



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 981 of 2001

TAJINDER SINGH KALSI PLAINTIFF

VERSUS

KENCELL COMMUNICATIONS LIMITED.....DEFENDANT

JUDGMENT

The plaintiff sued Kencell Communications seeking an order, **“directing the defendant to connect his lien to the service he subscribed for i.e. Yes Post Paid 180.”**

He also prayed for damages for breach of contract, damages for business lost, damages for inconvenience and pain suffered as a result of the defendant’s wrongful act, and costs of the suit.

The plaintiff’s claim arose from a contract he signed with the defendant as a subscriber of the telephone services **“Yes Post Paid 180”**, which service entitled him to certain rights and privileges as per the contract. The plaintiff claimed to have paid, **“all the agreed fees under the contract, but, “contrary to the terms and conditions provided in the contract or implied therein, the defendant unlawfully connected to plaintiff’s mobile telephone to another system which did not give the plaintiff the rights and privileges enjoyed by the subscriber of the Yes Pre Paid 180 system, and started billing and has since been billing the plaintiff as if he was a subscriber for another system, other than the said Yes Pre Paid 180 system”**.

The plaintiff complained that he suffered loss and damage as a result of the defendant’s unlawful Act.

In para 8 of the plaint, the plaintiff claimed that,

“as a result of the unlawful act on the part of the defendant unlawfully disconnected the plaintiff’s line from 29th November to 1st December, 2000 whilst the plaintiff was on a business tour in Mombasa thereby leading to the plaintiff losing a business transaction in which he was engaged in Mombasa. If the plaintiff had been connected to the right service for which he subscribed his line would not have been liable for disconnection”.

The defendant denial the plaintiff’s claims, vide the defence and counter claim filed in court on 17th August, 2001.

In para 7, the defendant state that, **“it because necessary to disconnect the plaintiff from the service after he refused and failed to pay a total of Kshs.71,739/= outstanding bills he incurred on the Yes!**

And Yes! 180 service”.

The defendant gave the details of the counterclaim in para 11 of the defence, and subsequently prayed that the plaintiff's suit be dismissed with costs.

Testifying in court, the plaintiff stated that he is a businessman operating air charter Express Ltd, and that he subscribed for a service with the defendant for a mobile line for the Yes Prepaid 180 service, which entitles one to 180 minutes at a specified cost to other Kencell subscribers. He entered into the contract on the 1st September, 2000, and he was given a line, 0733 – 513 – 350. He signed a contract which he produced in court as an exhibit.

The plaintiff started using the line and after one month in September 2000 he noticed that there was no free 180 minutes which was to be paid at the agreed rate.

He went to the head office to complain, and learnt from the customer care service that this was a mistake as they had billed him wrongly. As the bill was already due and payable, they asked him to pay a certain amount on account, which he did, about Kshs.6,000/=.

The defendant promised to rectify the service and bill the plaintiff correctly, but the mistake again occurred the following month, as the bill came under the service he had not signed for.

The plaintiff traveled to Mombasa between 29th November 2000 to 1st December, 2000. His service (mobile) was disconnected. He did not communicate and lost business as a result of this.

The plaintiff again went to enquire why he had been disconnected. The defendant looked through his file and reconnected him back to the service, though the proper service had not been connected. Eventually the plaintiff was disconnected.

The plaintiff claimed that he lost business as his clients could not reach him. He prayed that the defendant should be ordered to reconnect his line. He also prayed for damages for breach of contract and also prayed for the dismissal of the counter claim.

On questioning, the plaintiff said that he made payments to the defendant totaling Kshs.70,000/=.

He did not, however, make a written complaint. He has a Safaricom line but did not use it whilst in Mombasa because he left it for his wife in Nairobi.

To further questions, the plaintiff answered

“I was given credit for being put in the wrong service. I was given various credits whenever I complained”.

The plaintiff's Kencell line was disconnected three times. He got calls from the defendant demanding more credit to the line. When asked how much he owed the defendant, the plaintiff said, **“I do not owe the entire sum of Kshs71,790/=. I owe some money, not all”**.

The defendant company was represented by Christine Tiriongo, of the Credit Control Department of the defendant company.

She conceded that the plaintiff applied for a **“Yes, 180 Postpaid Line”**. At the time, the deposit was Kshs.10,000/= which the plaintiff paid, and the monthly charges were 1700 (taxes).

The plaintiff's line could not however be activated and he was informed that there was a technical problem. Because he was not on the service he applied for, he was given a credit of Kshs. 3,000/=, before the bill was sent to him. This is reflected on the bill produced in court, as “gesture of good will”.

The 1st bill incurred by the plaintiff was Kshs.6,188/=. He complained about it, but paid it. The monthly fees was Kshs.1,700/= and since he was activated on “Yes”, he was charged only Kshs. 400/= as the “Yes”, post paid does not come with free minutes, yet he was entitled to 180. In November, 2000 the defendant gave the plaintiff a credit of Kshs.8,600/=. Still they could not connect him on the service.

Christine produced in court a statement of the plaintiff’s account dated 1st December, 2000, for the period 1st to 30th November, 2000.

She stated further that the plaintiff had a limit of Kshs. 10,000/=. He was telephoned and informed that he was exceeding his limit of Kshs. 10,000/= which could not be increased unless he made advance payment.

On 22.11.2000, the plaintiff was given a credit of Kshs.8,600/= because of not being on the service he applied for. He was informed accordingly, but even after being given credit, the amount outstanding was more than his deposit, and this resulted in his line being barred, i.e. he could receive calls, but could not make any.

The plaintiff called on 29.11.2000 to enquire about his line which had been blocked. He was told that his consumption had gone beyond his deposit. This was recorded and appears in the bill. The following day of 30.11.2000, the plaintiff made a payment of Kshs.10,000/=. This too is reflected in the bill.

The following day of 30.11.2000, the plaintiff made a further payment of Kshs.10,000/=. This too is reflected in the bill. His line was then unblocked, but another bill he had incurred was sent to him and for that, a credit of Kshs.4,300/= was given to him for not being put on the service he applied for. Another credit was given to him on 6.2.2001. It is reflected in the bill of 1.3.2001.

The bills reflect the credit given at various times. The plaintiff was eventually given the service he had signed for on 15.3.2001. A letter to that effect was written to him. The outstanding bill then was Kshs.58,222/=. The plaintiff demanded a correct bill before paying and by this time his account stood at Kshs.66,347/= and the line was suspended, but before that he had used the line several times and the final amount now stood at the sum claimed in the counterclaim. The line was disconnected completely on 4.7.2001.

On the plaintiff’s prayer for damages, Christine said that the plaintiff was being compensated “**per month**” for not being put on the right service, and this is reflected on the statement of accounts produced in court.

The advocates consented to make written submissions, however, I only got submissions from counsel for the defendant who asked the court to ignore the plaintiff’s prayer for reconnection of his line as he did not push for it during his oral evidence.

On the question of damages for breach of contract, the submission was that the plaintiff did not quantify his claim, that he threw this prayer at the court and left it to decide what he lost. How can the court tell what he lost?

The same argument was advanced for the claim of business lost. The court was not given guidance by the plaintiff on how to calculate this.

The defendant compensated the plaintiff every month at the rate of Kshs.4,300/= for not being put on the correct service. The defendant said that to be asked to pay compensation to the plaintiff again would be double jeopardy as he was compensated every month.

The defendant maintained that it acted in good faith, so it could not pay “*exemplary damages*”. The defendant referred to its statements produced in court, in arriving at the conclusion that it had proved its counterclaim.

I have not considered the contents of the “Reply to the Defence and Counterclaim,” as the same was filed by an advocate who did not hold a valid practicing certificate. This was admitted in the plaintiff’s replying affidavit to the application for dismissal of the case for want of prosecution filed on 27th January, 2003.

Having considered the evidence on record, I have to find, a fact not disputed by the defendant that the plaintiff was not put on the service he contracted for. The reason given was “**technical problems**” which the plaintiff was made aware of. He admitted as much in his oral evidence in court. The plaintiff also admitted that he was given credit every month for this “**mistake**” and further, that he had paid a deposit of Kshs. 10,000 for the service which he contracted for.

The defendant appreciated the plaintiff’s dilemma for no fault of his and compensated him monthly, but despite this, the plaintiff exceeded his limit periodically and this was drawn to his attention and when he did not pay the service was disconnected. This happened about 3 times.

In the meantime, the plaintiff’s account with the defendant “**grew**”, whenever he exceeded his limit. The entire statement of account was produced in court, and the plaintiff’s counsel had the opportunity to cross examine Christine on it and seek explanations and or clarifications where necessary.

To sup up this case therefore, I find that though the plaintiff was not given the service he contracted for, he was informed of the reason why, and thereafter compensated per month to make up for non user of the service at a fixed rate of Kshs.4,300/= p.m. The statements reflect this.

The plaintiff accepted this monthly credit, but as I have stated, periodically exceeded his deposit of Kshs.10,000/= which he had paid.

It is interesting to note that the plaintiff does not deny owing the defendant money as pleaded in the counter claim. His answer during cross-examination was, and I repeat, “**I do not owe the entire sum of Kshs. 71,790/= . I owe some money not all.**”

At least the defendant brought the statement of account of the plaintiff’s line. The plaintiff did not offer any evidence as to what he owes the defendant. He just said “**some money**”. This admission to my mind meant that the plaintiff conceded that though he was not given the service he contracted for, he was informed of this, and was thereafter given credit per month, as shown in the statement of account of his line, but exceeded his deposit of Kshs.10,000/= and that is how he incurred money on his line.

The plaintiff has in my considered opinion failed to prove his case on a balance of probabilities and I proceed to dismiss the same with costs to the defendant.

At the same time, I find that the defendant has proved his counterclaim basing it on the statement of account of the plaintiff’s line, produced in court. This statement was not challenged, so I accept it as showing the correct position of the plaintiff’s line.

I find judgment for the defendant against the plaintiff in the counterclaim in the sum of Kshs.71,790/= plus costs and interest.

Dated at Nairobi this 19th day of May, 2006.

JOYCE ALUOCH

JUDGE