



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E 262 OF 2019

ELIGE COMMUNICATIONS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

SAFARICOM PLC.....DEFENDANT/RESPONDENT

RULING

1. **ELIGE COMMUNICATIONS LIMITED** (hereafter Elige) and **SAFARICOM PLC** (hereafter Safaricom) entered into a local interconnection Agreement dated 25th September 2017. By that agreement they agreed to interconnect their telecommunication network systems. The purpose of the interconnecting link was to enable Safaricom System interconnect with those of Elige and permit the exchange of messages between their system and thereby enable the customers on both parties network to make and receive local calls.

2. Elige has filed a notice of motion dated 27th August 2019 seeking the following orders:

- **THAT** upon inter partes hearing of this application, this Honourable court be pleased to grant a mandatory order of injunction compelling the Defendant/Respondent to unconditionally unblock all the Plaintiff/Applicant's numbers that it has blocked and remove the limits of concurrent calls on the interconnect link pending the hearing and determination of this suit;
- **THAT** upon inter partes hearing of this Application, this Honourable court be pleased to grant temporary prohibitive orders of injunction restraining the Defendant/Respondent by itself, its agents, servants and/or employees from interfering with the service operations of the Plaintiff/Applicant by acts of limiting the Plaintiff/Applicant's concurrent calls and blocking the plaintiff's numbers pending hearing and determination of this suit;

3. Elige has brought the action and the application on the grounds that in April 2018 contrary to the Agreement and to the Interconnect Regulations Safaricom was deliberately interfering with the services of Elige by blocking Elige's calls and limiting the number of concurrent calls that Elige could send over the interconnect link.

4. Elige raised this concern with Safaricom but it was not resolved. Consequently Elige filed a complaint with the communications Authority of Kenya on 8th June 2018 whereupon Safaricom filed its response. Parties have also filed their submissions there. They however have not received directions from that authority on their complaint, perhaps because the board of the authority is not presently properly constituted. In the mean while the problem has persisted. Elige stated as a result of Safaricom actions it has incurred substantial loss.

5. Elige has also referred its claim for losses incurred because of that action for arbitration.

6. Safaricom in response denied deliberately limiting Elige's number of concurrent call. However safaricom pointed out that Elige is prohibited under the Agreement from transmitting, terminating or re-selling international traffic or telephone calls originating from outside Kenya into Safaricom's network system. Further that under the Agreement parties are obligated to co-operate in detection and investigation of fraud. In that regard Safaricom installed a mobile network fraud detection tool which automatically blocks calls identified as terminating international traffic on the national truck. That there were suspicious activities detected by Safaricom's fraud system. It was further deponed on behalf of safaricom thus:

23. THAT it is in the interest of the public that security should not be compromised, and it is imperative that calls that either conceal or alter their CLIs should be blocked for the following reasons:

- a. It is essential in counter-terrorism efforts by ensuring that individuals involved in terrorist activities would not perpetrate their activities through the system by concealing their caller Line Identities (CLI) or altering their IP addresses.**

b. It is part of the interconnection agreement between the parties and a requirement of the Plaintiffs Application Service Provider License that they only terminate calls from the National Numbering Network.

7. I have two or perhaps three concerns over this matter.

8. Elige has filed an action for arbitration and parties there have filed their pleadings. Looking at Elige's pleadings at arbitration it relies on the same facts as are before me save that what it seeks before the arbitrator is an award for the loss it alleges it has incurred.

9. Elige has also filed an action, similar to the one before me before the communications authority of Kenya. Parties are waiting for the board of that authority to be constituted so that they can be heard.

10. Before this court Elige having pleaded in the plaint the wrongs it alleges against safaricom only prays for mandatory injunction similar to the one sought by the interlocutory application before.

11. So what is the sum of all that. I do find that Elige is playing what I can only term as '**Russian roulette**' with this court, the arbitrator and the Authority. It is here and everywhere seeking where it will get the orders it seeks. I do find that it is an abuse of process for a party to file matters before different forums placing before those forums the same grievances. What if the different forums reach differing conclusion. The court will not allow its process to be abused. Elige needs to decide where it wishes to advance its grievances. Before it does that, this court will hold back its hands and decline to entertain the application before it. Even if Elige finds that the Authority is not in a position to hear it the arbitrator seized with this matter is capable of granting interim orders of protection as proceedings go on before him or her.

12. Further, since Elige has prayed for the same prayers in the plaint as it has done in the interlocutory application it follows that on granting the interlocutory application this court will have granted the only prayers in the plaint. What then will be the incentive to go for trial in this case.

13. On the whole I decline to grant the orders sought in the application dated 7th August 2019. I do find the application and perhaps this cause to be an abuse of the process of the court.

14. Accordingly the Notice of Motion dated 7th August 2019 is dismissed with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15th March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

MARY KASANGO

JUDGE