



**Airtel Network Kenya Limited v Khan (Civil Appeal E011 of 2024)
[2025] KEHC 3321 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E011 OF 2024
DKN MAGARE, J
MARCH 7, 2025**

BETWEEN

AIRTEL NETWORK KENYA LIMITED APPELLANT

AND

MOHAMMED S. KHAN RESPONDENT

JUDGMENT

1. This is an appeal from the ruling of Hon. C. Ocharo (SPM) given on 28.7.2023 in Kisii CMCC No 52 of 2013. The Appellant was the defendant in the lower court. This matter is an interlocutory appeal. The primary suit is still pending in the lower court.
2. The Respondent filed suit on 22.2.2013 regarding the termination of mobile phone services under one of the tariffs offered by the Appellant. The Respondent sought the following:
 - a. Damages incurred from April 2012. The last date is not given.
 - b. An order to reconnect two phone lines.
 - c. Exemplary damages.
 - d. Costs.
3. The Appellant entered appearance on 22.3.2013 and filed defence and counterclaim on 3.4.2013. They filed a counterclaim for Ksh. 21,834.87. A reply to defence and defence to counterclaim was filed on 15.4.2013. The appellant did not admit jurisdiction. The parties recorded consent on 4.7.2018 to the following terms:
 - a. The matter be removed from the hearing list of today.
 - b. Parties to be given a mention date after 30 days to record a consent on quantum.



- c. Should parties fail to record a consent as outlined in 2 above a hearing date be taken.
4. Pursuant to that consent, what is remaining is a hearing date on quantum. However, I cannot trace any consent on liability. Subsequently, the court made a ruling on 5.9.2018 related to amendments to include special damages of Ksh. 10,000,000/=. On 19.9.2018, an application for a stay of proceedings pending appeal was filed. The stay was granted. The amendment had been made after PW1 had testified. The Appellant then filed HCCA 84 of 2018.
5. The fate of that appeal is unclear. However, on resumption of the hearing, the Appellant filed another application seeking to strike out the suit on the following terms:
 - i. That this Honorable Court lacks jurisdiction to hear and determine the Plaintiffs/ Respondent's suit.
 - ii. That the Plaintiffs/Respondents never exhausted the express statutory dispute resolution mechanisms provided for under the [Kenya Information and Communications Act](#) and the Kenya Information and Communications (Dispute Resolution) Regulations, 2010.
 - iii. That the Plaintiffs/Respondent's suit be dismissed with costs to the Defendant/ Applicant.
 - iv. That the costs of this application be provided for.
6. The application was supported by an affidavit of Lilian Mugo, who describes herself as the Legal Manager of the Appellant. She stated that regulations, known as the Kenya Information and Communications (Dispute Resolution) Regulations, 2010, governed the relationship between the parties. To her, it has robust procedures for resolving disputes under the Kenya Communications Authority. According to her, the dispute has to be notified to the communication authority before the court. The High Court has appellate decision from a tribunal formed to deal with those issues. Finally, they pleaded that ignorantia juris non excusat.
7. They also raised a preliminary objection to the effect that:
 - a. The plaintiff's cause of action, as set out in the body of the amended complaint, relates to disputes concerning a licensed telecommunication service provider under the [Kenya Information and Communications Act](#), 1998, and a consumer of the defendant's services.
 - b. The subject matter and nature of the foregoing dispute fall squarely within the meaning of dispute as set out in Regulation 2 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010.
 - c. The Honourable Court lacks the requisite jurisdiction to hear and determine the matter.
 - d. This suit has been brought contrary to Regulation 3 of the Regulations, which grants the Commission the power to resolve disputes between a consumer and a service provider.
 - e. This claim should be handled by the Communications Authority of Kenya, established under section 3 of the [Kenya Information and Communications Act](#).
8. The preliminary objection is not embedded in the defence. The outcome of appeal No. 84 of 2018 is still a mystery. The court will address issues on the following:
 - a. The question of a preliminary objection.
 - b. Striking out a suit.
 - c. Merit of the application and preliminary objection.



Submissions

9. The Appellant submitted that the court was barred from determining the dispute as jurisdiction lied with the Communications Authority of Kenya.
10. Reliance was placed on Section 102(2) of the *Kenya Information and Communications Act*, 1998 to canvass the argument that a party was required to appeal within sixty days to the Tribunal. That a decision of the tribunal would also be appealed to the High Court within thirty days under Section 102G (1) of the Act.
11. The Appellant submitted that the relationship between the Appellant and the Respondent was regulated under the Act and the Regulations made thereunder. They cited Leonard Otieno v Airtel Kenya Limited [2018] KEHC 9063 (KLR), where a consumer had failed to pursue internal dispute resolution under the Act and the court dismissed the case.
12. The Respondent filed submissions dated 5.12.2024 by which it was submitted that the lower court rightly found that the suit fell within the exceptions to the exhaustion requirements for internal dispute resolution mechanisms. They relied on James Kuria v Attorney General & 3 others (2018) eKLR. It was also submitted that the Appellant had not demonstrated any prejudice that would occur to it.

Analysis

13. A preliminary objection has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations. The Court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

14. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus The Board Of Trustees of the Cashewnut Industry Development Trust Fund, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S.S. Kadage JJA), sitting in Dar Es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in Kampala in the Mukisa biscuit case (Supra) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the “improper practice” never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.”



15. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd* (supra): -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

16. A Tanzania Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & Others vs Attorney General* (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010),(Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

17. Justice Prof. J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro vs Mbaja* [2005] eKLR:

I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.



18. A preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.
19. The preliminary objection herein is based on the question of law, whether, the court has jurisdiction to hear this claim. Jurisdiction is everything. In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said it is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

20. The court cannot expand its jurisdiction through judicial craft or innovation. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

21. The court will, therefore, assume jurisdiction where it has and eschew jurisdiction where none exists. In the case of Phoenix of EA Assurance Company Limited vs SM Thiga t/a Newspaper Service [2019] eKLR, the Court of Appeal held that:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on



arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself.”

22. The parties proceeded well, even amended claims, and even appealed on other issues relating to amendment. The parties have been in court since 2013. The preliminary objection dawned on the Appellant late in the day. The same is based on Section 2 of the [Kenya Information and Communications Act](#), 1998. There appears to have been some regulations, Kenya Information and Communications (Dispute Resolutions, 2010). They are of doubtful legality having been promulgated over 10 years ago.
23. The [Kenya Information and Communications Act](#), 1998 has the long title as an Act of Parliament to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications, and postal services) and electronic commerce, to provide for the transfer of the functions, powers, assets, and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.
24. The disputes set out in the act itself relate to the grand disputes of land, sites, and operators. They do not deal with disputes with consumers. The Kenya Information and Communications (Dispute Resolution) Regulations, 2010 are made under Sections 27, 38 46(k) and 66.
25. The said sections provide for the following:
 - a. section 27 – General regulations for telecommunication services
 - b. sections 38 – Regulations on radio communication
 - c. sections 46(k) – Regulations on broadcasting
 - d. sections 66 – Regulations for postal services
26. The said act was amended to introduced section 27A-27D vide Act No 41A of 2013, which commenced on 2nd January, 2014 as gazette on 18.12.2013. The new sections dealt with sim card registration. There were no attendant regulation placing the dispute mechanism under sections 27A-27D under the Kenya Information and Communications (Dispute Resolution) Regulations, 2010. The suit herein was filed on 22.2.2013. The rules cannot apply retroactively.
27. The court thus had jurisdiction to hear and determine a case filed before the issue of registration and transfer of the sim card was regulated by the Act. The preliminary objection does not apply.
28. Secondly, the preliminary objection was raised after the period for the referral had passed. The regulations cannot drive a person from a seat of justice; there must be an effective way to be heard. Where the mechanism is a phantom, none is bound to follow the same. In the case of Canadian Supreme Court decision in *Uber Technologies Inc. v Heller*, [2020] SCC 1, the Supreme Court of Canada sitting in Ontario, had this to say:

“The Canadian doctrine of unconscionability had two elements: an inequality of bargaining power, stemming from some weaknesses or vulnerability affecting the claimant and an improvident transaction. In many cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party’s ability to freely negotiate a contract, compromised a party’s ability to understand or appreciate the meaning and significance of the contractual terms or both. A bargain was improvident if it unduly



advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed; unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances for example, almost any agreement would be an improvement over status quo. In those circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. That could occur where the price of goods or services departed significantly from the usual market price. Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable adequately to protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they have equal bargaining power.”

Unconscionability, consists of the two-pronged test that prevails in most jurisdictions today. One, procedural unconscionability which hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print. Two, substantive unconscionability which arises when a term is “overly-harsh” or “one-sided.” But more importantly, unconscionability isolates terms to which parties do not assent in any meaningful way. Thus, when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. Indeed, modern unconscionability empowers courts to strike down provisions that “fall outside the ‘circle of assent’ which constitutes the actual agreement”.

29. The court cannot respect any bid to curtail a right to a fair hearing by limiting the same so severely that it does not, in an actual sense, exist. It is also pertinent to note that there was nothing to exhaust; the period for which the commission is to be approached ended. The rules do not amend the *Limitation of Actions Act*. The cause of action remains in place until extinguished by limitation. It is unconscionable to have the Appellant to be heard in a far-off tribunal whose rules drive him out of the seat of justice. The Appellant slept on their laurels and only woke up a decade later to plead exhaustion.
30. In *Wahome v Public Health Officers & Technicians Council & another (Constitutional Petition E418 of 2021)* [2023] KEHC 2680 (KLR) (Constitutional and Human Rights) (31 March 2023) (Ruling), A C Mrima posited as following regarding exceptions to exhaustion:

The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows:

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R vs Independent Electoral and Boundaries Commission (I E B C) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of



Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.*⁶⁰ As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.⁶¹ The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR*.

31. The right is severely limited in terms of time. Further, the Appellant is guilty of laches. Thirdly, the regulations do not apply to SIM cards or phone lines, as these were introduced after the rules were promulgated.
32. I agree with the Respondent's submission on the import of exceptions to the exhaustion doctrine; this is well enunciated in the case of *James Kuria v Attorney General & 3 others [2018] eKLR*, where the court, John M. Mativo J, as he then was, posited as follows.
 37. I am conscious of the fact that the right of access to court is entrenched in our Constitution and it is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes. Construed in this context of the rule of law, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable. This is the test the court should bear in mind when invited to decline jurisdiction.
 38. The need for an effective remedy in a case may justify this court to take the exceptional course of entertaining a dispute where the court is satisfied that the laid down statutory mechanism may not provide an effective remedy to the aggrieved party or if it is clear the dispute disclosed by the facts substantially or wholly lie outside the scope of the laid down statutory mechanism.
 39. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred or will occur or there is a clear violation of *the Constitution* and that there is no alternative effective remedy within the statutory established mechanism.
 40. Our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute. It is also settled that the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of



redressing the complaint [in its totality].....a remedy is considered available only if the applicant can make use of it in the circumstances of his case.

33. The Respondent is based in Nairobi; it is not practical, effective, or even contemplated that the over 66 million mobile subscriptions SIM card holders in Kenya as of March will all have their disputes in Nairobi.

Determination

34. The upshot of the foregoing is that the preliminary objection was rightly dismissed. Therefore, the following orders are hereby issued:
- a. The appeal lacks merit and is dismissed with costs of 125,000/=, payable within 30 days in default execution do issue.
 - b. Given that this is a dismissal order, any application for stay shall only be made to the Court of Appeal under Rule 5(2)(b).
 - c. Noting the multiple appeals in the matter, the lower court shall proceed with the matter on a priority basis and conclude without further delay.
 - d. The lower court file shall be mentioned on 7.4.2024 before the trial court for taking a date for hearing.
 - e. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7TH DAY OF MARCH, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael

M. D. KIZITO, J.

