Geonet Communications Limited v Safaricom PLC (Civil Suit E207 of 2019) [2024] KEHC 882 (KLR) (Commercial and Tax) (30 January 2024) (Judgment)

Neutral citation: [2024] KEHC 882 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E207 OF 2019

FG MUGAMBI, J

JANUARY 30, 2024

BETWEEN

GEONET COMMUNICATIONS LIMITED ..... PLAINTIFF

AND

SAFARICOM PLC ..... DEFENDANT

JUDGMENT

Background

1. The amended plaint dated 8th November 2022 describes the plaintiff as a private limited company incorporated and licensed in Kenya to provide various types of services under the *Kenya Information and Communications Act*, 1998 (KICA). The defendant is a public limited liability company also licensed under KICA to provide various telecommunication services and solutions.

2. The parties entered into an Interconnection Agreement (the Agreement) dated 24th October 2016, following a request by the plaintiff to interconnect its infrastructure with the defendant's. The interconnection would allow customers of both parties to exchange calls seamlessly across networks, in accordance with their respective licenses.

3. The plaintiff avers that sometime around November 2016, the defendant, in breach of the agreement began blocking concurrent calls, channels between the plaintiff's and the defendant's network and further limiting the plaintiff's customers calls to the defendant's network. As a result of the breach the plaintiff filed a complaint with the Communication Authority of Kenya (CAK). The CAK found the defendant culpable and directed parties to renegotiate the agreement.

4. The plaintiff avers that the defendant has refused to revise the agreement as directed by the CAK and remove a clause that the CAK found to be unlawful. The plaintiff argues that the defendant has continued to interfere and interrupt telecommunication services offered by the plaintiff and refused

to allow full connection of the plaintiff's telecommunication system with its own. The actions of the defendant have amounted to economic sabotage of the plaintiff's business, the particulars of which are pleaded as well as the particulars of loss.

5. With respect to the counterclaim put forward by the defendant, the plaintiff denies that it owes the defendant and avers that its losses outweigh the claimed losses by the defendant.

6. The defendant's Statement of Defence and Counterclaim is dated 5th December 2022. It confirms that indeed parties entered into an agreement arising from which the plaintiff filed an application before the CAK being Republic V Communications Authority of Kenya ex parte Geonet Communications Limited & 5 Others, [2016] eKLR. The application which sought to compel the defendant amongst other operators to enter into interconnection agreements with the plaintiff was dismissed.

7. The defendant confirms that in consideration for the interconnection services, each party was supposed to pay respective applicable charges. In this respect, the defendant counter claims against the plaintiff for the amount of Kshs. 75,644,843.93 being unsettled interconnection fees as at 18th March 2021, when the Agreement stood terminated at the defendant's instance for breach. The defendant denies economic sabotage of the plaintiff's business.

8. The defendant further confirms that as a result of the disagreement, both parties filed a complaint before the CAK on 15th and 22nd November 2016. Upon hearing parties, the defendant further confirms the recommendation by the CAK for the need for parties to re-negotiate the interconnection agreement. This was not done and instead the defendant eventually terminated the agreement.

9. Each of the parties presented 1 witness during trial. PW1 was Peter Maina, the plaintiff's Chief Executive. DW1 was Alfred Mugambi, a Senior Manager of Regulatory Compliance with the defendant. I shall not regurgitate the witness testimonies which are more or less along the lines that I have already stated, although I will refer to them in my analysis hereafter. Parties also filed respective written submissions. The plaintiff's submissions and supplementary submissions are dated 27th March 2023 and 19th May 2023 respectively. The defendant's submissions are dated 16th May 2023.

Analysis

10. I have carefully considered the pleadings, testimonies, evidence and written submissions by rival parties in support of their cases. Four (4) issues stand out for determination. These are:

    i. Whether the defendant unlawfully interfered with the plaintiff's business;

    ii. Whether Clause 3.7 of the Interconnection Agreement is unlawful;

    iii. Whether the plaintiff is entitled to the reliefs sought; and

    iv. Whether the defendant is entitled to the reliefs in the counter claim.

Whether the defendant unlawfully interfered with the plaintiff's business;

11. The plaintiff's case is that the defendant interfered with its business by creating barriers to market entry. The plaintiff asserts that despite having made a request for interconnection to the defendant on 3rd July 2012, the interconnection was only granted after the plaintiff sought relief from this Court in Republic V Communications Authority of Kenya ex parte Geonet Communications Limited & 5 Others, [2016] eKLR Miscellaneous Application 358 of 2015.

12. It is further averred that even though the Agreement was eventually signed, this was in contravention of Regulation 5(9) of the Kenya Information and Communications (Interconnection and Provision of

Fixed Links, Access, and Facilities) Regulations, 2010 (the Regulations) which provides that a request for interconnection should be granted within 6 weeks of application.

13. According to the plaintiff, the refusal by the defendant to grant interconnection within reasonable time was an effort to exclude the competition that would have come from the plaintiff's entry into the Kenyan market. The plaintiff submits that it incurred losses while awaiting the approval arising from costs of infrastructure, licenses and expected revenue.

14. The defendant in response to the assertion notes that the plaintiff's letter had sought an international connection as a carrier for traffic from the United States of America, as opposed to a local connection. It is the defendant's case that the Regulations are made pursuant to the KICA which is only applicable in Kenya. The defendant argues that it was therefore not obliged to negotiate an international interconnection agreement within the timelines provided under the Regulations.

15. The CAK is the regulatory authority for the communications sector in Kenya. It is at the center of enforcing fair competition and equality of treatment among licensees. It is for this reason that section 84T of the KICA empowers CAK to carry out investigations on alleged breach of fair competition either suo motu or upon receiving a complaint.

16. The said provision has an elaborate procedure for the complaint, investigation process and also empowers the CAK to make orders as to remedies should there be a finding of breach. Section 84T(8) of the Act provides for an appeal against the findings of the CAK in this regard, to the Communications and Multimedia Appeals Tribunal (CAMAT).

17. Section 102F further confirms that where the CAK is empowered to makedecisions, such decisions may be subject to an appeal to the Tribunal. Section 102G in turn provides for appeals from the Tribunal to this Court in the following terms:

> " Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court."

18. The need for parties to exhaust laid-out procedures for dispute resolution before approaching the Courts is now of esteemed juridical lineage in Kenya. The Court of Appeal pronounced itself in Geoffrey Muthiga Kabiru & 2 others V Samuel Munga Henry & 1756 Others, [2015] eKLR noting that:

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."

19. The need to respect the mandate of Institutions established by law to carry out specific mandates was also emphasized in Francis Mutuku V Wiper Democratic Movement - Kenya & Others, [2015] eKLR, Mumbi, J (as she then was) noting that it would be to undermine and defeat the mechanism and institutions provided by law, which are underpinned by *the Constitution*, to hold otherwise.

20. Besides the CAK in whose purview the investigative role falls, the CAMAT exists as a specialized quasi-judicial Tribunal. I am cognisant of the need for the Court to rely on and grant deference to the factual findings of the Tribunal unless there is a compelling cause to depart. From the record that is before me, there is no evidence that the plaintiff followed the right procedure. Such a complaint for breach

of fair competition should have been filed before the CAK first and heard on appeal by the CAMAT before being escalated to this Court. That being the case, this Court has no jurisdiction to determine this issue, for want of exhaustion of remedies.

21. The plaintiff further submits that the defendant interfered with its business by blocking over 90% of the plaintiff's lawful revenue-generating calls and limiting the plaintiff's customer's calls that terminate on the defendant's network to not more than 60 concurrent calls and not longer than 30 minutes.

22. In response to this averment, the defendant raises the defense of res judicata. The defendant notes that this issue was raised by the plaintiff before the CAK in the Interconnection dispute between Safaricom Limited & Geonet Communications in Determination No. 1 of 2018. The same was a further subject of appeal before the CAMAT in Appeal No. 3 of 2018 Elige Communications Limited V Communications Authority of Kenya, Safaricom PLC & Geonet Communications Limited.

23. It is clear from the proceedings before the CAK and CAMAT that at the heart of the dispute was the plaintiff's complaint against the defendant for blocking some of the plaintiff's traffic from terminating at its network. The defendant defended its move and took issue with the plaintiff for terminating international traffic in breach of the interconnection agreement which was established to exchange national traffic only. The plaintiff does not deny that this was the gist of the complaint.

24. I further note that this Court rendered itself in a second appeal being Appeal No. E023 of 2022 Geonet Communications Limited vs Safaricom PLC, Elige Communications Limited and Communications Authority of Kenya. In dismissing the appeal, the Learned Judge stated as follows:

> " After analyzing material presented before them, CAK and the Tribunal found Geonet guilty of SIM-Boxing on the ground that there was no evidence of international numbers in CDRs analyzed and submitted by the parties. CAK's concluded that Geonet terminates international calls disguised as local calls by re-originating international calls using local numbers... I cannot fault CAK and the Tribunal for concluding as such as the balance of the evidence was against Geonet. I also agree with the Tribunal that once Geonet made the assertion that the calls in question had been made using its Geonet calling cards and that in its technical description of its services, Geonet had clearly indicated that the calling cards were operated from its switching platform in the USA, then Geonet was under the obligation to present evidence bearing such numbers from the USA. Having failed to do so, CAK and the Tribunal could only conclude and impute an improper motive by Geonet and find it guilty of SIM-Boxing or conduct akin to SIMBoxing. This ground of Appeal by Geonet fails."

25. I should therefore say no more on this issue as the same has already been determined by this court and is res judicata.

Whether Clause 3.7 of the Interconnection Agreement is unlawful;

26. It is the plaintiff's case that clause 3.7 of the Agreement is illegal as it sought to prevent the plaintiff from providing services that were allowed under its International Gateway Service license. Section 23(2)(d) of KICA recognized international transit calling services and according to the plaintiff therefore, clause 3.7 was contrary to Regulation 5(8). Regulation 5(8) provides that:

> " Interconnection agreements shall not, directly or indirectly:
>
> a. preclude or frustrate the exercise of rights or privileges given under the Act or a licence or by any person;

b. impose any penalty, obligation or disadvantage on any person for exercising any rights under the Act or a licence;

c. prohibit a person from providing an interconnection service which that person is able to lawfully provide; or

d. frustrate the provision of a telecommunications service by a person is able to lawfully provide."

27. The defendants have asked this Court to ignore the submissions made by the plaintiff in as far as the legality of clause 3.7 goes. According to the defendant, the plaintiff did not specifically plead in the body of the Amended Plaint or at all that clause 3.7 of the Agreement was unlawful but chose to instead advance their argument by way of submissions.

28. The defendant argues that no particulars were furnished by the plaintiff on how clause 3.7 of the Agreement breached the provisions of any law. The fact that this was not pleaded denied an opportunity for the defendant to formulate its defence to the issue, and meant that the plaintiff is bound by its case as disclosed in its pleadings.

29. To this, I will refer to Order 2 Rule 10 of the Civil Procedure Rules which provides that:

> " Every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded..."

30. The need for precise and concise pleadings cannot be overemphasized particularly within the set-up of an adversarial system such as ours. it is widely acknowledged that pleadings are inherently required to be brief and summarized but that each party must state its case with sufficient detail so as to avoid situations where parties are ambushed either in the prosecution or defence of their claims. The defendant has pointed out a number of decisions towards this end.

31. I am required to determine whether the defendant as alleged, has been ambushed or disadvantaged by the plaintiff's pleadings. I am alive to the decision of the Court of Appeal in Salmin Mbarak & 2 Others V Hadi Karama & 2 Others, CA 97/989 where the Court held that a dismissal of an action for failure to supply particulars imposes a drastic penalty. By its paragraphs 13 and 15 of the Amended Plaint, the plaintiff avers that 'a clause in the agreement preventing the plaintiff from transiting, terminating, or reselling international traffic or calls originating from outside Kenya into the Safaricom network system was unlawful'.

32. The plaintiff should have pointed out the exact clause that was being referred to, for the avoidance of any doubt. In all fairness to the defendant, I do also concur that the plaintiff failed to provide succinct details as to why the clause was illegal. These particulars were necessary to enable the defendant to narrow down its arguments and provide a rebuttal on this averment.

33. As to the consequence of this non-compliance, the defendant prays that this Court should disregard the submissions made by the plaintiff on the illegality of clause 3.7. It is the defendant's contention that submissions cannot replace pleadings. This I also agree.

34. I do however note that the defendant has on a without prejudice basis responded to the averment by the defendant on the issue. Further, having perused the list of documents filed by the parties, I am of the view that the dispute surrounding this clause is not a novel one, that both parties had in previous communications and appearances before both the CAK and CAMAT raised it. I further note that the documentation filed with respect to this particular issue is sufficient to fill in the gaps and particulars

as would allow the defendant put in a rebuttal as it has done. I will therefore spare the plaintiff from the drastic penalty of disregarding its submissions on this point.

35. That said, it is a cardinal principle of commercial practice that when parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. All that is required of the Courts is then to hold the parties to their bargain as was held in National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd & Another, [2002] EA 503. It is not the work of the Court to rewrite the contract for the parties.

36. The exception to this principle is where there are unconscionable terms, which the plaintiff has not pleaded. I find unbelievable the testimony by PW1 that the contract was not negotiated and that the plaintiff only received the contract from the defendant to sign. I note that at no other instance has the plaintiff raised this issue even with the CAK. PW1 confirmed that the plaintiff signed the said agreement which was also filed with the CAK.

37. This Court has long held the view that Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. (See Housing Finance Co. of Kenya Limited V Gilbert Kibe Njuguna, Nairobi HCCC No. 1601 of 1999).

38. I have carefully considered the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations (2010) (hereinafter the Regulations), which I find relevant in this instance. I am unable to place my fingers on any regulations that provide a blanket cover for the terms of an interconnection agreement. On the contrary, I take the view that the KICA and its regulations are largely interventionist and modeled on the freedom of parties to bargain and create the terms of their agreement as they desire without interference from the regulator.

39. The term "interconnection" is defined in a broad sense without reference to any form of interconnection as follows:

> " The physical and logical linking of telecommunication networks used by the same or different service licensees in order to allow the users of one licensee to communicate with users of the same or another licensee or to access services provided by another licensee."

40. Regulation 5 provides a framework for the negotiation of interconnection agreements. The process begins with a written request from an interconnecting licensee (in this case the plaintiff). The request should conform to regulation 13(1) by providing the interconnection licensee (in this case the defendant), with information relating to amongst others, the form of interconnection. On the basis of such written request, parties then enter into negotiations of terms and conditions for interconnection of their telecommunications networks.

41. The terms that the interconnection agreement should specify are listed in Regulation 7. Regulation 7(a) particularly requires that parties specify the scope and specification of interconnection. This leaves no doubt that the agreement between parties ought to be contextualized to their specific needs. The plaintiff relies on Regulation 5(5) which in my view emphasizes on the need for negotiations to be facilitative but emphasizes on the need for terms to be negotiated between parties. It provides that:

> " The terms and conditions for inter-connection of telecommunications networks shall be based on the agreement reached between the parties to an interconnection agreement and promote increased access and efficient use of telecommunications systems services and facilities."

42. I have considered the plaintiff's written request to the defendant, dated 3rd July 2012. The request was for interconnection with the defendant's network for purposes of building the plaintiff's national numbering plan. It is my understanding that the defendant interpreted this request to be one for purposes of exchanging national traffic based on national numbering plans. There is correspondence between the parties confirming this position. This in my view justifies clause 3.7 of the Agreement, noting that the intention between parties was to exclude international calls in the local interconnect link.

43. For the avoidance of doubt, clause 3.7 states thus:

> "It is hereby agreed by the parties herein that GeoNet shall not transit, terminate or re-sell international traffic or telephone calls originating from outside Kenya into the Safaricom system. On breach of this clause by Geonet, Safaricom may exercise the option to suspend or terminate this agreement in accordance with clause 21 herein below."

44. I note that the agreement was executed by both parties, further confirming their intention to have an interconnection agreement that applied to local calls only. It is a trite concept of contract law that contracts which are freely and voluntarily entered into should be honored. It was up to the parties to agree on different terms and even this Court cannot force them to other terms. As per the negotiated terms, the plaintiff could not therefore terminate international calls using the local link as this would have been a breach of the interconnection agreement.

45. The CAK in Determination No. 1 of 2018 Interconnection Dispute Between GeoNet Communications Ltd and Safaricom PLC compared clause 3.7 of the Agreement herein with other existing agreements in the market. The interconnection agreements reviewed confirmed the existence of similar clauses, prohibiting termination of international traffic to their networks.

46. My understanding of the recommendation by the CAK against this background is that the agreements needed to be re-negotiated so as to consider the specific needs and demands of the parties. Certainly, interconnection agreements for local traffic only are prohibitive and contrary to the objective of the KICA which is to facilitate connectivity.

47. While appreciating the narrow scope and limitation of these Agreements to the contracting parties, the CAK recommended that parties do re-negotiate and enter into interconnection agreements that provide for termination of both local and international traffic as well as international transit traffic and VOIP traffic. This would facilitate the demand and need between the interconnected parties and avoid disputes.

48. That in my view is not the same thing as stating that clause 3.7 of the Agreement was in itself illegal or void. Even though the plaintiff possesses an International Gateway Service License, which is not controverted, the commercial terms reflected in the Agreement that the parties entered into only allowed the defendant to terminate its local calls traffic onto the plaintiff's network and not international traffic. I further note that the plaintiff subsequently made a written request to the defendant dated 16th November 2014, for international interconnection.

49. This request ought to have provided a basis for parties to negotiate another interconnection agreement or revise the existing agreement. It would appear that this did not happen perhaps owing to the already existing dispute and subsequent notice of termination by the defendant of the Agreement. Since the agreement has already been terminated, ordering parties to renegotiate the Agreement would be an exercise in futility. All in all, it is my view that clause 3.7 of the Agreement is not void.

Whether the plaintiff is entitled to the reliefs sought;

50. Based on the reasons that I have stated therebefore, I find that the plaintiff is not entitled to any of the reliefs sought in the amended plaint. I reiterate that the issue of unfair competition is not properly before this Court. The issue of interference and blockage of the plaintiff's calls is also res judicata and as such, prayers (c), (d) and (e) also fall on the wayside.

Whether the defendant is entitled to the counter claim?

51. By way of counterclaim, the defendant claims from the plaintiff the amount of Kshs. 75,644,843.93 being interconnection fees outstanding as at 18th March 2021, when the Agreement was terminated, together with interest and costs of the suit.

52. The plaintiff denies owing the defendant. By way of submissions the plaintiff argues that the fee chargeable under the Agreement was only payable for services provided and that the payment for the few calls that were allowed to terminate on the plaintiff's network had been fully paid for.

53. From a cursory look at the contract between the parties, I note that it was a term of the Agreement under clause 5.1 that each party would pay respective charges for the interconnection services as set out in Schedule 8 of the Agreement. The defendant has attached a statement of account running from 1st January 2015 up to 10th February 2023 in support of the amount of Kshs. 75,644,843.93 claimed.

54. In its defence to the counterclaim, the plaintiff merely denies owing the amounts stated. During cross examination PW1 confirmed having received a notice of intention to suspend the link from the defendant. The plaintiff confirmed that the amount was not paid and that thereafter the defendant proceeded to suspend the link.

55. It does not otherwise challenge the statement prepared by the defendant or provide evidence of payment of the amounts in the statement of account. The reason pleaded by the plaintiff that the defendant owes it more than it owes the defendant is not a fair and substantial answer to the claim by the defendant. I am therefore inclined to agree with the defendant that the plaintiff does not deny owing the defendant the claimed amount.

56. Before I conclude, since the Interconnection Agreement is part of the record before this Court, I wish to comment on the application of clause 18 of the Agreement. The clause provides for 'limitation of liability' and is intended to provide for the scope of liability of either party in specific situations. I take the view that by dint of clause 18.2, this clause is not applicable to the liability of parties arising from clauses 5 and 6 of the Agreement. The counter claim raised by the defendant is based on interconnection fees chargeable under clause 5.1 of the Agreement, whose liability is therefore not limited.

Determination

57. The long and short of this is that:

    i. The plaintiff's suit against the defendant is dismissed.

    ii. Judgment is hereby entered in favour of the defendant in the counterclaim to the tune of Kshs. 75,644,843.93 together with interest at court rates from the date of filing this suit until payment in full and costs for the counterclaim.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE