REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.E207 OF 2019

GEONET COMMUNICATIONS LIMITED.....APPLICANT

VERSUS

SAFARICOM PLC.....RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated **16th October 2019** by which **SAFARICOM PLC** (the Defendant/Respondent) seeks for Orders that:-

> **"1. SPENT**
>
> **2. This Honourable court be pleased to set aside the default judgment entered against the Defendant/Applicant on 23rd August 2019 together with all consequential orders *ex debito justitiae*.**
>
> **3. The costs of this application be provided for."**

(2) The Application was premised upon **Sections 1A, 1B & 3A of the Civil Procedure Act, Chapter 21, laws of Kenya, Order 10 Rule 11, Order 49 Rule 26 Order 51 Rule 1 of the Civil Procedure Rules, 2010,** and any other enabling provisions of the law. It was supported by the Affidavit of even date sworn by **JOHN OHAGA** Advocate of the High Court of Kenya.

(3) The Plaintiff/Respondent **GEONET COMMUNICA-TIONS LTD** opposed the application through the Replying Affidavit dated **30th October 2019** sworn by **HASSAN KATETEI MDACHI** a director of the Plaintiff Company.The application was canvassed by way of written submissions. The Defendant/Applicant filed its written submissions on **15th November 2019** whilst the Plaintiff/Respondent filed its submissions on **26th November 2019**.

BACKGROUND

(4) On **23rd August 2019** the Honourable Deputy Registrar entered judgment in default of defence in favour of the Plaintiffs against the Defendants for a sum of **Kshs.7,399,961,321.00**. The Plaintiff/Applicant avers that they only became aware of this default interlocutory judgment on **3rd October 2019,** when the matter was called out for highlighting of submissions in respect of the Plaintiff's application dated **2nd July 2019** seeking injunctive orders.

(5) The Defendant/Applicant submits that the default judgment was irregular as the Plaint did not contain a liquidated claim. The Defendant concedes that no defence was filed to the Plaintiff's suit as they had filed Grounds of Opposition dated**18th July 2019**challenging the jurisdiction of the Court to hear and determine the dispute between the parties on the following grounds:-

> 1. The application is misconceived, bad in law and is an abuse of the Court process.
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> 2. This Honourable Court lacks the original jurisdiction to determine this matter in view of the express provision of clause 19 of the Interconnection Agreement between the parties; **Sections 102F and 102G of Kenya Information and Communications Act, 411A; Regulation 2** of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010; and Regulation 16 of the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010;

3. An Agreement or its termination doesn't constitute a subject matter capable of being preserved under **Section 7** of the **Arbitration Act, 1995 ("the act")** as was held by the Court in **Seven Twenty Investments Limited Vs Sandhoe Investment Kenya Limited (2013) eKLR;**

(6) The Applicant views the Plaintiff's action of obtaining default judgment in the circumstances as stealing a match against the Defendant/Applicant.

(7) As stated earlier the application was opposed. The Plaintiff/Respondent contends that they were entitled to seek and obtain interlocutory judgment as their Plaint included a prayer for damages for loss of business quantified at **Kshs.7,399,961,321.00** as at **25th June 2019**. The Plaintiff/Respondent cited and relied on the case of **FABRIZIO GRICOLETTI & Another –VS- KENYA POWER & LIGHTING COMPANY LTD [2011]eKLR**, where the Court held that:-

> **"The prayer in the Plaint was for damages in the sum of Kshs.43,660,000/= which was a total figure of different losses which the Respondent outlined in different paragraphs of the Plaint. This was thus a liquidated claim as contemplated by Order 4 Rule 4…"**

ANALYSIS AND DETERMINATION

(8) I have carefully considered the submissions filed by both parties in this matter. **Order 10 Rule 4** of the **Civil Procedure Rules, 2010** provides for the instances upon which judgment in default may be entered on a liquidated claim as follows:-

> **"(1)Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No.13 of Appendix A, enter judgment against the Defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment and costs.**
>
> **(2) Where the plaint makes a liquidated demand together with some other claim, and the Defendant fails, or all the Defendants fail, to appear as aforesaid, the Court shall, on request in form No.13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim."**

(9) I do not agree with the Plaintiff's argument that a claim for damages which have been quantified amounts to a liquidated claim. In **Cimbria East Africa Limited V Kenya Power & Lighting Company Limited [2017] eKLR, Justice Fred Ochieng** held as follows:-

> **"A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic. I adopt the following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33;**
>
> **A liquidated demand is in the nature of a debt, i.e specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand" but constitutes "damages"…**

(10) Similarly**, in Goldrock Capital Limited Vs the Cabinet Secretary for the Treasury & Others [2018] eKLR,** it was held thus:-

> **"…It is well settled that the ability of the Plaintiff to calculate the quantum of the compensation payable to him is not determinant of whether or not the sums claimed can be claimed to be liquidated."**

(11) I find that the Plaintiff's claim was not for a liquidated demand. As such, in the circumstances, the entry of interlocutory judgment by the Hon Deputy Registrar was irregular and must be set aside.

(12) The Plaintiffs have raised the issue of the failure of the Defendants to annex a draft defence to their application as a bar to setting aside the judgment. However, even in the absence of a draft defence my view is that in view of the colossal amount being claimed by the Plaintiff, it would serve the interests of justice to have the suit determined on its merits.

(13) On the question of whether or not this is a matter for arbitration that is an issue that will be addressed during arguments on the Plaintiff's Notice of Motion dated **2nd July 2019**.

(14) Finally and in conclusion, I do allow the present application. The interlocutory default judgment entered against the Defendant/Applicant on **23rd August 2019**, is hereby set aside. Costs are awarded to the Defendant/Applicant.

Dated at Nairobi this 14th day of July 2020.

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Justice Maureen A. Odero