Geonet Communications Ltd v Communications Authority of Kenya; Safaricom PLC & another (Interested Parties) (Petition E368 of 2022) [2023] KEHC 3038 (KLR) (Constitutional and Human Rights) (5 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3038 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E368 OF 2022

PM MULWA, J

APRIL 5, 2023

BETWEEN

GEONET COMMUNICATIONS LTD ..... PETITIONER

AND

COMMUNICATIONS AUTHORITY OF KENYA ..... RESPONDENT

AND

SAFARICOM PLC ..... INTERESTED PARTY

TELKOM KENYA PLC ..... INTERESTED PARTY

Oversight of telecommunication interconnection agreements and consumer rights in Kenya

Reported by John Ribia

Telecommunications Law *– interconnection – interconnection agreements – body with the duty to oversee interconnection agreements – Communications Authority of Kenya – whether the Communications Authority of Kenya (CAK) had a duty to supervise and oversee interconnection agreements to ensure they conformed with the Kenya Information and Communication Act (KICA) and relevant Regulations – Kenya Information And Communications Act (cap 411A) sections 2, 5, 5A, and 23(2)(a); Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access, and Facilities) Regulations, 2010 (cap 411A Sub Leg) regulation 5(11)(b); Interpretation and General Provisions Act (cap 2) section 9(1); 27 and 34.*

Constitutional Law *– fundamental rights and freedoms – consumer rights – right to fair administrative action – duty of Communications Authority to oversee interconnection agreements between telecommunication companies – whether the Communications Authority of Kenya (CAK) breached consumer rights and the right to fair administrative action of a telecommunication company it regulated by failing to respond to its concerns about CAK's failure to compel interconnection with Safaricom – Constitution of Kenya, 2010 articles 10(2), 46, 47, 232(1), and 232(a); Kenya Information and Communications (Interconnection and Provision of Fixed Links,*

Access, and Facilities) Regulations, 2010 (cap 411A Sub Leg) regulation 5(11)(b); Interpretation and General Provisions Act (cap 2) section 9(1); 27 and 34.

Statues *– interpretation of statutes – interpretation of section 21 as read with section 27(2) of the Statutory Instruments Act – whether section 21, as read with section 27(2) of the Statutory Instruments Act, automatically revoked the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access, and Facilities) Regulations, 2010 – whether the term "immediately before" within the context of section 21, as read with section 27(2) the Statutory Instruments Act applied to the Regulations that had been operational for three years before the Act's commencement.*

Words and Phrases *– definition – immediately – without interval of time, without delay, straightaway, or without any delay or lapse of time. It also defines the word 'before' as prior to; preceding. 'Immediately before' can, hence, be deduced to mean: a subsequent event occurs but prior to it, without interval or lapse of time or delay, there was an initial on – Black's Law Dictionary, revised 4th Edition, West Publishing Company, page 884.*

Brief facts

The petitioner, Geonet, was a licensed provider of telecommunication services whose operations depended on interconnection with local mobile network operators, including Safaricom and Telkom. Geonet wrote to the Communications Authority of Kenya (CAK), requesting that it compel Safaricom to provide and reinstate interconnection on reasonable terms, citing public interest concerns. However, the CAK failed to take any remedial or favourable administrative action.

Geonet contended that the CAK's inaction enabled anti-competitive conduct, effectively excluding it from significant portions of Kenya's telecommunications market. As a result, Geonet's subscribers and the general public were unable to communicate efficiently and seamlessly across networks. Consequently, the petitioner filed a constitutional petition before the High Court seeking an order to compel the CAK to enforce interconnection with Safaricom on fair and reasonable terms in the public interest.

Issues

i. Whether the Communications Authority of Kenya (CAK) was under a statutory duty to supervise and regulate interconnection agreements to ensure compliance with the Kenya Information and Communications Act (KICA) and the relevant Regulations.

ii. Whether the CAK violated the petitioner's constitutional rights—specifically the right to fair administrative action and consumer rights—by failing to address its request to compel Safaricom to provide interconnection on reasonable terms.

iii. Whether sections 21 and 27(2) of the Statutory Instruments Act had the effect of automatically revoking the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010.

iv. Whether the phrase "immediately before" in section 21, as read with section 27(2) of the Statutory Instruments Act, applied to regulations that had been in force for more than three years prior to the commencement of the Act.

Held

1. Section 5 of the Kenya Information and Communications Act (KICA), read together with Regulation 3 of the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access, and Facilities) Regulations, 2010, subjected all interconnect and interconnecting licensees to regulatory oversight regarding the form and content of interconnection agreements. Any agreement between Geonet and Safaricom was only valid if it conformed to these Regulations. Parties were not at liberty to formulate terms inconsistent with the regulatory framework.
2. Under Regulation 4(1), once an interconnecting licensee such as Geonet complied with the Act and the interconnection guidelines, it was entitled to select its interconnection licensee to route data and calls to the customers of other licensees. An interconnection licensee could not arbitrarily deny such routing arrangements where regulatory compliance was met.

3. An interconnection licensee was legally obligated to negotiate interconnection upon a reasonable request from an interconnecting licensee to ensure end-to-end connectivity and interoperability. Freedom of contract was limited in such instances. However, Regulation 5(5) provided limited grounds for exemption from interconnection, including legal prohibitions, licensing constraints, technical infeasibility, or threats to safety or service quality. Any such exemption required publication by the CAK. While terms could be negotiated, they had to remain within legal bounds and serve the objective of facilitating interconnection.
4. The negotiation process was subject to regulatory oversight by CAK. Regulation 5(11)(b) empowered the CAK to supervise interconnection agreements to ensure conformity with the Act, Regulations, and guidelines. Where, however, an interconnection licensee failed to act on a request, the CAK could intervene, compel interconnection, and impose terms in the public interest.
5. The primary obligation was for parties to negotiate interconnection terms. If agreement was reached, the CAK retained oversight to ensure legal compliance. Where negotiations failed due to a default by the interconnection licensee, the CAK could compel interconnection. Regulation 11 prescribed a six-week timeline for negotiations, which the CAK could abridge. If no agreement materialized within this period, the CAK was authorized to intervene. The CAK held broad procedural and substantive powers to supervise, regulate, and facilitate interconnection.
6. The CAK's role was not passive; it was expected to actively facilitate its regulatory objectives. Under section 5A(2) of the Act, the CAK was guided by national values and principles under articles 10 and 232 of the Constitution. It was required to act responsively, promptly, impartially, and equitably to promote fair competition and uphold merit-based regulatory decisions.
7. The CAK failed to act on Geonet's concerns. It could not rely on procedural default by Geonet to justify its inaction. As a regulator, the CAK had a duty to resolve disputes under the law and was empowered to act *suo motu* to correct irregularities in the sector. Its failure amounted to a breach of Articles 10, 232, 46, and 47 of the Constitution.
8. The Statutory Instruments Act came into force in January 2015, by which time the 2010 Regulations had been operational for approximately three years. Section 21 of the Act provided for automatic revocation of instruments made "immediately before" its commencement. However, the Act did not define the temporal scope of that phrase.
9. The phrase "immediately before" implied an event occurring directly prior to another, without delay or lapse of time. It referred to actions or instruments enacted just before the Statutory Instruments Act came into effect on January 25, 2013. The 2010 Regulations, being in force for three years by then, could not reasonably be considered as falling within the scope of "immediately before."
10. Although section 27(2) of the Statutory Instruments Act had retrospective effect, it was limited to instruments made "immediately before" the Act's commencement. Given the lack of specific submissions on temporal limits, the Court refrained from determining precise timelines. Nonetheless, a three-year interval clearly fell outside the meaning of "immediately before."
11. Accordingly, sections 21 and 27(2) of the Statutory Instruments Act did not operate to revoke the 2010 Regulations. The Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access, and Facilities) Regulations, 2010 remained valid and in force.

Petition partly allowed.

Orders

i. *A declaration was issued that the Communications Authority of Kenya breached articles 10, 232, 46 and 47 of the Constitution.*
ii. *An order was issued that within 60 days of the instant judgment, the Communications Authority of Kenya was to respond to the concerns raised by Geonet in the instant petition and further make an impartial decision that would promote fair competition.*
iii. *Each party was to bear its own costs.*

Citations

Cases

Kenya

1. *Geonet Communications Limited v Safaricom PLC* Civil Case E207 of 2019; [2020] KEHC 3509 (KLR) - (Mentioned)
2. *Kandie, Karen Njeri v Alassane Ba & another* Petition 2 of 2015; [2017] KESC 13 (KLR) - (Mentioned)
3. *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* Civil Appeal 266 of 1996; [1997] KECA 58 (KLR) - (Explained)
4. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)

Texts

1. Black, HL., Black, HC., (Eds) (1990), *Black's Law Dictionary* St Paul Minnesota: West Group 6th Edn
2. Hogg, QM., (Lord Hailsham) *et al* (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 44
3. Mackay, J., (Lord of Clashfern) *et al* (Eds) (2002), *Halsbury's Laws of England* London: Lexis Nexis Vol 1 p 111

Statutes

Kenya

1. Constitution of Kenya articles 10(2); 46; 47; 232(1); 232(a) - (Interpreted)
2. Fair Administrative Action Act (cap 7L) In general - (Cited)
3. Interpretation and General Provisions Act (cap 2) sections 9(1); 27; 34 - (Interpreted)
4. Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access, and Facilities) Regulations, 2010 (cap 411A Sub Leg) regulation 5(11)(b) - (Interpreted)
5. Kenya Information and Communications Act (cap 411A) sections 2, 5, 5A(1); 5A(2); 23(2)(a) - (Interpreted)
6. Statutory Instruments Act (cap 2A) sections 2, 3(1); 13; 27; 27(2) - (Interpreted)
7. Supreme Court Act (cap 9B) sections 15, 17, 16; part IV - (Interpreted)

Advocates

Mr Christopher Rosana for the petitioner
Mr N Malonza for the respondent
Ms Leyla Ahmed for the 1st interested arty
Mr Chiuri Ngugi for the 2nd interested party

JUDGMENT

1. The petitioner has moved this court by way of a petition dated July 15, 2022.

2. The petitioner is a telecommunication company duly incorporated in Kenya. It offers technological services that avoid high roaming charges. The respondent is a statutory body established under the *Kenya Information and Communications Act* (KICA) with a mandate to regulate the telecommunication industry in Kenya. The interested parties are licensed mobile network operators in Kenya.

3. Geonet provides telecommunication services to its subscribers, but this is dependent upon being interconnected with local mobile operators such as Safaricom and Telkom. It is therefore Geonet's case that on June 27, 2022, it sent a letter to the Communications Authority of Kenya (the CAK)

asking it to compel Safaricom to provide and reinstate interconnection with Geonet on reasonable terms on grounds of public interest. However, the CAK did not take any remedial action or any other favorable administrative action. According to Geonet, the failure to comply with their letter continues to promote anti-competitive conduct as Geonet is effectively locked out of a large section of the telecommunications market in Kenya. Further to this, Kenyans and its other subscribers are unable to communicate with each other in an easy and seamless manner.

4. Because Safaricom controls a large section of the telecommunications service market in Kenya, Geonet contends that the CAK's failure to compel interconnection has promoted the abuse of its dominant position in the telecommunications market.

5. Further to this, Geonet stated that in October 2020, it entered into an interconnection agreement with Telkom. This agreement was approved by the CAK on January 5, 2021. On August 12, 2021, Geonet informed the CAK that Telkom was billing it unlawfully, that is, Telkom was double billing Geonet for each call. After being informed, the CAK responded to Geonet that it was going to deal with the concern raised, however, the CAK failed to deal with the issue.

6. According to Geonet, the CAK's failure to address the issues raised concerning the interconnection with Safaricom and the improper billing by Telkom is a violation of article 10(2) and 232(1) of the *Constitution*. Also, the CAK's regulatory inaction towards Geonet's request for interconnection is a violation of article 47 of the *Constitution*. It is further averred that Geonet pays license fees to the CAK in exchange for being allowed to operate in Kenya. Therefore, Geonet has a right to services of reasonable quality under article 46 of the *Constitution*. Geonet further contends that regulation 5(11)(b) of the *Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access, and Facilities) Regulations, 2010* (hereinafter, 'the regulations') is invalid for being inconsistent with article 10, 46, 47, and 232 of the *Constitution* and section 23(2)(a) KICA. Geonet avers that in the alternative, the said regulations have no force of law on the strength of sections 2, 3(1), and 13 of the *Statutory Instruments Act*.

7. On the nature of the injury caused, Geonet pleads that it has suffered legal injury from the ineffective and poor services provided by the CAK. These poor services by the CAK have been to the detriment of Geonet and its subscribers while benefitting Safaricom and its subscribers. Geonet pleads that it has continued to suffer financial loss, damage, and extreme inconvenience through the regular inaction of the CAK.

8. It is for these reasons that Geonet prays for the following reliefs: -

    a. An order by way of judicial reviewcompelling the respondent to direct the 1st interested party to provide interconnection to the petitioner within 30 days pursuant to section 23(2)(a) of the *Kenya Information and Communication Act, 1998*.

    b. An order by way of judicial review compelling the respondent to resolve the dispute between the petitioner and the 2nd interested party within 30 days.

    c. A declaration of invalidity against regulation5(11)(b) of the Kenya Information and Communications (Interconnection and Provision of Fixed Link, Access and Facilities) Regulations, 2010 for being inconsistent with article 10, 46, 47, and 232 of the *Constitution* and section 23(2)(a) of the *Kenya Information and Communications Act, 1998*.

    d. A declaration that *Kenya Information and Communications (Interconnection and Provision of Fixed Link, Access and Facilities) Regulations, 2010* has no legal force having expired under the provisions of the *Statutory Instruments Act, 2013*.

e. A declaration that the respondent's regulatory inactions concerning the 1st and 2nd interested parties is a violation of consumer rights under article 46 of the *Constitution* in respect of the petitioner and the section of the public it serves.

f. A declaration that the respondent's regulatory inaction violates the national values and principles of governance and principles of public service under articles 10 and 232 of the *Constitution*.

g. A declaration that the respondent's regulatory inaction violates article 47 of the *Constitution* and *Fair Administrative Action Act, 2015*.

h. A declaration that the respondent's regulatory inaction promotes and facilitates anti-competitive market conduct and abuse of dominant position.

i. Cost of this petition.

j. Any other relief the court may deem fit to grant.

Respondent's Response

9. The CAK responded to the petition *vide* a replying affidavit sworn by Ezra Chiloba the Director General. He deposed that pursuant to the Interconnection Regulations there is an elaborate procedure to be followed by an interconnecting licensee before an interconnecting agreement is reached, including making a request for interconnection to the interconnect licensee in writing, a copy of which should be availed to the CAK. According to Mr Chiloba, the written request by the interconnecting licensee is a conditional precedent to negotiate between the interconnecting licensee and the interconnect licensee, and to any intervention or facilitation to the parties, as may be required of the CAK under the interconnection regulations. He deposed that for an interconnecting licensee to claim that the CAK declined to compel or act against an interconnect licensee who has allegedly declined interconnection, the interconnecting licensee must demonstrate that it made the requisite request in writing to the interconnect licensee and forwarded a copy of the request to the CAK. This has not been demonstrated by Geonet. Therefore, the demands contained in Geonet's letter dated June 27, 2022 are premature as are the claims in the petition.

10. Mr Chiloba deposed that Geonet's failure to put in motion processes towards the negotiation of an interconnection agreement between itself and Safaricom, it cannot then be said that the CAK's inaction has resulted in violation of article 10, 232, and 47 of the *Constitution* and the *Fair Administrative Act*.

11. On the unlawful billing by Telkom to Geonet, Mr Chiloba deposed that clause 7 of the Interconnection Agreement between Geonet and Telkom provided for an elaborate dispute resolution mechanism for disputes relating to 'Billing and Payment'.

12. Further to this, Mr Chiloba deposed that it is not correct that the regulations have expired or ceased to have force of law pursuant to the *Statutory Instruments Act, 2013*. He stated that section 27 of the act is a transitional provision that makes the regulations valid and in force.

13. According to Mr Chiloba, Geonet has not pleaded with precision or demonstrated at all the extent to which *Regulations* 5(11)(b) is inconsistent with articles 10, 46, 47, and 232(a) of the *Constitution* or how the obligation placed on the CAK to compel a telecommunications service licensee who has not interconnected upon request to interconnect its facilities, is inconsistent with the said provisions of the *Constitution*. Also, Geonet has not demonstrated how the said regulation is inconsistent with

the CAK's obligation to protect the interests of all users of telecommunications services as provided under section 23(2)(a) *KICA*.

Response by the 1st Interested Party.

14. Safaricom responded to the petition vide a replying affidavit sworn by Daniel Mwenja Ndaba Safaricom's senior legal counsel. He deposed that the petition is misconceived, bad in law, untenable and an abuse of the court process as it has been brought before this court based on significant material non-disclosure. He deposed that on October 24, 2016, Safaricom and Geonet entered into an interconnection agreement. Each of them was required to pay respective charges payable for the interconnection services. Clause 6 of the agreement provided for 'billing and payment' and as of April 30, 2019, Geonet owed Safaricom Kshs 30,013,757. Consequently, on July 4, 2019, Safaricom issued Geonet with a notice of termination of the agreement and suspension of the link at the expiry of 30 days from the date of the said notice.

15. From this notice, Geonet filed a case, High Court (Commercial and Tax Division) Civil Case No E027 of 2019 - *Geonet Communications Limited vs Safaricom PLC*. It sought, *inter alia*, for orders of a temporary injunction against the suspension of the link. The court in its ruling delivered on December 21, 2020 awarded Geonet a temporary injunction for 60 days where Safaricom was restrained from interfering with the telecommunication interconnectivity link and for Geonet to also deposit a bank guarantee of Kshs 15,000,000/= within 30 days. Geonet was unable to comply with the order to deposit the bank guarantee, and the temporary injunction lapsed.

16. Mr Ndaba deposed that Geonet was aware of these rulings when it filed this instant Petition, hence, this court cannot compel Safaricom to provide interconnection to Geonet when the Commercial dispute is still ongoing.

17. He further deposed that this court should enforce the contract between the parties as they are the true intentions of the parties. Mr Ndaba deposed that there are no constitutional issues to be adjudicated as these are purely matters of a contractual nature. According to Mr Ndaba, Geonet has failed to frame its allegation of violated rights with precision as is required of constitutional Petitions.

Response by the 2nd Interested Party

18. Vide a statement of grounds of opposition, Telkom averred that Geonet has not *ex facie* alleged any facts disclosing the manner of infringement or threatened infringement by Telkom. Also, Geonet has not *ex facie* disclosed a reasonable cause of action against Telkom. It is stated that Geonet has only pleaded and exhibited a copy of their agreement that stipulates the procedure for settling disputes which Geonet is yet to exhaust.

Petitioner's Response

19. In response to the CAK's replying affidavit, Geonet filed a further affidavit sworn by Hassan Katetei Mdachi, Geonet's Director. He deposed that the CAK is authorized to ensure that the users of the telecommunications services enjoy affordable and good quality services under section 23 of *KICA*. The Director General regulates the rates the various service providers charge each other. Mr Mdachi deposed that the CAK *vide* its letter dated December 21, 2021 advised Geonet to renegotiate the charges of Mobile Termination Rates (MTR) and the Fixed Termination Rates (FTR).

20. He deposed that an auditor, arbitrator, or any other party that is not the CAK cannot decide on questions of law, that is, MTRs and FTRs rates that service providers charge each other. He deposed that the CAK sets the MTR and FTR rates. He deposed that double-billing dispute is not an issue

of what should be paid, it is not a mere accounting problem, and that what is paid depends on how one defines a 'call' or 'transit call' and that definition is not something that an auditor can determine. According to Mr Mdachi, Telkom has been taking Geonet's calls, transiting it within their network from fixed switch to mobile switch. He deposed that this is an unlawful method to contrive illegal charges. He deposed that Geonet requested Telkom to correct this method or restrict Geonet's calls to the mobile switch only. This request was denied by Telkom and since it was acting on the CAK's behest, he deposed that Geonet had to seek the latter's intervention.

21. According to Mr Mdachi, section 27 of the *Statutory Instruments Act* must be interpreted in context by considering the content of the cross-referenced provision (now repealed) because the statute must be read as a whole. Hence, the preparatory words '(2) Despite the provisions of subsection (1)' appearing in section 27(2) of the *Statutory Instruments Act* mean that the succeeding words in that section should be interpreted in the context of section 27 and 34 of the *Interpretation and General Provisions Act*. He deposed that the saving and transitional provision was meant to save only those statutory instruments that had not at that time complied with sections 27 and 34 of the *Interpretation and General Provisions Act* as they were; it was not to save every existing statutory instrument.

Determination

22. I have considered the petition, the responses, the rival submissions of counsel and the authorities cited. The issues for determination are as follows: -

    i. Whether the CAK breached the provisions of the *Constitution* by failing to respond to Geonet's concerns.

    ii. Whether the court should issue Judicial Review orders under prayers (a) and (b).

    iii. Whether regulations 5(11) (b) of *the Regulations 2010* are inconsistent with articles 10, 46, 47, and 232 of the *Constitution* and section 23(2) of *KICA*.

    iv. Whether the *Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010* are still valid under the provisions of the *Statutory Instruments Act*.

Whether the CAK breached the provisions of the *constitution* by failing to respond to Geonet's concerns.

23. Geonet and Safaricom entered into an interconnection agreement. By the said agreement, Safaricom interconnected its telecommunication system with that of Geonet telecommunication systems to form an interconnection link. Clause 6.4 of the agreement provided that after Safaricom has submitted a billing statement and supporting information, it is entitled to payment from Geonet. However, from the Ruling in High Court (Commercial and Tax Division) Civil Case No E027 of 2019 - *Geonet Communications Limited vs Safaricom PLC*, Geonet owed Safaricom Kshs 30,013,757 as of April 30, 2019. Consequently, Safaricom issued Geonet with a notice to terminate their agreement and the suspension of the interconnection link within 30 days. Geonet attempted to avoid this suspension by seeking a temporary injunction. It was granted a conditional temporary injunction. Geonet did not meet the conditions, and Safaricom went ahead to suspend the interconnection link. On June 27, 2022, Geonet wrote to the CAK requesting it to compel Safaricom to reinstate the interconnection link.

24. Section 5 of *KICA* stipulates that the object and purpose of the CAK is to license and regulate postal, information and communication services in accordance with the Act. The CAK's wide powers are clearly spelt out in section 2 of the Act which provides that the CAK shall have all the powers necessary

for the performance of its actions under that Act. Accordingly, it is expected to take such actions as would ensure that communication services are regulated and in so acting section 5A (1) of the Act provides that it be independent and free of control by the government, political or commercial interest in the exercise of its powers and in the performance of its functions. It is further required by section 5A (2) to be guided by the national values and the principles in articles 10 and 232 of the *Constitution*. Article 232 requires the CAK to be responsive, prompt, effective, impartial, and equitable in the provision of services to promote fair competition and merit as the basis of its provision of services.

25. Therefore, in making its decision, the CAK must do so in a manner that is responsive to the parties concerned; such a decision must be prompt in the sense that it has to be made expeditiously; the decision itself must be an effective in the sense that it ought not to be merely academic but must be geared towards achieving its objectives and purpose for which it is established. Further, the decision must not be seen to favour persons or interests but must promote the principles of equity in the provision of services. To achieve the maximum benefit to the consumers of communication services the CAK is enjoined to promote fair competition and merit.

26. Regulation 3 thereof provides as follows:

> " These regulations shall apply to all interconnect licensees and interconnecting licensees, including the form and content of interconnection agreements, access and facilities."

27. From the foregoing, all interconnect licensees and interconnecting licensees are subject to the aforesaid regulations in terms of form and content of interconnection agreements, access, and facilities. That is, the agreements arrived at between the parties can only be valid if they conform to the regulations. In arriving at an interconnection agreement, the parties do not have a free hand in hammering out their terms which do not conform to the regulations.

28. Regulation 4(1) proceeds to provide as follows:

> " An interconnecting licensee shall, subject to compliance with the provisions of the *Act* and any guidelines on interconnection of telecommunications systems and services that the Commission may from time to time publish, have the right to choose its interconnection licensee to route its data traffic and calls towards customers of another licensee."

29. In my view, this provision provides that once an interconnecting licensee such as Geonet complies with the provisions of the *Act* and the guidelines on interconnection of telecommunications systems and services as published by the Commission, the interconnecting licensee is then entitled to choose its interconnection licensee to route its data and calls towards customers of another licensee. In other words, an interconnection licensee cannot bar such an interconnecting licensee from entering into an agreement to route its services through the systems put into place by the interconnecting licensee to the customers of other licensees.

30. Regulation 4(2) on the other hand provides that:

> " Notwithstanding paragraph (1), an interconnecting licensee shall route its data traffic and calls towards international destinations through a licensee who has been licensed to provide the service."

31. So, where an interconnecting licensee seeks to route its data traffic and calls towards international destinations, it can only do so through a licensee licensed to provide such service. In other words, in such an event, the routing can only be done via a service provider licensed to route such data traffic

and calls internationally. This position clearly appreciates that in such cases, the CAK may not have the legal authority to regulate such services due to jurisdictional issues.

32. Regulation 4(3) provides that:

> " An interconnection licensee shall have the right and, when requested by an interconnecting licensee, an obligation, to negotiate the interconnection of its telecommunications system, facilities and equipment with the telecommunications system, facilities and equipment of the interconnecting licensee, in order to provide end-to-end connectivity and interoperability of services to all customers."

33. Therefore, what comes out from the foregoing is that, the interconnection licensee has no option when an interconnecting licensee requests the former to negotiate the interconnection of its telecommunications system, facilities and equipment with the telecommunications system, facilities and equipment of the interconnecting licensee, in order to provide end-to-end connectivity and interoperability of services to all customers. In such negotiations, regulation 4(4) states that:

> " An interconnection licensee shall accept all reasonable requests for access to its telecommunications system at the network termination points offered to the majority of the interconnecting operators."

34. This is to mean that if the request for access to its telecommunications system is reasonable, the interconnection licensee is under a legal obligation to accept the same. In other words, in such circumstances, the issue of freedom of contract does not arise. However, under paragraph (5) an interconnection licensee may be exempted from this obligation where an interconnection agreement is prohibited by law; where the license issued to a licensee does not permit a licensee to offer the services for which the interconnection is requested; or where the requested interconnection is rendered impossible as a result of technical specifications; or where the interconnection would endanger the life or safety or result in injury of any person or harm to the interconnect licensee's property or hinder the quality of the services provided by the licensed service provider. The rider however, is that the CAK is enjoined to publish any such exemption. Agreeably, it is clear that the details of the agreement must be hammered out between the parties if the terms remain within the confines of the law.

35. Accordingly, regulation 5(5) provides that:

> " the terms and conditions for interconnection of telecommunications networks shall be based on the agreement reached between the parties to an interconnection agreement and promote increased access and efficient use of telecommunications systems, services and facilities".

36. The terms must however be geared towards the achievement of the objective of interconnection since regulation 5 (6) provides that:

> " All interconnection agreements shall facilitate end to end connectivity by ensuring that calls originated on the telecommunications system of an interconnecting operator can be terminated at any point on the telecommunications systems of any other telecommunications service provider on a non-discriminatory basis"

37. In the process of arriving at the agreement, the parties are however subject to the supervision of the CAK. What then is the role of the CAK where an agreement has either been reached or not reached? Regulation 5(11) (b) reads as follows:

> " Where a telecommunications service licensee—
>
> (b) has not interconnected its facilities upon request by another licensee, the Commission shall require the licensee concerned to interconnect its facilities in order to protect essential public interests and may set the terms and conditions of the interconnection."

38. The above regulation emphasizes the power of the CAK as a regulator to oversee agreements entered between telecommunications licensees in order to ensure that they conform with the Act, regulations and any guidelines on the interconnection of telecommunications networks issued by the Commission. Where however the interconnection licensee does not act on the request of the interconnecting licensee, the CAK is empowered to intervene and require the licensee concerned to interconnect its facilities in order to protect essential public interests and may set the terms and conditions of the interconnection.

39. Therefore, the first avenue is for the parties to negotiate their terms of interconnection and where there is agreement entered into, it can review the same to determine whether the same conforms to the provisions. On the other hand, where no negotiations are entered into, because of a default on the part of the interconnection licensee, the CAK is empowered to direct the interconnection licensee to connect the same in the public interest. It is however clear that the negotiations are not open-ended. Regulation 11 gives the timeline for such negotiations as 6 weeks. However, the CAK has the power to abridge the said period and where no agreement is forthcoming within the said period of six weeks, it can intervene.

40. Geonet pleaded that when it requested the CAK to intervene between them and Safaricom on grounds of public interest, the CAK barely responded to their request. Geonet also informed the CAK of its concerns that Telkom was unlawfully double billing it. The CAK responded stating that it will address the issue. Till today, nothing has been addressed by the CAK. The CAK's argument is that the dispute between Geonet and Telkom could be resolved under the dispute resolution mechanism in the agreement (Clause 7). Therefore, the letter for the CAK to intervene was premature.

41. Under regulation 5 abovementioned, the CAK is empowered to intervene and review the interconnection agreement entered into. This power is reinforced by the interconnection procedures provided for under regulation 13 which stipulates as follows:

> "(1) All requests by an interconnecting licensee for any form of interconnection shall be in writing and shall provide the interconnection licensee with information relating to—
>
> a. The form of interconnection;
>
> b. The date for the commencement of negotiations;
>
> c. The approximated area the interconnection is required;
>
> d. And an estimate of the capacity required.

(2) A copy of the request for interconnection in paragraph (1) shall be forwarded to the Commission by the requesting party within seven days of the request by the requesting party.

(3) The interconnect licensee shall inform the interconnecting operator in writing within fourteen days of receipt of the request for interconnection of its ability and willingness to supply the form of interconnection requested within the time frames requested by the interconnecting licensee and its ability to commence negotiations on the date requested.

(4) Where the parties do not agree on the date to commence negotiations, the Commission shall facilitate negotiations to an interconnection agreement on a date specified by the Commission.

(5) Where the Commission is of the view that parties to an interconnection agreement have taken longer than necessary to negotiate and conclude an interconnection agreement, and the proposed charges to an interconnection agreement are unreasonable and do not promote effective competition the Commission shall make a determination to be applicable during the time when negotiations are going on and the time within which negotiations on interconnection are to be completed.

(6) Where a party or any other person alleges that there has been a contravention or failure to comply with the provisions of the Act, regulations and any guidelines on interconnection or an interconnection agreement, the Commission shall investigate and make a decision.

42. It is therefore clear that in terms of procedural actions in respect of the interconnection, the CAK is given very wide powers to supervise, regulate and facilitate the interconnection agreements.

43. From the foregoing, did the CAK violate Geonet's rights under articles 46 and 47? Did the CAK breach the provisions of articles 10 and 232 of the *Constitution*? The role of the CAK in the provision of communication services is not just that of a disinterested observer but it is expected to be actively involved in the process with a view to achieving its objectives. Section 5A (2) of the *Act* stipulates that the CAK is to be guided by the national values and principles in articles 10 and 232 of the *Constitution*. The CAK is required to be responsive, prompt, effective, impartial, and equitable in the provision of services to promote fair competition and merit as the basis of its provision of services.

44. The CAK barely lifted a finger in response to Geonets concerns. The CAK is not permitted to state that it did not take any regulatory steps because Geonet did not follow the laid down procedure. The CAK's role is that of a referee and where disputes arise, it must take steps to resolve the same in accordance with the law. The CAK should not leave it to the parties themselves to decide the best decision to take. This is why the law empowers the CAK even on its own motion to take steps to rectify mis-steps taken by the parties in the telecommunications industry. Therefore, it breached article 10, 232, 46 and 47 of the *Constitution*.

Whether the court should issue Judicial Review orders under prayer (a) and (b).

45. It is settled law that the High Court has the power to compel as a remedy against government agencies or bodies or persons to amend all errors, omissions and failure to meet legitimate expectations which tend to oppress the right holders. That kind of infringement resulting in misgovernment calls for this court to exercise discretion through one of the constitutional tools provided as a means of enforcing

the performance of a public duty bestowed by the *Constitution* or statute. The purpose of judicial review is to uplift the quality of public decision-making by holding the public authority to the limit defined by the law.

46. Geonet prays that the court should compel the CAK to direct Safaricom to provide interconnection services to it, and for this court to further compel the CAK to resolve the dispute between Geonet and Telkom.

47. The threshold for issuing orders of *mandamus* was clearly set out by the Court of Appeal in *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR where the court held;

> " The next issue we must deal with is this: What is the scope and efficacy of an order of *mandamus*" Once again we turn to *Halsbury's Law of England*, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: -
>
> > " The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."
>
> What do these principles mean? They mean that an order of *mandamus* will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

48. The upshot of the foregoing is that the orders sought must compel the performance of a public duty that a body or institution is legally bound to perform. The CAK is legally bound by section 5A (2) of the *Act* to be guided by the national values and the principles in articles 10 and 232 of the *Constitution*. Article 232 requires the CAK to be responsive, prompt, effective, impartial, and equitable in the provision of services to promote fair competition and merit as the basis of its provision of services.

49. I decline to issue prayer (a) and (b) of the petition. In the alternative, I hereby order that within 60 days of this judgment, the CAK respond to the concerns raised by Geonet in this petition and further make an impartial decision that will promote fair competition.

Whether regulations 5(11) (b) of the regulations 2010 are inconsistent with articles 10, 46, 47, and 232 of the *Constitution* and section 23(2) of KICA.

50. Regulation 5(11) (b) reads as follows:

> " Where a telecommunications service licensee—
>
> (b) has not interconnected its facilities upon request by another licensee, the Commission shall require the licensee concerned to interconnect its facilities in

order to protect essential public interests and may set the terms and conditions of the interconnection."

51. On the other hand, section 23(2)(a) of the Act is drawn as follows:

> " (2) Without prejudice to the generality of subsection (1), the Commission shall—
>
> (a) protect the interests of all users of telecommunication services in Kenya with respect to the prices charged for and the quality and variety of such services;

52. Regulation 5(11)(b) emphasizes the power of the CAK as a regulator to oversee agreements entered between telecommunications licensees in order to ensure that they conform with the *Act*, regulations and any guidelines on the interconnection of telecommunications networks issued by the Commission. Section 23(2) further empowers the CAK to regulate the telecommunication industry. Geonet's argument is that regulation 5(11)(b) introduces an unlawful precondition when the words 'upon request by another licensee' are used.

53. The CAK in regulating the telecommunication industry is guided by article 10 and article 232. The fact that the wording in the regulation is 'upon request by another licensee' does not mean that the request will be denied therefore infringing the rights of the licensee. Section 23 of the *Act* is substantial while regulations 5(11) provide the procedural nature of how the CAK performs its duties. A written request is essential to alert the CAK to act. These provisions are not conflicting or inconsistent with the provisions of the *Constitution*.

Whether the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010 are still valid under the provisions of the *Statutory Instruments Act*

54. It is Geonet's contention that the *Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010* contravene section 21 of the *Statutory Instruments Act*, No. 23 of 2013.

55. It is submitted that the regulations are a statutory instrument. As such, the law gives an operational lifespan to any statutory instrument of 10 years unless lawfully exempted or extended.

56. The *Statutory Instruments Act* became operational in January 2015. By then, the regulations had been in force since March 2010. Were the regulations therefore caught up by s{{^}}ection 21 of the *Statutory Instruments Act*?

57. Section 21 of the *Statutory Instruments Act* provides that:

> " Automatic revocation of statutory instruments
>
> (1) Subject to subsection (3), a statutory instrument is by virtue of this section revoked on the day which is ten years after the making of the statutory instrument unless—
>
> (a) It is sooner repealed or expires;
>
> (b) A regulation is made exempting it from expiry
>
> (2) The responsible Cabinet Secretary may in consultation with the Committee, make a regulation under this Act extending the operation of a statutory rule

that would otherwise be revoked by virtue of this section for a period as is specified in the regulation not exceeding twelve months.

(3) Only one extension of the operation of a statutory rule can be made under subsection (2).

58. Given that section 21 of the *Statutory Instruments Act* came into play long after the regulations had been enacted, it becomes incumbent to examine whether the doctrine of retrospectivity is a complete bar in this case.

59. The Supreme Court in Application 2 of 2011, *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR was confronted with the question of whether it had jurisdiction under section 15 and 16 (Appeals to the Supreme Court) of the *Supreme Court Act* to entertain an appeal from the Court of Appeal on a decision that was delivered on July 31, 2008, two years before the advent of the new constitutional order that created the Supreme Court. In that case, the respondents contest on jurisdiction was based on the argument that the powers of the Supreme Court only relate back to the date of its establishment and upon the appointment of judges to the Supreme Court. In seeking to emphasize the presumption against retrospectivity, the respondents pointed to section 9(1) of the *Interpretation and General Provisions Act* which provides that:

> " Subject to the provisions of subsection (3) an Act shall come into operation on the day of which it was published in the Gazette. (3) If it is enacted in the Act, or in any other written law, that the Act or any provisions, thereof shall come or to be deemed to have come into operation on some other day the Act or as the case may be, that provision shall come or be deemed to have come into operation accordingly.

60. The respondents' bottom line was that there is no provision neither in the *Constitution* nor in the *Supreme Court Act* that incorporated retrospectivity into the provision under section 16 and part IV of the *Supreme Court Act*.

61. In determining the question whether the appellate jurisdiction of the Supreme Court stretched back to the time prior to the promulgation of the *Constitution*, the learned judges interrogated the issue of retrospective/retroactive application or operation of legislation and the *Constitution*. In so doing, they referred to the *Black's Law Dictionary* (6th Edition) which defines retrospective law as follows;

> " A law which looks backwards or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."

62. The learned judges then went ahead and spoke to the doctrine against retrospectivity with respect to the criminal and civil justice system in the following manner: -

> " Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in article 50 (2) (n) of the *Constitution*. That article provides that:
>
> > Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law."

63. With respect to non-criminal legislation, the learned judges opined that they are *prima facie* forward looking and are not to be given retrospective application. In making reference to *Halsbury's Laws of England*, 4th Edition Vol. 44 at p.570 they observed: -

> " As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

64. The learned judges however remarked that exceptions do exist in the rule against retroactive application. They observed as follows in respect of legislation: -

> " (61) ...retroactive law is not unconstitutional unless it:
>
> i. is in the nature of a bill of attainder;
>
> ii. impairs the obligation under contracts;
>
> iii. divests vested rights; or
>
> iv. is constitutionally forbidden."

65. In giving effect to the foregoing exceptions, the learned judges, with a particular bias to the *Constitution*, stated as follows: -

> " (62) ...At the outset, it is important to note that a *Constitution* is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a *Constitution* may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the *Constitution* to determine whether it permits retrospective application of any of its provisions, a court of law must pay due regard to the language of the *Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the *Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the *Constitution*. (A

position endorsed and reiterated more recently by the same court in Petition 2 of 2015, *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR.)"

66. From the foregoing the learned judges made the finding that the court could not operate retrospectively. It declined reliance of section 15 of the *Supreme Court Act* by the applicants to confer jurisdiction to the court. It dismissed the application.

67. I have carefully perused the *Statutory Instruments Act*. Section 27 provides as follows: -

> "(1) Sections 27 and 34 of the *Interpretation and General Provisions Act* (cap. 2) are hereby repealed.
>
> (2) Despite the provisions of subsection (1), any regulations, order or notice issued immediately before the commencement of this Act shall continue in force as if it were made under this Act unless it is expressly revoked by an Act of Parliament under which it is made.

68. As stated hereinabove, the regulations were enacted in March 2010. By the time the *Statutory Instruments Act* came into force, the regulations had been operational for a period of 3 years. The *Statutory Instruments Act* does not define in terms of time, what the phrase 'immediately before the commencement of this Act' means. Be that as it may, section 27(2) of the *Statutory Instruments Act* intended that the Act applies to any regulations, orders or notices made immediately before the enactment of the Act.

69. The *Black's Law Dictionary*, revised 4th Edition, West Publishing Company defines the word 'immediately' at page 884 as Without interval of time, without delay, straightaway, or without any delay or lapse of time. It also defines the word 'before' as prior to; preceding. 'Immediately before' can, hence, be deduced to mean: a subsequent event occurs but prior to it, without interval or lapse of time or delay, there was an initial one.

70. The words 'immediately before', therefore, connote those events which happened just before the issue at hand. In this case, it will be the regulations, orders and notices which were enacted immediately before the coming into force of the *Statutory Instruments Act* on January 25, 2013. As said, the Regulations by then had been in place for 3 years.

71. Whereas section 27(2) of the *Statutory Instruments Act* has an aspect of retrospectivity, such is capped to 'immediately before' the commencement of the Act. Whereas this court will not attempt to fix the possible timelines in the context of the words 'immediately before', given that the parties did not sufficiently render themselves on the matter, it is obvious and logical that an event which took place 3 years ago cannot, by any standards, be deemed as falling within the term 'immediately before' in respect of another event which occurred 3 years later.

72. This court, therefore, finds that section 21 as read with section 27(2) of the *Statutory Instruments Act* does not apply to the regulations in this case. The regulations are valid and in force.

73. The issue is, hence, answered in the negative.

Disposition

74. Flowing from these findings and conclusions, the disposition of the petition dated July 15, 2022 is as follows:

a. A declaration hereby issues that the Communications Authority of Kenya breached articles 10, 232, 46 and 47 of the *Constitution*.

b. An order is hereby issued that within 60 days of this judgment, the Communications Authority of Kenya respond to the concerns raised by Geonet in this petition and further make an impartial decision that will promote fair competition.

c. As the petition has partly succeeded, each party bears its own costs.

Orders Accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED AT MILIMANI THIS 5TH DAY OF APRIL, 2023

.....

P. MULWA

JUDGE

In the presence of:

Mr. Christopher Rosana: For the Petitioner

Mr. N. Malonza: For the Respondent

Ms. Leyla Ahmed: For the 1st Interested party

Mr. Chiuri Ngugi: For the 2nd interested party

Mr. Ochieng: Court Assistant