



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL AND TAXATION DIVISION**

**CIVIL SUIT NO. 64 OF 2020**

**JAMII TELECOMMUNICATIONS LIMITED.....PLAINTIFF**

**-VERSUS-**

**COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT**

**RULING**

1. **Jamii telecommunications Limited**, the Plaintiff herein commenced this suit by its **Plaint** dated **3<sup>rd</sup> September 2020**. In that **Plaint** it was averred that the Plaintiff was granted public rights of way in the form of wayleaves for laying optic cables along various roads in Mombasa County by the Defendant.
2. The Plaintiff then erected a network of terrestrial fibre optic infrastructure along the agreed roads. The relationship then shoulders an obligation on the Plaintiff to pay annual wayleave license fees to be assessed by the Defendant.
3. According to the Plaintiff, the Defendant has resorted to demand payments for license fees on wayleaves which are no longer in use by the Plaintiff. For example, it was contended that vide a letter dated **28<sup>th</sup> April, 2020**, the Defendant demanded for the payment of **Kshs.7,085,100/=** in respect of annual wayleave license fees for the **year 2020** which amount the Plaintiff laments includes fees for wayleaves which are no longer in use by the Plaintiff.
4. The Plaintiff responded by seeking the Defendant to provide a break down of the amounts claimed and the mode of valuation of the wayleaves. Instead of tendering a response as requested, the Defendant opted to demand a sum of **Kshs.79,095,400/=** being the alleged arrears for wayleave charges owing by the Plaintiff since the **year 2010**.
5. The Plaintiff was not in agreement with the amounts being demanded and it caused a meeting with the Defendant's officials which happened on **5<sup>th</sup> August, 2020**. What was agreed on is that; the Defendant was to set up a verification committee led by the County Engineer to audit the Plaintiff's existing network and submit a report; the Plaintiff pays a sum of **Kshs.4,483,200/=** which it considered as the outstanding wayleave charges for the **year 2020**; and lastly, that upon payment of the said sum, the Defendant would authorize the Plaintiff to proceed with the roll out and maintenance of its networks without interruptions.
6. Further, the Plaintiff averred that it paid the sum of **Kshs.4,483,200/=** but contrary to what had been agreed on, the Defendant yet again demanded the sum of **Kshs.58,194,900/=** as the outstanding arrears vide a letter dated **20<sup>th</sup> August, 2020**, and subsequently seized the Plaintiff's equipment to realize the said sums. Based on the foregoing the Plaintiff was of the view that the demands by the Defendant were arbitral and contravened the right to fair and procedurally reasonable administrative action.
7. In the end, the Plaintiff then sought reliefs for, among other thing that; an injunction issues restraining the Defendant and/or its servants from interfering and/or disrupting the works being undertaken by the Plaintiff to restore internet connectivity to its customers on account of disputed wayleave charges; the Defendant be compelled to constitute a verification committee as agreed on the meeting held on **5<sup>th</sup> August, 2020**.
8. And just to mention, the contemporaneous to the filing of the **Plaint**, the Plaintiff filed an application dated **3<sup>rd</sup> September, 2020** wherein the court ordered for the release of Plaintiff's sized properties.
9. The matter has been adjourned on many occasions on basis that parties were heavily engaged in negotiations towards reaching an out-of-

court settlement of the dispute in this cause. However, on **11<sup>th</sup> February, 2021**, **Mr. Shaban**, Counsel appearing for the Plaintiff informed the court that parties had basically agreed to settle except on some issues which he sought the court to determine. However, **M/S Kisingo**, Counsel for Defendant was of the view that all issues had been resolved.

10. The court then directed the parties to file a list of issues for determination and submit on the same to court for determination.

11. Both parties dutifully filed their issues. For the Plaintiff, the same was filed on **17<sup>th</sup> March, 2021** raising only one issue, which is, whether or not the wayleaves along Mombasa road from Chaani West Junction to Icolo measuring 6,319 meters is part of the wayleaves in use by the Plaintiff/Applicant for which the Applicant is liable to pay annual fees for.

12. The issue was further expounded in the **affidavit** of **Tony Musabi**, the Plaintiff's Regional Manager and he disclosed that sometimes in **2009**, the Plaintiff was contracted by Safaricom PLC to build a network which includes the wayleaves from Icolo to Changamwe. That the network has been in the exclusive use of Safaricom PLC until sometimes in **2014** when the relationship ended, and the network has since remained abandoned. That notwithstanding, the Defendant demanded Kshs.76,095,400/=, which amount, according to the Plaintiff has taken into account wayleaves not in use by the Plaintiff or have otherwise been abandoned.

13. Further, **Mr. Tony** deponed that parties resorted to constituting a Joint Venture Verification Committee to audit the wayleaves and it was indeed verified that the billing had taken into consideration wayleaves not in use by the Plaintiff and which had to be excluded. A meeting was subsequently held on **24<sup>th</sup> November, 2020** and it was agreed that the Joint Venture Committee would further conduct an audit on the Icolo, KPLC wayleave but the Defendant has refused to conduct the said audit.

14. Lastly, it was averred that the Plaintiff; services with Icolo is through KPLC's dark fibre used by the Plaintiff but not the 6,319 metre wayleave which is in contestation. All in all, the Plaintiff's standing is that the Defendant is only entitled to demand payment for wayleaves in use and strictly inform the Plaintiff on the same.

15. The Plaintiff also filed submissions on **2<sup>nd</sup> June, 2021** and having read through the same, it is clear that they reiterate the arguments canvassed above.

16. On the part of the Defendant, it pointed out seven (7) issues for determination namely;

*a) Whether the Applicant is liable to pay for all pending payments for wayleaves totaling 40,156 meters (being the total lengths arrived after deducting 38,310 meters from the Safaricom wayleaves from agreed length of 78,466 meters.*

*b) Whether the Applicant is being genuine in calling for the exclusion of the KPLC – ICOLO wayleave in computation of arrears payable to the respondent.*

*c) Whether the Applicant is entitled to having a further 6,319meters for the ICOLO wayleave deducted from the 40,156meters to make the Applicant liable for 33,837 meters of wayleaves.*

*d) Whether the contract between the Applicant and Kenya Power Limited in respect of the ICOLO Wayleave affects the Applicants duty towards the Respondent in so far as payment of wayleave charges arrears is concerned.*

*e) Whether the inability to maintain to ICOLO network by effect of extended roadwork discharge the Applicant from its duty to pay the annual charges in respect of the wayleave in view of the fact that the Applicant is still the registered owner of the wayleave.*

*f) Whether the Applicant is liable to pay the Respondent a total of Kshs.54,926,500.00 being the total amount computed from 40,156meters or Kshs.48,291,550.00 being the total amount computed using 33,837 meters having excluded the 6,319meters for the ICOLO-KPLC wayleave*

*g) Whether the Applicant should present a payment plan upon being issued with a demand note and within what period.*

17. There is also an **affidavit** sworn on **21<sup>st</sup> April, 2021** by **Kennedy Moturi** an engineer working for the Defendant. In his view, the relationship between the Plaintiff and the Defendant is described as that of a landlord and tenant so that for this case, the Plaintiff is said to have rented space to lay fibre optic cables and it would be immaterial whether the Plaintiff is earning any profit or in the actual occupation of the rented space. He however added that the Plaintiff had acknowledged its indebtedness and vide a letter dated **9<sup>th</sup> April, 2018** proposed to pay a down payment of Kshs.10,000,000/= and a balance spread over the year **2018**.

18. Nonetheless, the Plaintiff has been in arrears of Kshs.58,194,900/= and when the defendant demanded for Kshs.7,085,100/= being the renewal charges for the **year 2020**. The Plaintiff caused a meeting between its officials and it was agreed that the Plaintiff would pay a sum of shs.4,483,200/= as part payment of the entire debt.

19. According to the Applicant, the Plaintiff had been billed for all the wayleaves it had applied for since any other contracts between the Plaintiff and other third parties were not binding to the Defendants. Therefore, it was upon the Plaintiff to inform the Defendants which wayleaves were no longer in its use but unless and until that was done, the Defendants systems reflected that the Plaintiff was in possession of the wayleaves hence liable to pay for the licence.

20. However, following a joint verification by both parties, it was considered by the committee that 38,310 meters of the Plaintiff which had been transferred to Safaricom would be abandoned and not included in the wayleave charges leaving a total of 40,156 meters which the Plaintiff is liable to pay.

21. The deponent further avers that the Plaintiff went on to state that a further distance of 6,319 meters ought to have been deducted from the 40,156 meters since the same had been abandoned but the request was turned down on the basis that the Plaintiff's infrastructure was still underground, so that if it was at all damaged, the same could be repaired and used without additional wayleave charges from the Defendant. Thus, even if the 6,319 meters is deducted, the Plaintiff would still be liable to pay Kshs.48,291,550.00.

22. In its submissions filed on 2<sup>nd</sup> June, 2021, the Defendant reiterated that the grant of wayleave is just like renting a house where the tenant pays rent for as long as they are in occupation of the leased premises without decrying to be excused from paying. Therefore, it would be untenable and akin to the Plaintiff having its cake and at the same time eating it, when it seeks to be excused from paying the charges for the 6,319 meters because it had another contract with the KPLC.

23. The Defendant further submitted that it was justified in its demand for Kshs.54,926,500 for the average 40,156 meters of wayleave on the ground. That amount is arrived at by computation as provided in the **Finance Act** which allows the Defendant to charge Kshs.50, Kshs.100 or Kshs.150 per meter. The court is then urged to make a finding that the Defendant is justified in demanding the overdue amounts which the Plaintiff is liable to pay.

### **Analysis and Determination**

24. Having set out the contestations of the parties, the court takes the view that the following issues stand out for determination;

*a) Whether the wayleave billing should be based on the functional wayleave or entirely for the wayleaves applied for by the Plaintiff;*

*b) Whether the Icolo-KPLC wayleave measuring 6,319meters should be included in the billing for purposes of paying the annual fees;*

*c) Whether the Plaintiff is liable to pay a sum of Kshs.54,926,500/=.*

25. Despite outlining the issues for determination, I will not analyze them separately but will address them collectively in my analysis. To bring into context the dispute between the parties herein, it is important to understand the meaning of a wayleave and what it entails. I have not come across any Kenyan Act, not even the repealed **Wayleave Act Cap 292** which has attempted to define the word "wayleave" nor has any of the parties informed the court what would be the best provision to consider when construing a wayleave agreement.

26. At one point, the Plaintiff has likened it to easements which are determined after their usage while on the other hand, the Defendant thinks that a wayleave is more of a landlord-tenant relationship wherein the tenant has to pay rent as it falls due irregardless of whether the tenant is in actual possession of the leased land. Therefore, according to the Defendant, the Plaintiff, just like other tenants should pay the wayleave charges whether or not the same are functional since the fibre cables are still under ground.

27. Nonetheless, I wish to adopt the definition in the persuasive South African Case of **Vumacam (Pty) Ltd –vs- Johannesburg Roads Agency & 3 Others**, where the court defined wayleaves *as the right to use another party's property without owning or possessing it and the property is to be used in a specified way only. A common wayleave would for example involve the usage of public roads by private entities wanting to bury cables or to set up utility lines. It can therefore be safely said that wayleave is by itself an easement in that the owner of the land as the grantor accepts the grantee to enjoy the right of wayleave by allowing some defined act to be effected on his land. The grantee is then expected to pay a capital sum which in this case has been referred to by the parties as wayleave charges and it is the consideration that the grantees pays so as to keep its equipment in situ in perpetuity and to have access to the land for inspecting, maintaining or even replacing the equipment.*

28. Based on the foregoing, it is precisely clear that an agreement for the right of wayleave is far different from a lease which is generally intended to be a possessory interest on land giving the tenant exclusive occupancy of a certain land against the rest of the world. The former merely gives the grantee limited right to use a part of the land in a certain way to last for the life time of the transmission line.

29. In this particular case, it is not in dispute that the Plaintiff applied for wayleave in order to lay fibre cables along various roads which are Municipal land in consideration of a set capital sum. The Defendant has intimated that for wayleaves, a sum of Kshs.150 is payable per meter. Therefore, I am in agreement that the Defendant is entitled to demand the payment of the overdue. What is in contestation is whether the Plaintiff is liable to pay for the wayleaves which are no longer in use or have otherwise been destroyed.

30. Unlike in a leasehold relationship where the tenant is expected to pay for the rent so far as it is in possession of the subject property, I have pointed out herein that a wayleave just like any other easement can only last in the lifetime of the transmission after which it cannot be said to exist. Therefore, the Plaintiff is only liable to pay wayleave charges for the lines with active transmission but not for the one which have been rendered useless or for some reason, are no longer in the Plaintiff's use. It then follows that the billing process should not be based

on the entire wayleave that the Plaintiff applied for when some are no longer in use as the Defendant has done.

31. In my view, the above-stated was the main issue on controversy since it leads to the determination of all other issues, for example, whether or not the Icolo-KPLC wayleave measuring 9319 meters should be included in the billing for wayleave charges, is dependent on whether it is on active transmission or whether the same has been destroyed as purported by the Plaintiff. The Plaintiff is therefore liable to pay if the former position is confirmed as opposed to the latter. Similarly, whether the Plaintiff is liable to pay the Kshs.54,926,500/= for the 40,156 meters is also dependent on whether the amount was arrived at while taking into consideration that the wayleaves are no longer in use.

32. Lastly, it is my view that it is necessary for the defendant to provide a breakdown on how it arrived at the sum of Kshs.54,926,500/= and indicate what arrears accrued on a specific wayleave and for which year. Since the issue is a technical matter, the verification can best be done jointly with staff of technical know.

33. In the end, I do make the following orders;

***a) The Defendant be and is hereby directed to provide a breakdown on how it arrived at the sum of Kshs.54,926,500/= by stating which specific amount accrued to a particular wayleave and in which year(period).***

***b) The Parties are hereby directed to constitute a Joint Verification Committee within 30 days hereof to evaluate the wayleaves on active use by the Plaintiff including the Icolo-KPLC wayleave in good faith.***

***c) The intended committee in (b) above to file a report in court after the completion of the exercise.***

***d) Thereafter, any of the parties be at liberty to fix the matter for further directions.***

***e) Costs shall be cause.***

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Shaban counsel for Plaintiff

M/S Kisingo counsel for Defendant

Court Assistant - Winnie