



**Geonet Communications Limited & another v Safaricom PLC
& 3 others (Civil Appeal E023 & E028 of 2022 (Consolidated))
[2023] KEHC 2326 (KLR) (Commercial and Tax) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E023 & E028 OF 2022 (CONSOLIDATED)**

DAS MAJANJA, J

MARCH 17, 2023

BETWEEN

GEONET COMMUNICATIONS LIMITED 1ST APPELLANT

ELIGE COMMUNICATIONS LIMITED 2ND APPELLANT

AND

SAFARICOM PLC 1ST RESPONDENT

ELIGE COMMUNICATIONS LIMITED 2ND RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA 3RD RESPONDENT

GEONET COMMUNICATIONS LIMITED 4TH RESPONDENT

(Being appeals against the judgment of the Communications and Multimedia Appeals Tribunal at Nairobi dated 11th February 2022 in CAMAT Appeal No. 3 of 2018)

JUDGMENT

Introduction

1. GeoNet Communications Limited (“Geonet”) is the Kenyan subsidiary of GeoNet Communications Group Inc. registered in the state of Delaware, USA and whose current business is focused on the diaspora of Africa and businesses that make and receive telephone calls and money transfer services between Kenya and USA. Elige Communications Limited (“Elige”) is also a Kenyan company and an internet and telephone service provider. The Communication Authority of Kenya (“CAK”) is a body corporate established under section 3 of the [Kenya Information and Communication Act](#), No.2 of 1998 and is the statutory body charged with the responsibility of licensing and regulation of the



telecommunication industry. Safaricom PLC (“Safaricom”) is a telecommunication company and is licensed by CAK as a mobile network provider among other telecommunication services. CAK has also licensed Geonet and Elige to provide various types of telecommunication services including being application Service Providers.

2. The appeals have been consolidated since they arise from the same decision of the Communication and Multimedia Appeals Tribunal (“the Tribunal”). Before dealing with the issue raised in the appeals, it is necessary to set out in detail the process and decisions made in reaching the decision giving rise to this appeal.

The Complaint

3. At the material time, Elige and Geonet had entered into interconnection agreements with Safaricom, the purpose of which was to their customers to exchange calls seamlessly. On November 15, 2016, Safaricom filed a complaint with CAK claiming illegal termination of international voice traffic by Geonet. Safaricom stated that interconnection links were opened for live traffic in October 2016, however, Safaricom noted a substantial increase in grey and illegal international traffic being terminated by Geonet though the local interconnection link. That Geonet was transiting international calls to Safaricom’s network while disguising them as local Geonet calls and that this was not only against their interconnection agreement but also fraudulent and denied Safaricom customers the benefit of good quality international calls with CLI (Caller Line Identity). Safaricom further lamented that these illegal practices also compounded the existing challenges on illegal SIM Box terminations and denied Mobile Network Operators revenue.
4. Safaricom informed CAK that it had engaged Geonet to investigate and stop the practice but without success. According to Geonet’s response, the traffic terminating to Safaricom was from Geonet’s customers locally and in the diaspora but tests and the SIMBOX detection system showed that the calls were originating from other networks in the world and that Geonet was acting as the terminating party. Safaricom therefore requested CAK to intervene.
5. On November 22, 2016, Geonet reported to CAK interference and interruption of its numbering block by Safaricom especially those numbers that Geonet had assigned Session Initiation Protocol (SIP) Trunks that carried its calling cards from several of its distributors and small businesses that use multi-channel SIP Trunks to link their business in Kenya and USA. Geonet stated that the interruption was against the spirit and tenor of its contract with Safaricom. It accused Safaricom of attempting to suppress any competition in voice services in the ICT sector. Geonet urged CAK to convene a meeting noting that it had not been allowed to utilize its licenses especially for voice services for almost six years.
6. Elige also filed a complaint against Safaricom raising the same issues as Geonet and objecting to the inclusion of a clause in the interconnection agreement prohibiting the termination of international calls.

Determination by CAK

7. CAK, upon receipt of the complaints and in an effort to resolve them, organized various meetings with the parties between December 16, 2016 and November 21, 2017. Since the parties could not reach an amicable solution, CAK issued a determination; determination No. 1 of 2018 (“the determination”) pursuant to section 27 of the *Kenya Information and Communications Act*, 1998, *Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations*, 2010 and the *Kenya Information and Communications (Registration of SIM-cards) Regulations*, 2015.



8. In the determination, CAK stated that the main issue of contention between Geonet and Safaricom stemmed from clause 3.7 of their interconnection agreement prohibits termination of international calls through the local interconnect link between the two parties. The said clause states as follows:

It is hereby agreed that XXXX shall not transit, terminate or re-seil international traffic or telephone calls originating from outside Kenya into the Safaricom system. On breach of this clause by XXXX, Safaricom may exercise the option to suspend or terminate this Agreement in accordance with clause 21 herein below

9. On the basis of the submissions and consultations with the parties, CAK narrowed down the issues in contention as follows:

- i. Engagement in Telecommunications Service Interruption Activities (Call Duration Time Down)
- ii. Participation in Traffic Re-origination (SIM Boxing)
- iii. Participating in the use of numbering resources outside the National Numbering Plan
- iv. Provision of International Incoming & Outgoing Transit Services
- v. Provision of clause prohibiting International Call Termination in Interconnection Arrangements
- vi. Adherence to subscriber registration requirements.

10. On the issue of engaging in call duration time down, CAK noted Geonet's allegation that Safaricom had been interrupting its services by timing down their client's calls to less than 30 minutes. In seeking to verify this allegation, CAK analysed the Call Detail Records (CDRs) for the corresponding period from both Geonet and Safaricom and reached several findings. That based on analysis of CDRs provided by Geonet for calls from their network destined to Safaricom's Network, it was noted that all calls that lasted for 1,767 seconds were dropped by the terminating network (Safaricom) while for any other duration of calls, the termination was triggered either by the call originator or call recipient and the occurrences exhibited a normal distribution. CAK cited an example that for the period November 7, 2016 to December 31, 2016, the calls that lasted for 1,757 seconds constituted 13.3%, of the total calls (235,658) as per the CDRs and calls that lasted beyond 1,800 seconds in length accounted for 5% of the total calls for the same period. CAK held that these findings appear to be consistent with Geonet's allegation that Safaricom disconnected some of its calls lasting beyond 30 minutes. That analysis of CDRs provided by Safaricom for calls from Geonet's network destined to their Network for the same period (7th November to December 31, 2016) indicates that out of the total 278,584 calls, those that lasted 1768 seconds accounted for 12% while calls that lasted more than 30 minutes accounted for 0.1%, however a comparison of the CDRs provided by the two parties for the same period failed to reconcile with the observation made on disparities in the number of call records running up to 42,926 that had differing call durations.

11. CAK stated that whereas the comparison of the CDRs of the two parties showed significant differences on the number of calls, there was a close correlation between the CDRs of both parties in terms of percentage of calls that lasted just under 30 minutes. That based on Geonet's CDRs, a significant number of calls (13.3%) terminated at 1,767 seconds instant and in the case of Safaricom's CDRs a significant number of calls (12%) terminated at 1768 seconds instant and the closeness in the termination points of 1,767 and 1,763 seconds, and the closeness in percentage of calls terminated at these points appear to confirm Geonet's claim that Safaricom was engaged in disrupting its services.



Moreover, CAK noted that Safaricom's letter of December 15, 2016, indicated that indeed it had been blocking calls from Geonet's network on account of perceived violation of the interconnection agreement.

12. Based on its analysis, CAK held that Safaricom engaged in activities that resulted in interruption of interconnection services between itself and Geonet contrary to section 32(a) of the *Kenya Information and Communications Act*, 1998, section 10(2) of the *Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations*, 2010 and the license condition in respect of interruption of licensed service in the respective licenses.
13. On the issue of SIM Boxing, CAK noted Safaricom's assertion that although the alleged SIM Boxing calls were not re-originated by Geonet using Safaricom SIM cards, the calls were being re-originated using Geonet's own numbers disguising them as local calls. That on December 15, 2016, Safaricom submitted that it decided to block calls from Geonet as it believed Geonet was engaged in SIM boxing activities and disguising international calls as local calls. It was also noted further that the interconnection link between the two parties was based on SIP, which was said to have challenges including inability to identify calling line identity and that it was mentioned that the choice of interconnection through SIP was due to the physical challenge of establishing an Enterprise Integrator (EI) connectivity between the two parties' premises.
14. CAK observed that in the presentation made on December 20, 2016, Geonet indicated that it originates calls from USA and terminates them into the Mobile Operators' networks in Kenya. That despite this, CAK observed from the analysis of CDRs submitted by Geonet that there were no calls bearing USA numbers or any other foreign country, which begs the question as to how all calls in CDRs reviewed bore Geonet local numbers only when some are generated from foreign countries. CAK held that this pointed to support the claim from Safaricom that Geonet could be re-originating international incoming calls using their local numbers (SIM-Boxing). CAK held that the use of SIM-Boxes is expressly prohibited under CAK's regulatory framework and operators have been advised to install SIM-Box detection tools with instructions that whenever detected, they notify CAK for appropriate apprehension and prosecution of those involved.
15. Based on the assertion by Safaricom, the presentation by Geonet and in the absence of any evidence of international numbers in CDRs analysed submitted by parties, CAK concluded that Geonet terminates international calls disguised as local calls by re-originating international calls using local numbers. CAK held that such a practice amounts to SIM-boxing which apart from degrading quality of services, conceals the true identity of a caller, which could easily compromise national security. CAK therefore reiterated the provision under section 15 of the *Kenya Information and Communications (interconnection and Provision of Fixed Links, Access and Facilities) Regulations*, 2010 in respect of calling line identity and ensures that interconnecting parties provide each other accurate calling line data which provide for the correct identification of the true origin of the call as provided for by the relevant ITU-T Standard. It stated that the parties must adhere to this requirement which is critical for various reasons including those relating to national security.
16. On the issue of participating in the use of numbering resources outside the National Numbering Plan, Safaricom submitted that Geonet was fraudulently manipulating numbers and using the same to terminate calls into Safaricom's network using numbers outside the national numbering plan such as +25488888888. CAK held that a review of the CDRs submitted by Safaricom showed that there were records of numbers outside the national numbering plan that terminated calls into Safaricom's network from Geonet network but that a review of Geonet's CDRs did not reveal any such records. It noted that some Safaricom lines were making calls from Geonet systems, and some Geonet to Geonet calls passed through the interconnect link (transit calls). CAK found that Geonet admitted that this



was a mistake arising from a malfunctioning call forwarding facility and committed to address the problem through system upgrades to be effected in December 2017 to eliminate the problem. CAK therefore determined that in the absence of corroborating evidence on the alleged use of numbering resources outside the numbering allocation framework and more so outside the national numbering plan, it was unable to make a conclusive determination based on the submission made. CAK further held that the parties in dispute failed to reconcile their CDRs before submission despite CAK's directive to this effect. It notified the parties that both the originating and terminating parties must not allow origination or termination of calls originated by numbers outside the national numbering plan and reiterated the need for all licensees to adhere to the [Kenya Information and Communications \(Numbering\) Regulations, 2010](#) and the [Kenya Information and Communications \(Interconnection and Provision of Fixed Links, Access and Facilities\) Regulations, 2010](#) as well as the license conditions on Numbering and Interconnection and in particular the prohibition on the use of unallocated numbering resources and those outside the national numbering plan.

17. On Provision of International Incoming and Outgoing Transit Services, CAK stated that Safaricom made submissions backed by evidence in the form of CDRs to the effect that Geonet had been sending traffic to destinations outside the country (transit traffic) through Safaricom's network via the interconnect link. That Safaricom was also able to demonstrate Geonet's Internet Protocol (IP) address as the source of the said international calls and that Geonet did not contest these submissions. CAK also found that in a presentation made on December 20, 2016, Geonet indicated that part of their core business is transiting of calls destined to other networks including both local and international destinations.
18. CAK's view on the issue was that Geonet transited international calls through the interconnection link with Safaricom outside the provisions of the interconnection agreement entered into between the two parties. It also held that Safaricom had been facilitating transit traffic from Geonet to destinations outside its network outside the provisions of the interconnection agreement entered into between the two parties. Based on these findings, CAK's held that the two operators ought to establish an interconnect agreement that allows for exchange of transit traffic in order to facilitate the apparent demand/need between the interconnected parties. It explained that the interconnection for international traffic is a commercial engagement between the interconnect parties and not subject to local termination rates. It noted that Geonet also held an International Gateway Systems and Services license, which authorized it to establish international telecommunications systems and provide international telecommunications services. That with this licence, Geonet was authorized to establish its own international gateway facilities and transmit and receive its own international traffic through its internal facilities. CAK did not therefore expect Geonet to transit its international traffic through any other party unless by mutual consent under an appropriate interconnection agreement.
19. On the provision of a clause prohibiting International Call Termination in Interconnection Arrangements, CAK found that a review of the interconnection agreements between the Mobile Network Operators and other licensed operators confirmed the existence of a Clause prohibiting termination of international traffic to their networks. That currently, the distinction between local and international calls is deduced from ITU-T Recommendation E.100, under foot note 1, on definition of terms used in international telephone operation, where the word "international" is applied to any relation between countries whether those countries are in the same continent or not. CAK also stated that the Kenya Communications Regulation 2001 also defines "international telephone call" as an effective or completed telephone call exchanged with a telecommunications station outside the country in which the calling telecommunications station is situated. CAK thus held that consequently and given the technology neutral licensing framework adopted in Kenya, "International call" is defined as



- any call that is made from Kenya to another country or from another country into Kenya, technology used notwithstanding.
20. CAK further held that the import of the above is that whereas CAK's regulatory framework accords the interconnecting licensee the right to route its traffic towards customers of another licensee, the obtaining interconnection agreements between the Mobile Network Operators and other licensed operators should be done in a manner that facilitates all forms of traffic. CAK stated that interconnection agreements facilitate the exchange/termination of local calls under local termination rates, or for transiting international bound local calls from interconnecting licensee through interconnecting licensee or terminating calls of international origin through interconnect licensee to local subscribers of the interconnecting licensee under commercially agreed terms. CAK also noted that an interconnecting licensee may also bring in international Voice over Internet Protocol (VOIP) traffic for termination to the interconnect licensee's network but under commercially agreed terms and with clear Caller Line Identification for appropriate billing under the commercially agreed terms.
 21. CAK's took the position that licensees should enter into interconnection arrangements that provide for termination of local traffic, international traffic, international transit traffic and VoIP traffic under terms that are relevant to each category of traffic irrespective of the originating or termination destinations in order to ensure the maintenance of the rights of the interconnecting licensees with respect to how they route their traffic towards customers of another licensee. CAK added that in doing so, it was instructive to note that traffic originating and terminating locally is subject to local termination rates while traffic originating or terminating internationally is subject to commercial negotiations and agreements between parties. That in addition, given the technology neutral regulatory framework adopted in Kenya, a voice call is a voice call irrespective of the technology used for delivery as long as the origin and destination of the calls are properly identified through presentation of appropriate Caller Line Identification.
 22. CAK stated that whereas it regulates local interconnect and does not presently intervene on international regulatory arrangements, Kenya is a signatory of the International Telecommunications Regulations (ITRs) which govern international telecommunication services which parties were invited to take note of. CAK therefore held that it was instructive that licensees should enter into interconnection arrangements that are consistent with the *[Kenya Information & Communications \(Interconnection & Provision of Fixed Links, Access & Facilities\) Regulation](#)* 2010 and where relevant, the *[Final Acts of the World Conference on International Telecommunications](#)* (Dubai, 2012), which contains the ITRs. CAK thus directed the parties and all other affected licensees pursuant to Clause 6(3) of the *[Kenya Information & Communications \(Interconnection & Provision of Fixed Links, Access & Facilities\) Regulation](#)* 2010, to negotiate with a view to facilitating relevant interconnection agreements in compliance with the above stated principles and submit revised interconnection agreements to CAK within 60 days from the date of issuance of the Determination.
 23. On adherence to subscriber registration requirements, CAK stated that at the hearing it was alleged that some licensees were not strictly observing the subscriber registration requirements. It noted that Geonet's communication application ("App") registers customers through online self-registration mechanisms, which rely on the customers' self-declared information and uses third party information drawn from such sources as MPESA and credit card transactions to verify the identity of the person being registered. CAK confirmed this to be true for Geonet's registration process by means of actual registrations as Geonet App users. CAK noted that the registration mechanism was open and allowed anybody in the world to register as a customer of Geonet as long as one can access Internet and that based on this, Geonet therefore considers anybody who registers their App as their local customer and



hence their assertion that their customers are entitled to local interconnection and call termination rates irrespective of their location and where in the world they make their calls from. CAK reiterated that the requirement for a licensee to register her subscribers is provided for under section 27D of the *Kenya Information and Communications Act, 1998* and that the manner of undertaking the said subscriber registration is provided for under the *Kenya Information and Communications (Registration of SIM-cards) Regulations, 2015*. That the *SIM registration Regulations* prescribe a registration process, which includes personal appearance and the specific documents that must be presented during registration for verification by a human agent. In view of the foregoing, CAK concluded that the registration process adopted by Geonet's application and indeed similar Applications do not comply with the said *SIM registration Regulations* and that all licensees must comply with procedures under the *Kenya Information and Communications (Registration of SIM-cards) Regulations, 2015*.

24. CAK observed that whereas different technologies confer different benefits that should be leveraged for the benefit of consumers, it regulates based on a technology neutral approach, which does not treat different technologies differently. It emphasised that all licensees must strictly comply with the *Kenya Information and Communications (SIM Card Registration) Regulations, 2015*.
25. In conclusion, CAK stated that it had duly considered the matters under contention and had issued various determinations and for directives to the parties in dispute as well as general directives and reminders to the industry as a whole. CAK stated that the determination had gone on record and may be relied upon in other future regulatory undertakings such as consideration for general compliance status as may be appropriate. Meanwhile, the parties were required to implement the directives under the Determination and revert to CAK within the timelines specified in the various subsections or latest within 60 days where such timelines had not been specifically provided for in the subsections therein.

Appeal to Multimedia Appeals Tribunal

26. Elige was aggrieved with the determination and lodged an appeal to the tribunal seeking to have the determination set aside. It prayed that CAK be directed to recognize and respect the legality and operational nature of VoIP services and distinguish them from other services during regulation and that licensed Over the Top (OTT) telecommunication operators to use other forms of subscriber registration such as video conferencing considering the technology used by OTT service providers. Essentially, Elige was dissatisfied with CAK's findings on the issue of SIM-boxing, the provision of the clause prohibiting international call termination and the regulation, legality and operation of VoIP services and the issue of adherence to subscriber registration requirements for OTT telecommunication service providers. After considering the evidence and submissions, the Tribunal rendered its judgment dated February 11, 2022 dealing with several issues.
27. On whether CAK erred in fact and law by failing to take cognizance of the legality as well as the operational nature of VoIP services and the right of licensees to provide Internet (PC/IP Phone) to PSTN VOIP services at local rates irrespective of the location of the seller, the Tribunal held that it found no evidence in the Determination that CAK deemed the VOIP services illegal and the Elige did not specify their basis for such a position. The Tribunal further stated its perusal of the Determination did not find any specific reference to PC/IP Phone Public Switched Telephone Network(PSTN) VoIP services. That all CAK stated was that according to its technology neutral framework, an international call is any call that is made from Kenya to another country or from another country into Kenya irrespective of the technology for its delivery as long as the origin and destination of the calls are properly identified through presentation of appropriate caller identification. The Tribunal stated that Elige extrapolated that CAK would consider PC/IP Phone to PSTN VOIP call made from a local switching platform subject to commercially agreed call termination rates.



28. The tribunal stated that it had considered clause 3.2 of the [VoIP Guidelines](#) and was unable to see any distinction made therein between a local or international call made via PC/IP Phone to PSTN. In the Tribunal's understanding, such a call could be made from any location from a software application with a local switching platform without any carrier and therefore attracts a local termination rate, which was the tribunal's plain reading of the term, "local charge applied by the terminating PSTN operator". The Tribunal was of the view that had it been intended that this phrase was referring to commercially agreed rates, nothing would have been easier than to do so and that the [Kenya Communications Regulations, 2001](#) defines an international telephone call as "an effective or completed telephone call exchanged with a telecommunications station outside the country in which the calling telecommunication station is situated"
29. The Tribunal held that CAK's pronouncement that it is the geographical location of the caller that determines the origin or destination of a call as it relates to PC/IP Phone to PSTN call contradicts the provisions of [Kenya Communications Regulations, 2001](#) and offends Clause 3.2 of [CAK's Guidelines](#). The Tribunal stated that the call rate for via PC/IP Phone to PSTN calls is distinct from the situation contemplated in Clause 3.4 of the [Guidelines](#) where a call is originated from a landline or mobile network, then transmitted through internet protocol and finally terminated to a landline or mobile network. It was the Tribunal's view that it is such transmission of traffic which ordinarily is done through an international gateway that would be subject to commercially agreed rates, and not an IP/PC to PSTN call. The Tribunal therefore concluded that CAK ignored its own guidelines by appearing to base termination rates for IP/PC to PSTN on the location of the caller and not on the location of the switching platform and therefore misdirected itself.
30. On whether CAK made an error in holding Geonet guilty of SIM-boxing, the Tribunal held that in as much as CAK admitted that no SIM boxes were recovered at Geonet's premises, that no physical inspection of its hardware was carried out and that the local numbers said to have been used in the SIM Boxing were not captured in the Determination, Geonet was still under an obligation to explain why there were absolutely no international numbers in its CDRs. The Tribunal recalled that in Geonet's complaint to CAK dated November 22, 2016, Geonet complained that most of the calls in question had been made using its Geonet calling cards and that in its technical description of its services, Geonet had clearly indicated that the calling cards were operated from its switching platform in the USA and their use regulated by the American Federal Communication Commission. That consequently, CAK was right in expecting that calls made through those cards would bear American numbers and in the absence thereof, to find, on a balance of probabilities, that Geonet had manipulated the numbers to appear as local. This ground of appeal was therefore dismissed. Similarly, the Tribunal failed to find any part of the Determination in which CAK equates SIM Boxing with provision of PC/IP to PSTN VOIP services by licensees.
31. On whether CAK erred by applying the provisions of Regulation 7(2)(b) of the [Kenya Information and Communications \(Registration of SIM cards\) Regulations, 2015](#) to OTT telecommunications service providers notwithstanding the nature of services, the Tribunal found that there is a distinction between general OTT telecommunication service providers and VoIP telecommunication service providers licensed by CAK. That the former, such as Skype and WhatsApp are not regulated by CAK and could not therefore be subject of the appeal but that VoIP communications services providers licensed by CAK such as Geonet are under the regulatory authority of CAK. The Tribunal found that there was no dispute that VoIP services did not require a SIM card because they are internet-based. Nevertheless, the Tribunal held that under Regulation 7(2)(b) of the [Kenya Information and Communications \(Registration of SIM-cards\) Regulations, 2015](#) the law remains that subscribers to telecommunication services licensed by CAK must register with the provider, or its agent, in person.



As a result, the Tribunal held that CAK was not in error to require that its licensees obey the law. The Tribunal opined that the said Regulations, whether they appear to have been overtaken by advances in technology or not, remain in force until they are amended by the Cabinet Secretary, repealed by Parliament or nullified by a superior or higher court. The Tribunal thus dismissed this ground of appeal as well.

32. The Tribunal concluded and held that CAK's finding that the geographical location of a caller or callee determines whether a call is local or international and the terminating rates thereof, offends the definition of an international call in the [Kenya Communications Regulations](#) (2001) and was thereby set aside in so far as it contradicts Clause 3.2 of [CAK's 2005 VoIP guidelines](#). The Tribunal upheld CAK's finding that Geonet was guilty of SIM-Boxing by reason of absence of international numbers in its CDRs and stated that it did not have the jurisdiction to interfere with CAK's implementation of Regulation 7(2)(b) of the [Kenya Information and Communications \(Registration of SIM-cards\) Regulations](#), 2015.

Appeal to the High Court

33. Elige and Geonet are dissatisfied with the part of the Tribunal's judgment that found Geonet guilty of SIM Boxing and holding that they must abide by the provisions of the [Kenya Information and Communications \(Registration of SIM-cards\) Regulations](#), 2015 and register their subscribers. They have filed appeals before the court which as stated before, are now consolidated. The appeals were canvassed by written submissions.
34. Since the submissions of the parties regurgitate the parties' positions I have already summarised above, I do not find it necessary to highlight the same but I will only make relevant references in my analysis and determination below.

Analysis and Determination

35. In determining this appeal, I am cognizant that the court derives its appellate jurisdiction from section 102G of the [Kenya and Information Communications and Act](#), 1998 which provides as follows:
- 102G. appeals from the decision of the tribunal
1. Any person aggrieved by a decision or order of the tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.
 2. No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced until the appeal has been determined.
 3. The decision of the High Court on any appeal under this section shall be final.
36. Even though the scope of this court's jurisdiction has not been delimited in the aforementioned provision, I note that this is a second appeal since the CAK made the first determination which was considered by the tribunal. Although the court is entitled to review matters of fact, it must be recalled that the CAK and the Tribunal are expert subject matter authorities that deal with technical matters hence this court must be circumspect in interfering with their decision unless it is shown that there is an error of principle and that there is substantial injustice. In this respect, I would adopt the words of Tuiyott J., where he referenced the decision of the Registrar of Trademarks in [Sony Corporation v Sony Holding Limited](#) ML HCCA No. 376 of 2015 [2018] eKLR as follows:



- (3) It has to be remembered that the Registrar of Trademarks is a specialized quasi-Judicial Tribunal and so the Courts discretionary Jurisdiction must be circumscribed so that some deference is given to the decision of the Tribunal. One object of setting up specialized Tribunals is that they will be constituted by persons who have technical competence in their areas and a good appreciation of matters that come before them. Ordinarily therefore, short of a compelling cause, their appreciation of a dispute ought to be respected.
- (4) I accept the proposal by Counsel for the Respondent that the Singaporean Decision of *Future Enterprises Pte Ltd v. McDonald's Corp* [2007]2 SLR 845; 2007 SGCA properly prescribes what my role as an Appellant Court in this matter should be;

“The smorgasbord of trade mark cases which has reached the appellate courts demonstrates the innumerable (and subjectively perceived) similarities and differences that can be conjured up and persuasively articulated by an imaginative and inventive legal mind. Expert and experienced judges, such as Laddie J, have described trade mark infringement as “more a matter of feel than science”. (in *Wagamamu Ltd v. City Centre Restaurants plc* [1995] FSR 713 at 732), and Chao Hick Tin JA (as he then was) similarly alluded to it as a matter of “perception” (in *The Polo/Lauren* subjective nature of assessing similarity and the likelihood of confusion. We agree with the approach that an appellate court should not disturb the findings of fact of a trade mark tribunal unless there is a material error of principle”.

In my discretionary jurisdiction, I will only fault the Registrars’ decision if it is demonstrated the Decision was wrong in a material way or that the exercise of Discretion was so unreasonable that no reasonable Tribunal could have arrived at that Decision. To be emphasized as well is that the Appeal is not in the nature of a rehearing where the facts have to be reevaluated in the detail and manner of a Trial Jurisdiction. [Emphasis mine]

SIM-Boxing by Geonet

37. The substantial issue in contention in this appeal concerns the concurrent findings by the CAK and Tribunal that Geonet was the guilty of SIM-Boxing and that as a result was required to comply with the [Kenya Information and Communications \(Registration of SIM-cards\) Regulations](#), 2015.
38. Sim-Boxing is defined in the telecommunications industry as a practice whereby a person or group of people set-up a device that can take up several SIM cards (a SIM box) and use it to complete international calls it receives from the Internet as VOIP and in turn serve them to the in-country mobile network subscribers as local traffic. The SIM boxer thus bypasses the international rates and often undercuts the prices charged by local mobile operators (<https://androidkenya.com/2019/03/sim-boxing/>). *A Sim Box is a device that maps the call from VoIP to a SIM Card (in the SIM box) of the same mobile operator of the destination mobile, so that the international call terminates as a home call to the subscriber country(<https://www.lawinsider.com/dictionary/sim-box>).*
39. After analyzing material presented before them, CAK and the Tribunal found Geonet guilty of SIM-Boxing on the ground that there was no evidence of international numbers in CDRs analysed and submitted by the parties. CAK’s concluded that Geonet terminates international calls disguised as local calls by re-originating international calls using local numbers. These were conclusions of fact. I cannot fault CAK and the Tribunal for concluding as such as the balance of the evidence was against Geonet. I also agree with the Tribunal that once Geonet made the assertion that the calls in question had been made using its Geonet calling cards and that in its technical description of its services, Geonet had



clearly indicated that the calling cards were operated from its switching platform in the USA, then Geonet was under the obligation to present evidence bearing such numbers from the USA. Having failed to do so, CAK and the Tribunal could only conclude and impute an improper motive by Geonet and find it guilty of SIM-Boxing or conduct akin to SIM-Boxing. This ground of Appeal by Geonet fails.

Application of the Kenya Information and Communications (Registration of SIM-cards) Regulations, 2015

40. Elige and Geonet argue that the [*Kenya Information and Communications \(Registration of SIM-cards\) Regulations, 2015*](#) (“the Regulations”) do not apply to them as the VoIP services they provide do not require a SIM Card and thus the issue of subscriber registration does not apply to them.

41. On their part, CAK and Safaricom argue that the issue of registration applies to all telecommunications services providers whether they use physical SIM Cards or not. They cite section 27A(1) of the [*Kenya Information and Communication Act, 1998*](#) which provides as follows:

27A. Duties of telecommunications operators

1. Before a telecommunications operator sells a SIM- card or otherwise provides telecommunication services to a person, it shall obtain—
 - a. from natural persons, the person's full name, identity card number, date of birth, gender, physical and postal address;
 - b. from corporate persons or statutory bodies, official name, postal and physical address, particulars of registration, incorporation, enabling legislation or Gazette notice, as the case may be; and
 - c. such other information as may be prescribed from time to time.

42. They further rely on Regulation 2 of the [*Regulations*](#) which defines a “telecommunications operator” as inter alia a person or entity providing telecommunication services.

43. It is not in dispute and at any rate the parties do not deny that the VoIP services they offer are telecommunication services. This brings them directly under the ambit of a telecommunications operator meaning that both the [*Act*](#) and the [*Regulations*](#) apply to them. The issue whether Elige and Geonet and other like licensed operators require to register their subscribers is a question of statutory interpretation. Section 27A of the [*Act*](#) imposes specific obligations on telecommunication operators to, inter alia, obtain certain information from its subscriber. The section by referring to, “a telecommunications operator otherwise provides telecommunication services to a person” implies that the provider need not provide services through a SIM-card. The application of the statute is all encompassing and the Appellants have not shown that they are excluded from the obligations under aforesaid provisions. The aforesaid provisions is complemented by section 27C which set out the duties of telecommunication subscribers and which provides, inter alia, that a subscriber of telecommunication services shall, “provide the registration details required under section 27A.”

44. I therefore agree with CAK, Safaricom and the Tribunal that the fact that VoIP services do not use SIM cards does not exclude Elige, Geonet and other licensed operators like themselves from the framework of the [*Act*](#) and [*Regulations*](#). I agree with the tribunal that if at all a Regulation has been overtaken by a technological advancement, then the appropriate recourse is to amend and or repeal the [*Act*](#) or [*Regulation*](#).



45. Having reviewed the material on record alongside *Act* and *Regulations*, I can neither fault the CAK nor the Tribunal for urging Elige, Geonet and other operators to follow the procedures of the Regulations as they are bound by them.

Disposition

46. For the reasons outlined above, I dismiss the appeals with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Rosana instructed by Gakahu and Rosan Advocates for GeoNet Communications Limited.

Mr Wasonga instructed by Wasonga B. O and Associates Advocates for Elige Communications Limited.

Mr Malonza instructed by S. M. Kilonzo and Associates Advocates for Communications Authority of Kenya.

Mr Muturi instructed by Kiptiness and Odhiambo Associates LLP Advocates for Safaricom PLC.

