**Safaricom Limited v Porting Access Kenya Limited & another (Civil Suit 167 of 2011) [2024] KEHC 12266 (KLR) (Civ) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12266 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 167 OF 2011**

**CW MEOLI, J**

**OCTOBER 9, 2024**

**BETWEEN**

**SAFARICOM LIMITED ..... PLAINTIFF**

**AND**

**PORTING ACCESS KENYA LIMITED ..... 1ST DEFENDANT**

**PATRICK MWEU MUSIMBA ..... 2ND DEFENDANT**

**RULING**

1. The background to the Preliminary Objection dated 22.10.2023 by Safaricom Limited (hereafter the Plaintiff) is as follows. The Plaintiff via a plaint dated 06.05.2011 instituted a claim founded on the tort of defamation against Port Access Kenya Limited and Patrick Mweu Musimba (hereafter the 1st & 2nd Defendant/Defendants). By the suit the Plaintiff sought inter alia general damages for libel and slander; exemplary damages; and a permanent injunction restraining the Defendants whether by themselves, agents, servants or otherwise howsoever from further publishing or causing to be published any words and statements accusing, linking or associating the Plaintiff with sabotaging of the Mobile Number Portability process or any words and statements similarly defamatory of the Plaintiff concerning the implementation of Mobile Number Portability process.

2. The Plaintiff averred that in press conferences held on 26.04.2011 and 28.04.2011 the Defendants published or caused to be published words and statements defamatory of the Plaintiff regarding the implementation of the Mobile Number Portability (MNP) system which words were calculated to cause pecuniary damage to the Plaintiff's business. That the said words and statements were sensationally, maliciously and recklessly published, without any regard for the immense loss, damage and injury to be occasioned to the Plaintiff's business. The Plaintiff further avers that by reason of the publications of the said words and statements, it has been severely injured in its credit, character and

reputation in the way of its business and has been brought into public scandal, odium and contempt, for which damages are claimed.

3. The Defendants on their part filed a statement of defence, set-off and counterclaim dated 18.05.2011 which was later amended on 19.11.2012, denying the key averments in the plaint. In their amended set-off and counterclaim, they aver that the Plaintiff's Executive Head of Regulatory and Public Policy Department authored a letter dated 29.04.2011 following which one of the Plaintiff's directors published defamatory statements calculated to cause the right-thinking members of the public to shun them. For which they are entitled to damages, which in any event, ought to be set-off against any sum which may be awarded to the Plaintiff.

4. They further aver that on or about 30.06.2010, the 1st Defendant was duly awarded the license for the provision of MNP in Kenya and on 17.12.2010 all mobile operators entered into a MNP Services agreement (hereafter agreement) where it was agreed that the 'Go Live' date would be 01.04.2011, and at all material times, the Plaintiff promised to deliver on the automation of the MNP system. That soon after the 'Go Live' date, the Plaintiff in breach of the agreement deliberately, negligently and or recklessly failed to implement the automated system which interfered with and seriously disrupted the roll out of the MNP service, acting in bad faith and in blatant disregard of the agreement. By the counterclaim the Defendants seek damages in respect of the breach to the tune of Kshs.583,926,948; general damages for libel and slander; and exemplary damages, inter alia.

5. Subsequently, the Plaintiff filed a reply to defence and an amended defence to the Defendants' amended set off and counterclaim.

6. On 26.10.2021, the Plaintiff's suit was withdrawn with costs to the Defendants and directions thereafter taken on hearing of the amended set-off and counterclaim. When the latter came up for hearing, the Court was informed that the Plaintiff had filed a Preliminary Objection (PO) dated 22.10.2023, premised on grounds that: -

> " 1. This Honourable Court lacks the jurisdiction to hear and determine the Amended Set-Off and Counterclaim dated 19th November, 2012 in view of the express provision of clause 17.2 of the Mobile Number Portability Services Agreement dated 17th December, 2010 wherein it was agreed that disputes between the parties would be resolved through the mechanism provided for under the *Kenya Information and Communications Act*, 1998 (as amended) and the Regulations thereto;

2. The Communications and Multimedia Appeals Tribunal has the original jurisdiction by dint of section 102A (1) (c) of the *Kenya Information and Communications Act*, 1998 to hear and determine the Defendants' claim against the Plaintiff as contained in the Amended Set-Off and Counterclaim dated 19th November, 2012;

3. The Defendants have themselves acknowledged the Court's lack of jurisdiction as pleaded at paragraph 3 of the Amended Defence, Set-Off and Counterclaim dated 19th November 2012" (sic)

7. The PO was canvassed by way of written submissions. Counsel for the Plaintiff asserted that this Court lacks jurisdiction to entertain the Defendants' amended set-off and counterclaim. Because, the substance of the dispute therein relates to alleged breach of the MNP Services Agreement dated 17.12.2010 and damages consequent to the alleged breach. It was further highlighted that disputes between the parties under the Agreement were to be dealt with in the manner contemplated under Clauses 17.1 and 17.2 of the Agreement thereto, a fact equally pleaded at paragraph 3

of the Defendants' amended defence, set-off and counterclaim. On the premise of the foregoing therefore, the Communications and Multimedia Appeals Tribunal has the original jurisdiction to hear and determine the Defendants' claim pursuant to Section 102 of the *Kenya Information and Communications Act*

8. While calling to aid the oft-cited decision in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, counsel posited that a party cannot through its pleadings confer jurisdiction to a Court when none exists as jurisdiction is conferred by law. That under paragraphs 19 to 26 of the amended set-off and counterclaim, the pleaded substance of the Defendants' claim against the Plaintiff arises from the alleged breach of the MNP Agreement which is anchored on the Audit Report prepared by Communications Commission of Kenya (now Communications Authority of Kenya). Counsel thus argued, the determination of the Defendants' claim would entail extensive interrogation of the said audit report, procedure and guidelines which meant that the Defendants' claim against the Plaintiff is technical in nature and requires to be resolved through the mechanism provided for under the *Kenya Information and Communications Act* as agreed by the parties under Clause 17 of the agreement.

9. Counsel thus asserted that by dint of Article 159 of *the Constitution* and the doctrine of exhaustion, this Court lacks original jurisdiction to hear and determine the Defendants claim. The decisions in Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR, Jeremiah Memba Ocharo v Evangeline Njoka & 3 Others [2022] eKLR and Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR were relied on in the foregoing regard.

10. It was further contended that notwithstanding the provisions of Article 159(2)(c) of *the Constitution*, Clause 17 of the Agreement does not oust the jurisdiction of the Court, but merely postpones the entry point by the Court in order to allow the parties to resolve the dispute through mechanism provided for under the *Kenya Information and Communications Act* and as agreed by the parties. Counsel contending that the exceptions to the doctrine of exhaustion do not apply in the instant matter. Moreover, the parties are bound by the terms of their agreement in respect of which no fraud, coercion or collusion has been pleaded or proved by the Defendants with respect to the Agreement. The Court was therefore urged to allow the PO as prayed.

11. On part of the Defendants, counsel opened his submissions by stating that jurisdiction denotes the authority or power possessed by a court to hear and determine judicial disputes, or at the bare minimum, take cognizance of them. That in determining whether it has jurisdiction, the court ought to consider the nature of the dispute as pleaded by the Defendants. Counsel here pointing out that the Court has unlimited original jurisdiction by dint of Article 165(3) of *the Constitution* to entertain this matter. Hence Clause 17 of the MNP agreement does not oust the jurisdiction of this Court in favour of the Communications and Multimedia Appeals Tribunal, pursuant to Section 102 of the *Kenya Information and Communications Act*. It was further argued that the Defendants' suit does not comprise a complaint as envisaged by Section 102 of the Act. Further that Clause 17 of the MNP Agreement read in its entirety does not express an intention by the parties herein to restrict the pursuit for remedy for breach of the Agreement solely with the Tribunal.

12. Counsel viewed the PO as devoid of merit on further grounds. Including that the Defendants' claim does not fall within parameters contemplated under Article 165(5) & (6) of *the Constitution* but rather lies well within the jurisdiction envisioned under Article 165(3). The decision in Football Kenya Federation v Kenya Premier League Limited & 4 Others [2015] eKLR was cited in that regard. Counsel asserting that under Sections 102A(1)(c) and 102E of the Act, the tribunal can only deal with complaints and lacks power to grant the reliefs sought in the Defendants claim. Consequently, the tribunal lacks jurisdiction to entertain the Defendants suit. Besides, the Plaintiff having pleaded that

this Court has unlimited jurisdiction to entertain the dispute is bound by its pleadings and estopped from denying the position. The decisions in Daniel Otieno Migore v South Nyanza Co. Ltd [2018] eKLR and Safaricom PLC v Communications Authority of Kenya: Iristel Kenya Limited (Interested Party) [2021] eKLR were called to aid. Contending that the Court was seized of jurisdiction in the matter upon issuing interim orders in favour of the Plaintiff, having earlier benefitted from interim orders is therefore estopped from challenging this Court's jurisdiction

13. Citing the decisions in Owners of the Motor Vessel "Lillian S" (supra), Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others [2012] eKLR and Republic v Karisa Chengo & 2 Others [2017] eKLR counsel contended that a Court's jurisdiction is conferred either by *the Constitution* or statute however in the instant matter there is no limitation of this Court's jurisdiction pursuant to Section 102A(1)(c) of the *Kenya Information and Communications Act*. In conclusion, counsel cited the case of Jeremiah Memba Ocharo v Evangelien Njoka & 3 Others [2022] eKLR, to submit that the doctrine of exhaustion is being advanced eleven (11) years after filing of the Plaintiff's suit and is therefore an affront to the expeditious dispensation of justice. The Court was therefore urged to dismiss the PO with costs.

14. The Court has considered the record and the rival submissions in respect of the Plaintiff's PO dated 22.10.2023. As to the nature of a PO, the law is settled. In Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696, Law J. A. stated:"

> " So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....
>
> A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop."

15. In the case of Oraro v Mbaja [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that:

> " A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.
>
> Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."
>
> See also Kigwor Company Limited v Samedy Trading Company Limited [2021] eKLR.

16. Recently, in *Mulemi v Angwenye & Another (Civil Appeal 170 of 2016)* [2021] KECA 214 the same Court further illuminated the definition of a PO as elucidated in Mukisa Biscuits (supra) by stating as follows:-

> "i) It must be a pure point of law;
>
> ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
>
> iii) If argued as a pure point of law, it may dispose of the suit;
>
> iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court's discretion" .

17. The Plaintiff's PO challenges the jurisdiction of this Court to entertain the Defendants' amended set-off and counterclaim. The locus classicus on the question of jurisdiction is the case of Owners of the Motor Vessel "Lillian S" (supra) where Nyarangi. JA (as he then was) famously stated:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

18. As asserted by the respective parties and settled in Samuel Kamau Macharia & Another (supra), a Court's jurisdiction flows from either *the Constitution*, legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. That said, the High Court draws its original jurisdiction to entertain disputes from Article 165 (3) of *the Constitution* and statute. Here, the Plaintiff's PO is ostensibly premised on Section 102A (1) (c) of the *Kenya Information and Communications Act* which provides that: -

> (1) A person aggrieved by—
>
> (a) any publication by or conduct of a journalist or media enterprise;
>
> (b) anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or
>
> (c) any action taken, any omission made or any decision made by any person under this Act, may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.

19. As observed in Mukisa Biscuits (supra), a PO consists of a point of law that is pleaded and arises prima facie out of the pleadings and if argued in limine is capable of disposing of the suit. The Court is therefore enjoined and restricted, while considering a PO, to juxtapose the pleadings against the point in law, in order to arrive at a determination all without considering contested evidential matters. Therefore, if it was the Plaintiff's intention to invoke Clause 17.2 of the MNP agreement (Contract) as ousting the court's jurisdiction based on evidentiary matters, a reference motion would have been

more suitable than a PO. (See the dicta in National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR).

20. That said, a cursory review of the amended set-off and counterclaim herein reveals that the Defendants' grievance against the Plaintiff is premised on alleged defamation and breach of the MNP agreement (Contract). The various reliefs sought have already been set out elsewhere in this ruling. The Plaintiff's contention was that by dint of the doctrine of exhaustion this Court ought not to be the first port of call in regard to the Defendants' amended set-off and counterclaim. The Defendants riposte is that their suit is in no shape or form a complaint as contemplated by Section 102 of the Act, and besides, the tribunal lacks the requisite power to grant the reliefs sought in the Defendants' suit.

21. The doctrine of exhaustion is more or less codified under Article 159(2)(c) of our Constitution. In Mutanga Tea and Coffee Company Ltd v Shikara Limited & Another [2015] eKLR the Court of Appeal discussed the rationale underlying the doctrine. The Supreme Court in Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others [2019] eKLR while addressing a similar question observed that: -

> " In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

22. The question to be determined here is whether pursuant to Section 102A(1)(c) of the *Kenya Information and Communications Act* the Communications and Multimedia Appeals Tribunal, is vested with jurisdiction, in the first instance, to entertain the Defendants' amended set-off and counterclaim as contended by the Plaintiff. Section 102 establishes Communications and Multimedia Appeals Tribunal. The extent of the Tribunal's jurisdiction can be gleaned from a reading of Sections 2, 102A (1) and Section 102F (1) & (2) of the Act. The latter section provides that: -

> "(1). Unless otherwise expressly provided in this Act, the *Media Council Act* (Cap. 411B) or any other law, where this Act or the *Media Council Act* (Cap. 411B), empowers the Media Council or the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.
>
> (2) Any person who is aggrieved by an action or decision of the Media Council, the Authority or a person licensed under this Act, may within sixty days after the occurrence of the event or the making of the decision, against which he is dissatisfied, make a claim or appeal to the Tribunal.
>
> (3) .....

23. The particulars with respect to the Defendants' claim as against as the Plaintiff pertaining to the alleged defamatory publication by the Plaintiff are set out at paragraphs *13*, *14*, *15*, *16* & 17 whereas the particulars relating to the alleged breach of contract, are set out at paragraphs *19*, *20*, *21*, *22*, *23*, *24*, *25* & 26 of the amended set-off and counterclaim. At the heart of the Defendants' claim are the Plaintiff's publications and the MNP agreement dated 17.12.2010. In accordance with the dicta in Samuel Kamau Macharia & Another (supra), this Court draws its original jurisdiction to entertain civil disputes from Article 165 (3) of *the Constitution* as read with relevant Acts of Parliament. Section 102A as read with Section 102F (1) & (2) of the *Kenya Information and Communications Act* do not include the Defendants' pleaded grievance among those to be redressed before Communications and Multimedia Appeals Tribunal.

24. The objects of the *Kenya Information and Communications Act* are stated in the Act as follows:

> ''to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce, to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telcom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes''.

25. Section 102A(1)(c) of the Act must be read alongside other provisions of the Act. Here it is undisputed that the Plaintiff is a telecommunication operator and or service provider within the meaning of the Act. The jurisdiction donated to the Communications and Multimedia Appeals Tribunal to entertain a complaint concerning any action taken, any omission made or any decision made under the Act must be viewed within the matrix of Section 2, 23 to 34 of the Act. Therefore, given that the Defendants' cause of action against the Plaintiff is founded on the torts of defamation and breach of contract, it is difficult to see how Section 102A(1)(c) of the *Kenya Information and Communications Act* could oust this court's first instance jurisdiction.

26. By way of analogy, in Mutanga Tea and Coffee Company Ltd (supra), the plaintiff therein had been aggrieved by decisions made inter alia by a local authority under the Physical Planning Act, in connection with a development it was opposed to. Eschewing the mechanism for redress stipulated in Section 29 of the Physical Planning Act, the aggrieved party filed an action in the High Court. In the High Court, the action was struck out in limine on account of a jurisdictional challenge raised by the defendants by way of a preliminary objection. The plaintiff lodged an appeal to the Court of Appeal, which dismissed the appeal observing that the Physical Planning Act did not envisage the possibility that some aggrieved parties could sidestep the dispute resolution mechanism under the Physical Planning Act to bring their grievances directly to the High Court.

27. The Physical Planning Act provided an elaborate procedure for processing grievances arising thereunder. I find it useful to quote in extenso the reasoning of the Court of Appeal in that case:

> " The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance.
>
> This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of disputes. SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by *the Constitution*. In granting the order, the Court made the often-quoted statement that:
>
> "[W]here there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."
>
> (See also Kones V. Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others (2008) 3 KLR (ER) 296).
>
> It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by

*the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue.

To the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of *the Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of *the Constitution* in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In *Rich Productions Ltd. V. Kenya Pipeline Company & Another, Petition NO. 173 OF 2014*, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

"The reason why *the Constitution* and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."

28. The decisions in Geoffrey Muthiga Kabiru & 2 Others (supra), Jeremiah Memba Ocharo (supra) and Night Rose Cosmetics (1972) Ltd (supra) relied on by the Plaintiff do not offer succor to the PO, given that regarding the specific disputes in the said decisions, there existed an elaborate procedure for processing specified grievances arising. Read within the context of the entire Act, it is difficult to accept the Plaintiff assertion that Section 102 A of the Kenya Information and Communication Act ousts the jurisdiction of the High Court in suits founded on defamation and breach of contract. The court has already stated that the Plaintiff's invocation of Clause 17 of the Agreement as a ground in the PO cannot aid the Plaintiff's case as the ground would require determination of contested facts, and therefore is unsuited for a PO.

29. In the result, the Court is of the considered view that the Plaintiff's Preliminary Objection is not well taken. Accordingly, the objection is dismissed with costs to the Defendants.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Plaintiff: Mr. Ole Ntome

For the Defendants: Mr. Kisila h/b for Mr. Kimathi

C/A: Erick