the second Defendant requested the service. It had been applied for in June 2002 in anticipation of customers taking it up. After the line was disconnected, the Plaintiff was no longer able to provide a service to the second Defendant. The Plaintiff continued operating thereafter despite not providing a service to the second Defendant. The Plaintiff continued operations on other lines. He was unaware why the second Defendant had opted to take away this particular line. He presumed that if the second Defendant had requested a separate service and provision of lines from the first Defendant, then they would be allocated a new number other than 69055, which could prove inconvenient to the second Defendant\'s customers.

13. PW1 was then referred to the letter dated 29 October 2002. He confirmed that he signed it on that day. He did not know why the second Defendant required a letter but it was as a sign of good faith that the Plaintiff would not hold onto the number after the termination of the Agreement. He confirmed that the understanding as between the Plaintiff and the second Defendant was that the letter would only be used once the Agreement had been terminated. The witness confirmed that at the time that he wrote the said letter, it was the intention to transfer the line to the second Defendant\'s premises at Loita House. He felt that the letter was clear that the line that would be transferred to the second Defendant at the first Floor of Loita House, Loita Street.

14. The witness further confirmed that Kenya Data Network Limited was a competitor of the Plaintiff but he did not know when that company was licenced. He had heard that the company existed but he could not recall just from when. However, he knew that the company was applying for a licence around 2002. The Plaintiff was operating under a licence given to UUNET Communications Limited not the Plaintiff herein. He confirmed that such was a separate company. He could not recall the exact date that the licence was issued but that it was a lengthy process. He confirmed that UUNET Communications Ltd may not have had a PDNO Licence at the time when the line 69055 was transferred. The Plaintiff had already obtained an Internet Service Provider Licence ("ISPL") and it was under that licence that the services were provided. The Plaintiff was interested in operating its own data network but it could not use its existing licence for that purpose as it required a PDNO Licence which is why the company UUNET Communications was used for this purpose as a PDNO Licence allows the licensee to build a data network structure. The ISPL licence allows an operator to offer Internet services. At that time, the witness confirmed, the only body allowed to build a network structure with copper wire, optic fibre etc. was the first Defendant. He maintained that whoever obtained a PDNO Licence was immediately competing with the first Defendant.

15. PW 1 confirmed that the building in which the Plaintiff was housed had a mixture of fibre optic and copper wire applications. Technically, he noted that the component for in-house services was copper wire but for the connection to the first Defendant\'s exchange, fibre optic was used. In the witness' opinion, digital landlines and wireless could be provided either in copper or fibre and one could have the same number of lines in either. When it came to the first Defendant transferring lines, it did not necessarily mean that the line would be removed from the premises that it was serving. The witness informed the court that when it comes to transferring lines from one exchange operated by the first Defendant to another, there is a process known as "mapping" which programs such lines as necessary. Obviously, the transfer of the line No. 69055 within the same building was not going to be a difficult operation.

16. The witness was thereafter further cross examined as to the licensing of Kenya Data Network and that the first Defendant was now in competition as the former was offering PDNO services as well as ISPL services. It was of little interest to the witness as to how that company operated the two different services. He confirmed that the Plaintiff did offer "dial active" services to its customers the same as the second Defendant. However, the Plaintiff was offering such services on a wholesale basis rather than retail. Technically, it was the same service. He confirmed that the Plaintiff was a joint-venture company as between UUNET South Africa and Africa-On-Line. The latter bought the wholesale service and passed the same on to customers as a retail service. Finally, in re-examination, Mr. Mwondi confirmed that the line no. 69055 was under the Plaintiff\'s name for the entire period of the Agreement with the second Defendant. He confirmed that at no time had the first Defendant made contact to say that it was unable to transfer the line to Loita House. As far as he was concerned, there would be no difficulty in such translocation. He confirmed that the Plaintiff was not claiming for the no. 69055 to be returned to it but it was claiming for general damages for irregular termination. He reiterated that there was no other way that the first Defendant could have transferred the line without using the Plaintiff\'s said letter of 29 October 2002. The service that the Plaintiff offered to the second Defendant did not require a PDNO Licence and it did not matter what medium was used for the provision of the service to the second Defendant.

17. The Plaintiff\'s second witness was Tom Omariba who confirmed that he was a Managing Director of MTN business formerly UUNET. At the time that this case arose, he was the Finance Manager. He confirmed that he had signed a witness statement on 5 December 2011 which contained his evidence in the case. He referred the court to paragraph 5 of the Agreement which provided for the costs of the service to the second Defendant negotiated and agreed for the entire period of the Agreement. He noted Annexure D which refers to the pricing at US dollars 89 per port, which was not subject to review during the Agreement period. The second Defendant had taken up to 240 ports. He drew the court's attention to the fact that the second Defendant was a significant customer of the Plaintiff\'s and that either party wishing to terminate the Agreement could only do so by giving 12 months notice from the anniversary date of the same – 29th of August. He noted that the second Defendant had given notice on 2 October 2003 which was only a 30 day notice. He had attempted to bring to the attention of the Chief Executive Officer of the second Defendant the fact that the notice was in breach of the Agreement. If the notice had properly been given, there would be nine more months to the anniversary date to 29 August of the next

year. The witness noted that the second Defendant\'s reason for termination was “pricing” which it said was not affordable per port. In the witness’ opinion, it was not available to the second Defendant to give such notice as a way to proceed had already been agreed. It was not a valid notice to terminate. He observed that there had been no complaints as to the service itself but that in the second Defendant\'s letter of 6 November 2003, it had detailed that the contract had been frustrated because of the Plaintiff\'s rigidity on pricing. The witness confirmed that the Plaintiff had not deviated from the agreed pricing. It had responded to the second Defendant\'s said letter by its own letter of 14 November 2003, drawing the attention of the second Defendant to the consequences of its inadequate notice. Later, the Plaintiff had come to hear that the second Defendant had moved the EI circuit (as they call it) in December 2003. Upon hearing this, the witness informed the court that the Plaintiff had immediately written to the Managing Director of the first Defendant, advising that the action taken was not proper. The witness stated that the Plaintiff had not received a response. Accordingly, the Plaintiff had instructed its lawyers to write to the second Defendant and the witness was aware that the Plaintiff had applied for an injunction to have the line restored. However the line was never restored.

18. As regards the Plaintiff\'s claim, Mr. Omariba informed the court that the Plaintiff was seeking monies for an unpaid invoice to the second Defendant for 2003 in the amount of Shs. 1,808,521.20. It was also claiming 9 months’ notice to the anniversary date of the Agreement at a cost of US dollars 89 per month per port for a total of 240 ports. The Plaintiff was also claiming for the year\'s notice period giving a total of 21 months amounting to Shs. 34,808,256.00 as well as for costs and interest. The total amount of the claim was therefore Shs. 36,616,777.00. PW 2 stated that as at 29 September 2005 when it had filed the Amended Plaint, the exchange rate for the Kenyan shilling as against the US dollar stood at Shs. 77.6 to the dollar. The calculation is thus US $ 89 @Shs. 77.6 to the US $ = Shs. 6906.40 per port per month. Thus at 21 months x 240 ports x Shs. 6906.40 gave a total claimed amount per port of Shs. 34,808,256.00. The witness noted that the price that had been negotiated at the time was cost-effective, it was a wholesale price which included 24/7 customer support. The Plaintiff had to expand its service space to provide the service requested at considerable cost. If the second Defendant had taken more ports then the Plaintiff could have reduced the price to its customer.

19. Under cross-examination from Mr. Okeyo, PW 2 stated that he did not know when the letter addressed to the first Defendant as regards the transfer of lines was delivered but the transfer of the number happened about the end of November 2003. As a result of the transfer of the line, PW 2 wrote to the Managing Director of the first Defendant on 1 December 2003. He also wrote to the Regional Manager of the first Defendant on 2 December 2003. Another letter was also written on the 28 November 2003 but the witness did not know whether, as at that date, the line had been transferred. He agreed that no meeting with the first Defendant had been called for and that the only communication was by letter form. In any event, the Plaintiff\'s said letters had been totally ignored. The witness expected the first Defendant to have come back to the Plaintiff (as they always do) to let the Plaintiff know who would pay the transfer fees.

20. Thereafter Mr. Omariba was cross-examined by Mr. Oyatta for the second Defendant. He confirmed that the only way that the Agreement could be terminated was by utilizing the provisions of clause 4 thereof. He agreed that it could also have been possible to terminate under the provisions of clause 13. However he was of the opinion that clause 13 could only be used for material breach and he did not consider that it applied in the circumstances of the case. The witness stated that he had been involved in in the drafting of the Agreement together with the lawyers and that he was also involved in the pricing agreed between the Plaintiff and the second Defendant. He had attended several meetings with regard to pricing. After the termination, the witness stated that he had made efforts to have the dispute between the parties sent to arbitration. He agreed that the effective date for termination under clause 4.1 of the Agreement was 29 August 2002.That would be the date that would apply if there was breach. He agreed that the second Defendant\'s earliest opportunity to terminate the Agreement would have been the first anniversary date thereof i.e. 29 August 2003. If notice had not been given by that date, then the second Defendant\'s earliest date for termination would have been 29 August 2004 which was the end date of the Agreement anyway. PW 2 stated that it was good etiquette to inform the customer when it was in breach. The Plaintiff had no business issuing a Notice only to notify the customer that it was in breach. He confirmed that in his opinion, the service provided by the Plaintiff was cost-effective and what was

offered had been negotiated and the deliverables were agreed. He pointed to the provisions of clause 3.2 of the Agreement to that effect. The witness agreed that the main issue between the parties was pricing. He did not consider that it was the case that Kenya Data Network were providing network services considerably cheaper and lower than those quoted by the Plaintiff. He stated that the Plaintiff did investigate the pricing but that he was under no obligation to get a pricing schedule from Kenya Data Network as such was irrelevant to him. In any event, he did not believe that the pricing element amounted to a breach of the Agreement by the Plaintiff. The Plaintiff had employed different technology from that of Kenya Data Network. However, the witness agreed that the Plaintiff would have incurred a loss by providing services to the second Defendant at the price that the Kenya Development Network was quoting. He noted that at the time there were more customers coming on board and that the Plaintiff\'s pricing was very reasonable for the service provided. Importantly, the Plaintiff was an Internet Service Provider, it was not a PDNO licensee as was Kenya Data Network. Further, the witness agreed that the second Defendant had paid up all the invoices that the Plaintiff had raised from the commencement of the Agreement in August 2002 until October 2003. Finally, the witness stated that the way the Plaintiff had calculated the damages claim was based on the pricing that it had quoted to the second Defendant. He agreed that the Plaintiff did not pay Shs. 34,808,256.00 to anybody, but it had to pay its suppliers.

21. Under re-examination, Mr Omariba agreed with counsel for the Plaintiff that it would not have been possible for the second Defendant to have terminated the Agreement without assistance from the first Defendant. He also insisted that if the first Defendant had honoured the Plaintiff\'s instructions, the said letter could not have been used for the purposes of breaching the Agreement. He went on to say that the provision for providing the said letter was within and covered by the Agreement. The Plaintiff did not breach any of the terms of the Agreement. After the termination, the Plaintiff had tried to renegotiate the pricing with the second Defendant but that did not come to anything. It was the Plaintiff\'s viewpoint that if the second Defendant wanted to get out of the Agreement, it would have had to give notice under clause 4 of the same. The price was fixed for the period of the Agreement. There was no contractual obligation for renegotiation. Even if Kenya Data Network were offering a lower rate, the second Defendant would still have to have given a year\'s notice. The witness agreed that after notice had been given, the Plaintiff continued to offer the service to the second Defendant up until the last week of November 2003.

22. The court adjourned and upon the date fixed for the continuation hearing, the second Defendant commenced with its evidence. Mr. Oyatta called **Joseph Wakaba Mucheru** as the first witness for the second Defendant. The witness confirmed that he now worked for Google Kenya but that he had been a co-founder and shareholder of the second Defendant company and had been initially employed as its Technical Director. Later he served the company as its Strategy and Business Director and finally as its Chief Executive Officer. He left employment with the second Defendant in March 2007. He was referred to his witness statement dated 10th of January 2012 which he confirmed that he had signed and wished to rely upon its contents. He stated that he had witnessed the execution of the Agreement between the Plaintiff and the second Defendant dated 29 August 2002. The purpose of the Agreement was for the second Defendant to lease equipment from the Plaintiff and connection to E1 lines procured from the first Defendant. The equipment and the lines were to be used in providing Internet services to the second Defendant\'s customers. Further, the Plaintiff was to provide support services including IP addresses, bandwidth and maintaining the service and the lines. Where Mr. Mucheru’s evidence differed from that of the Plaintiff\'s witnesses, was that he maintained that the E1 lines procured from the first Defendant under the Agreement belonged to the second Defendant with the equipment belonging to the Plaintiff. The witness stated that it was the second Defendant who paid the first Defendant for the lines. However he stated that the lines were in the name of the Plaintiff to facilitate maintenance of the lines by the Plaintiff on the part of the second Defendant. Such maintenance, he said, required the Plaintiff to communicate regularly with the first Defendant. Prior to the Agreement, the lines were not installed in the Plaintiff\'s premises. They were for the second Defendant\'s services only and the Plaintiff did not use them for any other purpose.

23. The witness stated that there was no agreement that the Plaintiff would ever own the lines. In fact, the Agreement was that the lines would remain the property of the second Defendant and would be disconnected from the Plaintiff\'s equipment upon termination of the Agreement. They would then be

transferred from the Plaintiff as directed by the second Defendant. The Plaintiff gave a pre-signed letter to facilitate this arrangement. Further, the witness stated that at the time the second Defendant entered into the Agreement, it needed to expand its infrastructure to accommodate its growing customer base. Such expansion required the provision of the E1 lines which were only available from the first Defendant which had a regulatory monopoly over the same. The second Defendant\'s premises were located at Loita House in the City Centre. The witness maintained that at that location the provision of E1 lines was exhausted and the first Defendant was unable to give any assurance to the second Defendant for a fibre optic cable to be installed. The second Defendant could not install its own fibre optic cable as it was not licensed to do so by the Communication Council of Kenya. As a result, the second Defendant needed to identify premises in which fibre optic cables had already been installed and host the E1 lines there. The witness noted that fibre optic cables had already been installed at Parkside Towers where the Plaintiff was located, along with Kencell. The witness then detailed as follows:

"Due to time and space constraints WOL could not have been able to procure premises, install the necessary equipment, employ engineers and technicians and have a fully operational network access point at Parkside Towers in time to meet its customer obligations. UUNET was an Internet service provider like WOL and it had a network access point already functioning such that it was easy for them to host multiple ISP (B1) lines. WOL approached UUNET seeking to negotiate terms for hosting its E1 lines at UUNET premises. That the agreement was executed."

24. Mr. Mucheru went on to say that both the Plaintiff and the second Defendant were providing similar services to their customers and were in competition to own the market. He maintained that as a result of this position, there was a provision necessary in the Agreement for flexibility enabling negotiation should changes in technology or market conditions occur. It seemed that changes in technology were appreciated by both parties and were inevitable in the near future as at the time the Agreement was entered into. That was one of the reasons, the witness maintained, that the Agreement was only for a period of three years. Only a year after the signing of the Agreement, the Communications Council of Kenya introduced a new licence known as the Public Data Network Operator (PDNO) Licence which was acquired by Kenya Data Network on 22 January 2003. That licence enabled the Kenya Data Network to build a competing fibre optic network alongside that of the first Defendant. Accordingly, it began providing network access point services at close to 20% of the cost of the same service charged by the Plaintiff. It was at that stage said the witness, that the second Defendant approached the Plaintiff to renegotiate the Agreement, particularly as regards pricing, which the Plaintiff flatly refused to consider. Consequently the witness maintained that the second Defendant terminated the Agreement by letter dated 2 October 2003. The witness' position was that the second Defendant terminated the Agreement as a consequence of the Plaintiff\'s breach of the same as it was no longer viable for the second Defendant since the charges by the Plaintiff worked out as exponential compared to those charged by the Kenya Data Network. He stated that the second Defendant could not have survived in the market if it had continued to procure services from the Plaintiff and that this was clearly the intention of the Plaintiff by refusing to renegotiate the terms of the Agreement. In the witness' opinion such fully justified the second Defendant terminating the Agreement.

25. As a result of this situation, Mr. Mucheru detailed that the second Defendant had approached the first Defendant and delivered the said letter from the Plaintiff dated 29 October 2002. He noted that the number 69055 was configured into the second Defendant\'s customers\' machine, it was contained and detailed in the second Defendant's marketing material and to change the number would cost a lot of money and time. So, the second Defendant moved the line which it had secured from the beginning of the Agreement. In the witness\' opinion, the moving of the line would not have interrupted the Plaintiff\'s business. In this vein, the witness noted that the line did not belong to the Plaintiff, it belonged to the first Defendant as it was the only licensed fixed line operator in the country at the time. In cross-examination, the witness agreed that the term of the Agreement was 3 years. The second Defendant was only leasing 230 ports not 240 ports and he agreed that the price as per Annexure "D" of the Agreement was US dollars 89 per port per month. Mr. Mucheru referred the court to clause 3.3 of the Agreement which he stated was breached by the Plaintiff as regards a review of costs. In his view, the witness maintained that the second Defendant had followed the proper terms to exit the Agreement. The second Defendant\'s letter dated 2 October 2003 constituted, in his opinion, proper notice. Finally in cross-examination, the witness was shown the invoice from the Plaintiff for the month of November 2003 in the amount of Shs.

1,808,521.20. He agreed that the invoice was correct but did not know whether it had been paid or not.

26. The first Defendant called **Susan Oganga Wangola Siboe** as its witness. She testified that she was an Account Manager with the first Defendant and had worked with the first Defendant for 31 years. In her witness statement, she detailed that she was aware of both the Plaintiff and the second Defendant companies having dealt with them both on many occasions. She also stated that she was aware of an agreement entered into on the 7 August 2002 between the Plaintiff and the first Defendant in which the latter was to provide telecommunications services involving ISDN No. 69055. She maintained that services were provided and the Plaintiff was billed regularly. She maintained that on the 19 November 2003, the first Defendant received a letter dated 29 October 2002 from the Plaintiff, requesting the first Defendant to urgently transfer to the second Defendant its lines operated under the said no.69055. She stated that the first Defendant immediately complied with the request contained in the said letter and transferred the number 69055 to the second Defendant who subsequently signed a formal agreement with the first Defendant making it the new renter of the lines concerned. Further, the witness stated, that once the account for the number was transferred to the second Defendant, the first Defendant had no difficulty taking instructions from it including as to the location on the line which it was informed would be at its facilities housed at the KDN offices in Parkside Towers, Mombasa Road, Nairobi. In cross-examination, the witness stated that at the time, both the Plaintiff and the second Defendant were in her docket as a customer service manager. She confirmed, upon being shown the Plaintiff\'s said letter dated 29 October 2002 that he would not have received the same until August 2003. She pointed out that the letter did not specify the location to which the lines were to be transferred. She confirmed that the instructions to move the lines within Parkside Towers came from the second Defendant. She stated that a contract had been entered into with the second Defendant and she confirmed that the payment of connection charges was made on 27 November 2003. She identified the receipt for payment. In her view, instructions as to the placing of lines should come from the renter. Finally, answering a question from the court, the witness stated that she was not personally approached by anybody from the second Defendant as regards the transfer of the line. The first Defendant\'s Sales Officer would have been approached but she did not know who that was.

27. The Plaintiff filed its final submissions on 3 May 2012. In the introduction thereto, it outlined its claim as against both Defendants. It also summarised what it considered to be the evidence of the witnesses who appeared at the hearing of this matter. The Plaintiff thereafter considered the issues as it saw them and as per the signed Statement of Agreed Issues filed on 27 February 2006 as follows:

"Issue No 1. Whether the second Defendant breached the Network Services Agreement with the Plaintiff in terminating the same vide the letter dated 2 October 2003?

Issue No 2. Whether the subject telephone lines and access circuits belonged and/or were allotted to the Plaintiff or to the second Defendant at all material times?

Issue No 3. Whether the Agreement between the Plaintiff and the second Defendant was void and/or whether it was valid and enforceable?

Issue No 4. Whether the Plaintiff breached any of its obligations to the second Defendant under the Network Services Agreement?

Issue No 5. Whether the first Defendant\'s transfer of the circuit lines to M/S Kenya Data Network at the second Defendant\'s order was fraudulent, wrongful, improper and in breach of the letter dated 29 October 2002 from the Plaintiff?

Issue No 6 Whether the Plaintiff is entitled to the prayers sought in the Plaint:

a) General Damages against the first Defendant, Telkom Kenya Limited for fraudulent transfer of the circuit lines in terms of Paragraph 9 of the Amended Plaint.

b) Special Damages against the second Defendant for breach of contract in the sum of Kenyan

shillings 36,616,777.00 in terms of Paragraph 12 of the Amended Plaint.

Issue No 7. Whether the second Defendant is entitled to the prayers sought in the counterclaim?

Issue No 8. What is the order on costs?

28. As regards Issue No. 1, the Plaintiff submitted that in the Agreement, clause 13 thereof provides that either party may terminate the same. It observes that the process of termination was provided for in clause 4 which gives the notice period should either party wish to terminate the Agreement before the end of the 3 year Agreement term. It emphasised that a party wishing to terminate was required to give written notice to that effect to the other party not less than 12 months prior to the proposed date of termination at the Agreement anniversary. The Plaintiff pointed out that the second Defendant had not given such notice in that by its letter dated 2 October 2003 it only gave 30 days written notice. The Plaintiff also pointed out the provisions of clause 4 of Annexure "D" of the Agreement which provided that the second Defendant:

"will not proceed to transfer these lines or circuits at any time so long as this agreement is in force".

The Plaintiff noted that by giving a shorter notice period than that which had been contracted, the second Defendant had breached the Agreement in terminating the same by its letter dated 2 October 2003. As regards the "ownership" of the subject telephone lines and circuits, the Plaintiff admitted that the same were rented from the first Defendant. The No. 69055 lines were allocated to the Plaintiff by the first Defendant. The Plaintiff was making monthly payments by way of rental therefore. It pointed to clause 2 of the Annexure "D" of the Agreement in which it was provided that the lines and access circuits would be in the name of the Plaintiff. Then as regards the Issue No. 3, the Plaintiff stated that the second Defendant had confirmed that it had entered into the Agreement dated 29 August 2002 and that there was no material laid before court by the second Defendant to challenge the validity and/or enforceability of the Agreement.

29. The Plaintiff submitted that the pricing terms of the Agreement were clear as per Annexure "D" where the price of US dollars 89 per port was provided for. It is noted that there was no clause providing for the review of that price during the three-year period of the Agreement. As to the approach by the second Defendant as to a variation of the pricing, the Plaintiff noted that it had given conditions for a mutual variation of the pricing should the second Defendant take up 1000 ports to facilitate a reduction in the pricing. The Plaintiff submitted that at no time was the second Defendant overcharged by the Plaintiff and that all charges were in accordance with the Agreement. It noted that the second Defendant sought to rely upon the aspect of the licensing of Public Data Network Operators to claim for reduced pricing. The service offered by the Plaintiff was not by virtue of a PDNO licence but an ISP licence. The Plaintiff was utilizing a different technology from that used by PDNOs including Kenya Data Network. Finally under this heading, the Plaintiff noted that no failure of service as provided by it, was claimed by the second Defendant and consequently no breach could be justified on the basis of pricing alone. In the Plaintiff\'s opinion it did not breach any of its obligations to the second Defendant under the Agreement.

30. As regards the fifth Issue, the Plaintiff invited the court to closely examine its letter dated 29 October 2002 which it admitted was signed in anticipation of how the parties to the Agreement would carry out the transition upon termination of the same. The Plaintiff noted that its said letter had only been forwarded to the second Defendant on 6 August 2003 almost a year after the Agreement was signed. It was then submitted to the first Defendant in November 2003. The Plaintiff maintained that the first Defendant\'s witness had conceded that there should have been enquiries made of the Plaintiff before reliance was placed on that letter for the following reasons. Firstly, at the time that the letter was submitted to the first Defendant, the Plaintiff was still the renter of the subject number. Secondly, the letter was more than one year old and thirdly, the second Defendant required the transfer of the lines to Parkside Towers contrary to the instructions in the said letter to transfer the lines to Loita House. The Plaintiff submitted that had its letter of 29 October 2002 been strictly adhered to, the second Defendant\'s breach of the Agreement would not have been consummated as it would not have been possible to

transfer the lines. It maintained that the:

"reckless action by Telkom ended up assisting a defaulting party to opt out of an Agreement prematurely and continue enjoying the use of a line to the detriment of the Plaintiff. There was obvious collusion between the officers of the first Defendant and the second Defendant and as a consequence, the necessary procedures attendant to the Agreement were bypassed. This was only possible through the actions of Telkom."

The Plaintiff, concluded its summation as regards this Issue by stating that Telkom had transferred the line to a destination outside the Plaintiff\'s letter of instruction and that the said instructions had been altered without authority and prior consent of the Plaintiff. The Plaintiff maintained that Telkom had worked in collusion with the second Defendant to technically terminate the Network Services Agreement and thus the first Defendant\'s transfer of the circuit lines to Kenya Data Network at the second Defendant\'s order was fraudulent, wrongful and improper.

31. As regards the issue of damages, the Plaintiff referred the court to 3 authorities namely **Halsbury's Laws of England, 4th Edition Vol 45, para 1518, British Industrial Plastics vs Ferguson (1938) 4 All ER 504** and **Bamburi Portland Cement vs Imranali Chandbhai,** *Civil Appeal No. 83 of 1995***.** The Plaintiff submitted that in accordance with the decision of the Court of Appeal in Civil Appeal No. 83 of 1995, the general damages guideline as against the first Defendant should not be below the value of one month of the notice period that the second Defendant ought to have given. The Plaintiff noted that such effectively translates to a sum of Kenyan shillings 1,808,521.00. As regards Special Damages, the Plaintiff noted that its claim was twofold being the claim for payment in lieu of notice as well as the claim for the unpaid invoice for November 2003. The Plaintiff explained its calculation of how it arrived at its claim for Special Damages against the second Defendant in the total sum of Kenyan shillings 36,616,777.00 as per paragraph 12 of the Amended Plaint.

32. As regards the second Defendant\'s prayers in its counterclaim, the Plaintiff noted that the damages were unspecified and that no evidence had been led either in the written statement or in the Viva Voce evidence of Mr.Mucheru. It maintained that the second Defendant had not made any attempt to pursue its counterclaim and the same would appear to have been abandoned. As regards costs, the Plaintiff reiterated the general principle as to the allocation of costs in that they should follow the event. It submitted that the Plaintiff was entitled to costs. Thereafter, the Plaintiff summarised its claim as against the Defendants and requested the court to order accordingly.

33. The First Defendant detailed what it understood to be the Plaintiff\'s claim against it in terms of the termination of the Agreement as between the Plaintiff and the second Defendant. It noted that the Plaintiff averred to what it regarded as the lawful termination of the Agreement was made possible through the assistance of the first Defendant. Such assistance was given by transferring a circuit line, the subject of the Agreement, allegedly contrary to instructions given to the first Defendant. It noted that the Plaintiff claimed general damages as against the first Defendant for such inducement of breach of contract. The first Defendant noted, in its submission, that it was not a party to the Agreement between the Plaintiff and the second Defendant. As far as the Issues between the parties were concerned on that, the first Defendant wished to concentrate on Issues numbers 5, 6 and 8. Firstly, the first Defendant stated that as it was not a party to the Agreement, it was a stranger as to the dealings between the Plaintiff and the second Defendant. It maintained that it had been dragged into a dispute which was not of its making. In terms of whether the first Defendant had failed to adhere to the instructions as contained in the Plaintiff\'s said letter of 29 October 2002, the first Defendant noted that the primary intention of the letter was to ensure that after termination of the Agreement as between the Plaintiff and the second Defendant, the latter got control of the line. The first Defendant posed the question that if the second Defendant had moved premises, the intention of the parties would still be the same and that the provision of lines would be moved to the new location. In its opinion, the first Defendant had applied a reasonable interpretation to the said letter of 29 October 2002. The second point raised by the first Defendant was that in order for the Plaintiff to prove that it was responsible for inducing the breach of the Agreement, it had to show that the first Defendant had knowledge of the Agreement and the intention to induce a breach thereof. It maintained that the Plaintiff must prove that there was an intentional invasion of its contractual rights and

not merely that the breach of contract was a natural consequence of the first Defendant\'s conduct. The first Defendant then referred the court to the said extract and paragraph in **Halsbury's Laws of England** referred to by the Plaintiff and went to the trouble of spelling out the relevant paragraph as follows:

"where one person by unlawful means intentionally induces a second person to commit a breach of contract against a third person or prevents or hinders the performance of that contract, so that the third person suffers damage, the first commits a wrong actionable at the suit of the third unless the inducement is justifiable."

34. The first Defendant went on to submit that the word "intentionally" as clarified in **Halsbury's** detailed that it must be shown that the Defendant knew of the existence of the contract between the other two parties and intended to procure its breach and that a negligent interference with such a contract does not constitute this tort. The first Defendant submitted that in this matter, it had no knowledge of the contract between the Plaintiff and the second Defendant that there was no pressure or persuasion alleged on the part of the first Defendant. As regards the Plaintiff\'s claim that the first Defendant\'s actions amounted to fraud, the first Defendant submitted that fraud constitutes deliberate misrepresentation that causes damage to another person. It maintained that the particulars alleged by the Plaintiff are not in line with any deliberate acts on the part of the first Defendant. There was no obligation for the first Defendant to confirm the instructions detailed in the Plaintiff\'s said letter because the use of a letter in asking for the transfer of lines in the telecommunications industry is common practice. The first Defendant submitted that fraud as alleged was not proved as the first Defendant had acted reasonably and without any ill will towards the Plaintiff.

35. The second Defendant filed its submissions on the 24 July 2012. It commenced by detailing what were the undisputed facts as between the Plaintiff and itself, in terms of the Agreement stating as follows:

"In the year 2003, the Communications Commission of Kenya (CCK) licensed Kenya Data Networks (KDN) to provide the same service that the 2nd Defendant was procuring from the Plaintiff. KDN commenced operations in the same year and its charges were considerably lower than those charged by the Plaintiff. The 2nd Defendant approached the Plaintiff to renegotiate the agreement and in particular their charges and the Plaintiff declined insisting that the 2nd Defendant had to continue paying the same charges as before. By letter dated 2/10/2003, the 2nd Defendant terminated the agreement with the Plaintiff and started procuring services from KDN. In the process of termination, the 2nd Defendant's lines which had been installed at the Plaintiff\'s premises were disconnected from the Plaintiff\'s premises using a pre-signed transfer letter dated 29/10/2002 which the Plaintiff had provided at the time the agreement was executed."

The court does not consider that the second Defendant\'s position could be put any clearer than the above. The second Defendant\'s submissions then went into what it termed, an analysis of the Memorandum of Network Service Agreement dated the 29 August 2002. In concluding that courts of law do not enforce interpretations of contracts that result in absurd conclusions, the second Defendant cited the case of **AG v Wickman Machine Tool Sales Limited (1973) 2 All ER 39** as per **Lord Reid.** Detailing that:

"The more unreasonable the result the more unlikely it is that the parties can have intended it".

The second Defendant submitted that to expect any party to endure breach by the other party for a period of 12 months before termination, was absurd. It continued by saying that the fundamental question for this court to determine is whether it was the second Defendant who breached the Agreement by failing to comply with clause 4.1 thereof or whether it was the Plaintiff who breached the Agreement by failing to renegotiate the contract terms upon licensing of the Public Data Network Operators (PDNOs) with the resultant fall in prices. The second Defendant then urged the court to examine closely the provisions of clauses 3.2 and 3.3 of the Agreement emphasizing that the parties thereto had agreed that the Agreement required them to meet :

"**the highest reasonable commercial standards for network and service quality and performance**".

The second Defendant would have the court consider that by this intention expressed in the Agreement and reading of the two sub-clauses in their entirety, there could be no doubt that such intention was affected by the licensing of the PDNOs. The second Defendant maintained that the Plaintiff could not claim, after such licensing happened, to have been providing **"the highest reasonable commercial standards for network and service quality and performance"**, if its charges remained at 80% more expensive than the market price for that service.

As a result therefore, the second Defendant submitted that by the Plaintiff refusing to comply with a renegotiation of the Agreement and more particularly a reduction in its prices, the second Defendant was entitled to terminate the same.

36. Without prejudice to its submissions on liability, the second Defendant commented upon quantum of damage should the court find against it on liability. It was the second Defendant's submission that the amount claimed by the Plaintiff in the sum of Shs. 36,616,777.00 as special damages was based on the amount that the second Defendant would have paid the Plaintiff for the continued use of the 230 ports for the remainder of the term of the Agreement. It maintained that special damages in law are losses which are actually incurred by the party claiming them. Such special damages must be specifically pleaded and strictly proved. The second Defendant continued by saying that the Plaintiff had made no attempt to plead the actual losses which it incurred as a consequence of the termination. What it had pleaded was what could only be described as anticipated income. It underlined that income is not a loss, such includes expenses and clearly the Plaintiff never incurred any expenses for the period that the second Defendant did not utilise its services. It noted that no documents whatsoever were produced before court to demonstrate the actual losses amounting to the sum claimed by the Plaintiff. It continued its submissions by stating that in law, a court cannot award damages which are not proved. It pointed out that it was the Plaintiff\'s burden to tabulate the charges that would have been raised to the second Defendant so as to indicate which part of such charges constituted expenses and which part constituted the Plaintiff\'s profit (hence its losses). The second Defendant maintained that in the absence of such evidence it was obvious that in actual fact, the termination of the Agreement by the second Defendant did not result in any losses being incurred by the Plaintiff. In this regard, the second Defendant referred the court to the authority of the Court of Appeal in **Bamburi Portland Cement v Imnanali Hussein (1996) eKLR**. The second Defendant quoted from the judgement in that case of **Shah J A** (as he then was) as follows:

"In proving special damages (which have to be strictly proved) it is not sufficient to simply state that he was losing so much per lorry per day. Overheads of a transport business are not insubstantial. Simple calculations of his overheads as pointed out by the appellant\'s counsel in cross-examination showed that his overheads could well have exceeded his income. The learned judge, with respect, went wrong in not taking into account such overheads."

37. It would be logical to first consider herein, the Plaintiff\'s claim against the first Defendant. The claim against the first Defendant is spelt out in paragraph 9 A of the Amended Plaint. The paragraph reads as if the Plaintiff is accusing the first Defendant of fraud in relation to the moving of the lines number 69055 at the instance of the second Defendant to the premises of Kenya Data Network at Parkview Towers rather than to the second Defendant\'s premises at Loita House, Loita Street, Nairobi. In actual fact and with reference to the Plaintiff\'s submissions filed herein, it does seem that its actual cause of action against the first Defendant comprises the tort of inducing a breach of contract or at least interference with the performance of the same. Both the Plaintiff and the first Defendant in their submissions pointed to the **paragraph no. 1518** in **Halsbury's Laws of England, Volume 45: Tort**. That paragraph comes under the heading of **"Interference with Contractual Relationships"**. That paragraph reads:

"Interference with the performance of a contract. Where one person by unlawful means intentionally induces a second person to commit a breach of contract against a third person or prevents or hinders the performance of that contract, so that third person suffers damage, the first commits a wrong actionable at the suit of the third, unless the inducement is justifiable."

As per the footnotes to that paragraph, it must be shown that the defendant knew of the existence of the contract and intended to procure its breach. Further, it is enough to establish the tort if a person induces a

breach recklessly or carelessly whether it is a breach or not. Finally a negligent interference with a contract does not constitute this tort. See **Cattle v Stockton Waterworks Co. (1875) LR 10 QB 453.**

38. Although the first Defendant\'s witness **Susan Siboe** stated that she was aware of the Agreement as between the Plaintiff and the second Defendant, I gathered that such was within her knowledge but no more. It is the Plaintiff\'s case as against the first Defendant that the latter colluded and conspired with the second Defendant to avoid the Agreement. From **Susan Siboe's** evidence, I don\'t think that this was the case at all. The witness stated that she had received the Plaintiff\'s letter of 29 October 2002 on the 19th of November 2003 which requested the first Defendant to transfer to the second Defendant its lines operated under number 69055. As per the letter, she processed the transfer of the number out of the account name of the Plaintiff into the account name of the second Defendant. Thereafter, it appears, the instruction was given to the engineers to physically transfer the lines so as to provide the service to the second Defendant and at the instance of the second Defendant. I can find absolutely no intention on the part of the witness and indeed on the part of the first Defendant as regards interfering in the performance of the Agreement between the Plaintiff and the second Defendant. However, I did wonder as to whether it was the duty of the first Defendant, having received the Plaintiff\'s said letter of instruction to transfer the lines over a year after it was dated, to enquire of the Plaintiff and confirm the instruction. However as per **Cattle v Stockton** (supra), I do not consider that this lack of caution on the part of the first Defendant amounted to constituting the tort of interference with the performance of the Agreement. Further and as regards Issue No. 5 of the agreed Statement of Issues, I do not find that the first Defendant\'s transfer of the circuit lines to the premises of the Kenya Data Network Limited at Parkside Towers to be fraudulent, wrongful and improper or in breach of the intention of the Plaintiff\'s said letter dated 29th of October 2002. To my mind, that letter covered the situation as between the Plaintiff and the second Defendant as to what would happen when the Agreement between them came to an end, howsoever terminated. I accept the second Defendant\'s contention that the lines could have been installed at any premises not necessarily that occupied by the second Defendant in Loita House, Loita Street, Nairobi. Accordingly, I dismiss the Plaintiff\'s claim for general damages as against the first Defendant with costs to the latter.

39. Moving on then to the Plaintiff\'s claim against the second Defendant, here the Plaintiff is on safer ground. The first Issue was whether the second Defendant breached the Agreement or otherwise. I have taken into account the version of events put before court by the Plaintiff particularly the evidence of PW 2. I also considered the evidence put before court by Mr. Mucheru for the second Defendant. I have also closely examined the Agreement between the Plaintiff and the second Defendant entered into on 29th of August 2002. It seems abundantly clear to me that what happened in August/September 2003 was that the regulator for the telecommunications industry being the Communications Commission of Kenya rather suddenly decided to licence Public Data Network Operators (PDNOs) ending the monopoly of Telkom Kenya Limited in providing data network services to the Kenyan public. It appears that Kenya Data Network Limited (KDN) was one of the first licensees offering network services in the marketplace. Indeed I have no doubt that KDN was able to offer such data network services at much less cost to users such as the second Defendant. Having discovered this, the second Defendant approached the Plaintiff in order that the Agreement could be renegotiated as to pricing. It seems that the Plaintiff\'s answer to the approach was twofold. Firstly, it was not using the same technology as KDN and honestly could not match the latter\'s price to the second Defendant. Secondly, it appears that it did agree that the cost of the services to the second Defendant would reduce if the latter would agree to take more ports. It appears that the second Defendant was not prepared so to do despite the fact that in Annexure B to the Agreement, the anticipated requirements for the second Defendant for the quarter 1 December 2002 to end of February 2003 was 500 ports. It was the evidence of Mr. Mucheru that the second Defendant only ever used 230 ports although the calculation of damages made by the Plaintiff details 240 ports.

40. It appears as a result of the stand-off between the Plaintiff and the second Defendant in August/September 2003, the second Defendant decided to give a 30 day notice to the Plaintiff to terminate the Agreement. The second Defendant has done its best to convince this court that the refusal of the Plaintiff to the pricing amounted to a breach of the Agreement. To this end it pointed to the authority of the English House of Lords being **L Schuler AG v Wickman Machine Tool Sales Limited** (supra) to support its contention that courts of law do not enforce interpretation of contracts that result in absurd conclusions. With respect, the authority cited and the words of Lord Reid quoted by the second Defendant

are taken out of context. What that case decided was whether a breach of a condition of the contract by one party (underlining mine) gave a right to the other party to terminate the contract forthwith. In the case before court, I can see no breach of the Agreement by the Plaintiff either generally or even in relation to any particular condition. In my reading of the Agreement, there was no condition laid down and agreed by the parties allowing for a renegotiation of the price during the term of the Agreement. As far as I can see, the second Defendant knew perfectly well that the one month notice of termination of the Agreement that it gave to the Plaintiff was both inadequate and not in accordance with the termination clauses in the Agreement. To my mind, the second Defendant suddenly realized that the reduction in prices as offered by the newly licensed KDN meant that its own prices to its customers would soon be perceived as being on the high side and consequently it feared losing business in the telecommunications market place. Although there was an allegation that the Plaintiff and the second Defendant were in competition (bearing in mind the shareholding involvement of Africa-on-line in the Plaintiff\'s business/company). I have no doubt that the second Defendant and the said Africa-on-line were competitors. It seems to me that the second Defendant, by terminating the Agreement and obtaining cheaper prices for data services elsewhere than with the Plaintiff, may well have been trying to steal a march on Africa-on-line which was always locked into the Plaintiff\'s data services and the prices therefore. In any event, I do not accept Mr. Mucheru’s evidence that the Plaintiff was trying to ruin the second Defendant\'s business.

41. Reverting to the Agreement for a moment, I believe that clause 4.1 thereof is self-explanatory in that the term of the Agreement was for a period of 3 years from the commencement date thereof as at the date of execution being 29th August 2002. Further, should either party wish to terminate the Agreement it could do so by giving written notice to that effect to the other of not less than 12 months prior to the proposed date of termination. The Plaintiff interpreted that clause as meaning that the 12 months written notice could only be given on the first or any subsequent anniversary of the "Effective Date". In clause 1 of the Agreement the definition of the "Effective Date" (at clause 1. 1. 5) reads:

"Effective Date shall mean and refer to the date of the last party attesting to this agreement date".

If one then turns to the execution clause at page 26 of the Agreement, it is to be noted that it was executed by the Plaintiff by way of a signature over the company\'s rubber stamp on 29 August 2002 the witnesses being G. Clarke and Gladys Ogallo. For the second Defendant, the Agreement was again signed over a rubber stamp the witnesses being J. M. Gachui and J. W. Mucheru. However, that execution by the second Defendant is not dated. What then does the fact that there is no date to the execution by the second Defendant in so far as the Effective Date of the Agreement is concerned? Frankly, I don\'t read anything into this, as at the foot of each page of the Agreement the date 8/29/2002 is clearly endorsed. However, it is clear that the second Defendant as per its said letter dated second of October 2003, in which it gave 30 days’ notice of termination of the Agreement was in breach of the same. This then is the answer to the first Issue as between the Plaintiff and the second Defendant. The third Issue was whether the Agreement between the Plaintiff and the second Defendant was void and/or whether it was valid and enforceable. To my mind, the same was valid and enforceable despite my comments as to dating thereof as above.

42. As regards the second Issue as between the parties, whether the subject telephone lines and access circuits belonging to the Plaintiff or to the second Defendant at all material times, I do not consider that this is really relevant. There is no doubt that the Plaintiff rented the line as from the first Defendant and cannot therefore be said to be the owner thereof. It is clear that the lines were allotted by the first Defendant to the Plaintiff. It is further clear that the Plaintiff utilized the lines under number 69055 solely for the purposes of providing data services to the second Defendant. It is also clear that it was the intention of the parties that upon the termination of the Agreement, the Plaintiff would transfer to the second Defendant the said number. The fourth Issue between the Plaintiff and the second Defendant was whether the former breached any of its obligations to the second Defendant under the Agreement. In my opinion, it did not. It provided services as contracted for and at the price agreed. There was no evidence brought before court by the second Defendant that the Plaintiff\'s services were lacking in any way. As regards the fifth Issue between the parties, I have already answered the same in my finding concerning the first Defendant\'s liability or otherwise as above.

43. The sixth Issue between the parties was whether the Plaintiff was entitled to the prayers sought in the

Amended Plaint. Here again I have already held, as above, that the Plaintiff\'s claim against the first Defendant is dismissed. Having said that, the Plaintiff\'s prayer for special damages as against the second Defendant seeks a notice period of 21 months. It arrives at this calculation by taking the period from the date of the second Defendant no longer requiring the services as from December 2003 through to 29 August 2004 (9 months) plus a further 12 months from that date. The second Defendant\'s contention was that special damages in law are losses which are actually incurred by the party claiming them. It was interesting to note that both the Plaintiff and the second Defendant cited to court the same extracts from **Halsbury's Laws of England** as well as the **British Industrial Plastics** case and the **Bamburi Portland Cement** case in relation to damages for inducing a breach of contract. My having found that there was no such inducement (by the first Defendant) these authorities do not apply in that regard. However, the second Defendant has relied upon the **Bamburi Portland Cement** case (supra) more particularly in the finding of **Shah JA** therein, in relation to the proving of special damages. I find myself in agreement with both the authority cited and the second Defendant that the Plaintiff cannot claim the amount of the fees that it would have earned had Agreement run its full course. Those fees do not take into account the Plaintiff\'s expenses in providing the services to the second Defendant. What the Plaintiff should be claiming is its profit element in providing such services. There is no doubt that the Plaintiff was incurring expenses in providing data services to the second Defendant; for a start it was paying the monthly cost of the lines rented from the first Defendant. The second Defendant maintained that the Plaintiff ought to have produced figures before court to the effect that it was making profits and such should have been specifically pleaded and proved. It went on to say that in the absence of such proof, the court would not have any discretion in assessing damages and it should decline to award any. From the finding on damages as per both **Omolo JA** and **Shah JA** (by which I am bound), there is no discretion for a trial judge when assessing special damages. Special damages must be proved. In the absence of such proof, damages may be purely nominal.

44. In his testimony, Mr. Mucheru for the second Defendant admitted that the invoice from the Plaintiff for the month of November 2003 in the amount of Kenya shillings 1,808,521.00 had not been paid by the second Defendant. Accordingly, I have no hesitation in entering judgement in this amount in favour of the Plaintiff. The question is: what nominal damages to award on top? The Plaintiff has pleaded the amount of Kenya shillings 34,808,256.00 covering the fees which it would have earned for the 21 month period through to the expiry date of the Agreement. As I have observed above, such fees are not profit. Consequently, doing the best I can, I award nominal damages to the Plaintiff as against the second Defendant in the amount of Kenya shillings 1 million. Therefore, there will be judgement for the Plaintiff as against the second Defendant in the total amount of Kenya shillings 2,808,521.00. I am in agreement with the Plaintiff that costs should follow the event and award costs to it as against the second Defendant in relation to the Plaintiff\'s claim against the second Defendant.

DATED and delivered at Nairobi this 26th day of September 2012.

J. B. HAVELOCK
JUDGE