



**Geonet Communications Limited & another v Safaricom PLC
& 5 others (Civil Appeal E023 & E028 of 2022 (Consolidated))
[2023] KEHC 22156 (KLR) (Commercial and Tax) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22156 (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
SEPTEMBER 15, 2023**

BETWEEN

GEONET COMMUNICATIONS LIMITED APPELLANT

AND

SAFARICOM PLC 1ST RESPONDENT

ELIGE COMMUNICATIONS LIMITED 2ND RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA 3RD RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E028 OF 2022**

BETWEEN

ELIGE COMMUNICATIONS LIMITED APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA 1ST RESPONDENT

SAFARICOM PLC 2ND RESPONDENT

GEONET COMMUNICATIONS LIMITED 3RD RESPONDENT



RULING

Introduction and Background

1. On March 17, 2023 the court rendered a judgment where the appeals by GeoNet Communications Limited (“Geonet”) and Elige Communications Limited (“Elige”) from the Communications and Multimedia Appeals Tribunal (“the Tribunal”) were dismissed (“the Judgment”). Geonet has now filed the Notice of Motion dated March 22, 2023 seeking to review and set aside the Judgment by invoking Order 45 Rule 2 of the *Civil Procedure Rules*, section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), sections 47, 107, 108 and 109 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) and section 102G of the *Kenya Information and Communications Act*, 1998 (“KICA”). The application is supported by the grounds on its face and the supporting affidavit and supplementary affidavit of Hassan Katetei Mdachi, Geonet’s director, sworn on March 22, 2023 and June 9, 2023. It is opposed by Communications Authority of Kenya (“CAK”) through the Grounds of Opposition dated June 8, 2023 and by Safaricom PLC (“Safaricom”) through the Grounds of Opposition dated June 7, 2023. The parties have also supplemented their pleadings by filing written submissions.
2. Geonet’s application is grounded on the position that the Tribunal was not properly constituted at the time of rendering its judgment dated February 11, 2022 because it did not have the technical expertise required for the subject matter. That Mr. Malombe and Dr. M. Nyambura who had the technical expertise in telecommunications heard the appeal before the Tribunal but were not in office at the time of writing the judgment and as such they did not take part in the final determination of the said appeal. Geonet therefore contends that the decision of the appeal was made without the technical expertise and competence necessary in analysing its technology. Geonet refers to paragraph 36 of the Judgment to state that the court has referred to the decision of an incompetent Tribunal.
3. Geonet contends that there are errors apparent in the Judgment which constitute mistakes on substantial points of law. It points out that the court acknowledged that Geonet does not use physical SIM Cards yet it proceeded to hold that it was guilty of SIM Boxing. That contrary to the Court’s analysis, Geonet does not use calling cards but uses a mobile application named “GeoSafari App” that relies on Voice over Internet Protocol (VoIP) and runs on Session Initiation Protocol (SIP) mode of call handling. It avers that “GeoSafari App” does not utilise any SIM Cards therefore, it is illogical to hold that they are guilty of SIM Boxing, a practice which, by definition requires physical SIM Cards.
4. Geonet contends that the “GeoSafari App” was vetted and approved by CAK and that it utilises soft switch technology that allocates all its subscribers, whether local or international, a number that comes from the list of numbers assigned to Geonet by CAK under the Kenya Information and Communications (Numbering) Regulations, 2010. That the “GeoSafari App” contains two numbers for each subscriber — the first is the number allocated to the subscriber by the Mobile Network Operators, such as Safaricom, and the second is the one allocated to the subscriber by Geonet’s systems. That to verify each subscriber’s identity, CAK directed Geonet to rely on the Integrated Population Registration System (IPRS) database to authenticate Kenyan “GeoSafari App” users and that Geonet has always used the said database in a bid to comply with the Kenya Information and Communications (Registration of SIM-Cards Regulations, 2015). Furthermore, that each subscriber’s identity is authenticated by 2-factor authentication systems.
5. Geonet also contends that the possession of two numbers by Geonet’s subscribers is not to evade international rates but rather to shield the customers from double-billing and that it simplifies the billing process by separating the charges to be levied on a subscriber by Geonet and the relevant



Mobile Network Operator. That CAK inspected Geonet’s premises and found no SIM Box devices and therefore to hold that the Geonet is guilty of SIM Boxing contradicts the rule that “he who alleges must prove” contrary to sections 107 and 109 of the *Evidence Act*. That to hold that Geonet is guilty of SIM Boxing yet there were no SIM Boxes, SIM Card Numbers, or any details as to the Base Transceiver Stations through which the alleged SIM Card Calls accessed Safaricom’s network contradicts the licenses granted by CAK approving the very technology, that is, the “GeoSafari App” and its softswitch system, Geonet implemented in Kenya.

6. It is Geonet’s position that the absence of international numbers in the Geonet’s Call Detail Records is due to the fact that Geonet’s softswitch technology has allocated all subscribers Kenyan numbers in the Numbering Plan provided by CAK. That the switchboard of Geonet is in Nairobi and all calls made from the numbers assigned to Geonet’s subscribers, irrespective of their geographical location, will originate themselves from Nairobi, which is consistent with section 23(2) of *KICA* concerning innovation in telecommunications, and the licenses granted by CAK to Geonet.
7. Geonet maintains that the Judgment will result in grave injustice because; it contradicts Clause 3.2 of the Guidelines for the Implementation and Provision of Voice over Internet Protocol (VoIP) Services” (Gazette Notice No. 6394 of 2005) by equating VoIP in the GeoSafari App to SIM Boxing. That Geonet, having been granted licenses for telecommunications services in Kenya, after necessary vetting and approval, had a legitimate expectation that CAK would not declare the same technology as violating the law, which also violates the rules of estoppel under section 120 of the *Evidence Act* and section 24 of the *KICA*. That the Judgment impliedly outlaws lawfully licensed investments and technologies contrary to section 23(2) of *KICA* and that Clause 3.7 of the Interconnection Agreement dated October 24, 2016 (as it then was) between Geonet and Safaricom was unlawful under Regulation 5(8) of the *Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access, and Facilities) Regulations, 2010*.
8. CAK and Safaricom oppose on the ground that Geonet has not met the threshold required for review under section 80 of the *Civil Procedure Act* as well as Order 45 Rule 1 of the *Civil Procedure Rules, 2010*. They contend that the issues of competency of the Tribunal as well as the issue relating to ‘sim-boxing’ are res judicata.

Analysis and Determination

9. In order to succeed in an application under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the court to review.
10. Geonet’s application is anchored on the ground that the Judgment contains apparent errors on the face of the record. As submitted by the parties, the Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau* [1996] KLR 469 explained what constitutes an error of law apparent on the face of the record and the scope of review in that respect:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.



11. The grounds raised by Geonet in its application are a perfect manifestation and representation of what the appellate court has stated above do not constitute grounds for review. As is evident, Geonet is raising grounds that require elaborate arguments supported by evidence to be established. It is stating that the court proceeded on an incorrect exposition of the law, misconstrued the subject statute and regulations and therefore reached erroneous conclusions of the law. In essence Geonet is re-arguing and re-litigating its appeal in the hope that the court would reach a different factual and legal position.
12. The issue raised by Geonet that the Tribunal was not properly constituted when it delivered its judgment was not before the Tribunal nor before this court when it heard the appeal. It was a matter within its knowledge and cannot be a ground for review in these circumstances. More particularly, this contention lacks merit even on substantive grounds.
13. The Tribunal established under section 102 of [KICA](#), comprises a Chairperson and at least four other persons possessing knowledge and experience in, interalia, media, telecommunications, postal, courier systems, radio communications and information technology. When hearing a matter, the Tribunal is quorate when sitting with the Chairperson and four members. Geonet also admits this fact at Para. 12 of its supplementary affidavit where from the record, it has tabled the quorum of the Tribunal at the material times which shows that they were always a total of five at any given point. In accordance with section 102H, the Tribunal also has the power to call assessors who possess special skills and technical knowledge.
14. I have considered the proceedings and the Judgment in line with the statutory provisions and I find that there is nothing to suggest the Tribunal was not quorate at all times when it was hearing the matter and when it rendered judgment. Its composition was within knowledge of Geonet which did not raise any objection or call upon the Tribunal to call for expert assessors.
15. Geonet contended that paragraph 36 of the Judgment cast doubt on the jurisdiction of the Tribunal. I did not do so, I only set out the standard of review required in determining the appeal given that the technical nature of the subject matter and the fact that this court is a second appeal from the decision of the Commission.

Disposition

16. It is clear that the Geonet has not made out a case for review of the judgment dated March 17, 2023. The application dated March 22, 2023 is therefore dismissed with costs to Safaricom and CAK.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

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

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

Ms Ahmed instructed by TripleOKLaw LLP Advocates for Safaricom PLC.

