



Safaricom PLC v Communications Authority of Kenya; Iristel Kenya Limited (Interested Party) (Appeal 3 of 2021) [2021] KECMAT 132 (KLR) (5 November 2021) (Ruling)

Safaricom PLC v Communications Authority of Kenya; Iristel Kenya Limited (Interested Party) [2021] eKLR

Neutral citation: [2021] KECMAT 132 (KLR)

REPUBLIC OF KENYA

IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL

APPEAL 3 OF 2021

**ROSEMARY KURIA, CHAIR, COLLINS WANDERI, VIVIENNE ATIENO,
DAMARIS NYABUTI & RAMADHANI ABUBAKAR MUKIRA, MEMBERS**

NOVEMBER 5, 2021

BETWEEN

SAFARICOM PLC APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

AND

IRISTEL KENYA LIMITED INTERESTED PARTY

RULING

1. Pursuant to the leave granted on September 17, 2021 the Appellant filed an amended Memorandum of Appeal on October 4, 2021 where the decision being appealed against is the decision by the Respondent made on April 13, 2021 directing the Appellant to commence and conclude interconnection negotiations with the interested party. The appellant alleges that the decision ought to have been reached after addressing all the concerns raised.
2. The alleged concerns had to do with the interested party; its composition, mode of operation and its compliance with the relevant law.
3. At the opportune time the Appeal will be heard and determined.
4. Before us is another application dated October 13, 2021. We say another because the Appellant had filed another application dated June 10, 2021 where the Ruling was rendered on September 17, 2021; dismissing the application.



5. It will be important for us to lay bare and comb through the prayers that were sought in the application dated June 10, 2021 (hereinafter referred to as application 1) then thereafter address the orders sought in the other application dated October 13, 2021 (hereinafter referred to as application 2)
6. In application 1 the prayers sought were;
 - a. That the Honourable Tribunal be pleased to certify this matter as urgent and heard in the first instance.
 - b. That pending the hearing and determination of this Application, an order be and is hereby issued staying the Respondent's decision dated April 13, 2021 in so far as it regards the actual physical and logical interconnection of the respective networks of the Appellant and the Interested Party which would allow for the exchange of traffic between the parties.
 - c. That pending the hearing and determination of the Appeal herein, an order be and is hereby issued staying the decision of the Respondent dated 13th April, 2021 in so far as it regards the actual physical and logical interconnection of the respective networks of the Appellant and the Interested Party.
 - d. That pending the hearing and determination of this application and the appeal, an order be and is hereby granted maintaining the status quo by;
 - i) Exempting the Appellant from granting the physical interconnection of its network and systems with those of the Interested Party or in any other way performing the terms of the Interconnection Agreement dated May 26, 2021.
 - ii) An order precluding the Respondent from penalizing or levying any other coercive decision upon the Appellant in respect of the actual interconnection of the Appellant's and Interested Party's systems and network.
 - e. That the costs of this Application be provided for.
7. In application 2, the subject of this instant ruling, the prayers sought are;
 - a. That the Honourable Tribunal be pleased to certify this matter as urgent and heard in the first instance.
 - b. That pending the hearing and determination of this Application, an order be and is hereby issued staying the Respondent's decision dated 13th April 2021 in so far as it regards the actual physical and logical interconnection of the respective networks of the Appellant and the Interested Party which would allow for the exchange of traffic between the parties.
 - c. that pending the hearing and determination of the Appeal herein, an order be and is hereby issued staying the decision of the Respondent dated April 13, 2021 in so far as it regards the actual physical and logical interconnection of the respective networks of the Appellant and the Interested Party.
 - d. That pending the hearing and determination of this application and the appeal, an order be and is hereby granted maintaining the status quo by;
 - i) Exempting the Appellant from granting the physical interconnection of its network and systems with those of the Interested Party or in any other way performing the terms of the Interconnection Agreement dated May 26, 2021.



- ii) An order precluding the Respondent from penalizing or levying any other coercive decision upon the Appellant in respect of the actual interconnection of the Appellant's and Interested Party's systems and network.
 - e. That the costs of this Application be provided for.
8. We find that the orders sought in Application 2 to be a total replica of Application 1.
9. This tribunal pronounced itself on the orders sought and found application 1 to be without merit. What has changed?
10. The appellant argues that vide the ruling dated September 17, 2021 it was observed that the issue of physical and actual interconnection of the appellants and interested party's systems had not arisen because the agreement had not been approved for implementation by the Respondent.
11. It is now alleged that the approval of the interconnection agreement has been done by the Respondent and the same occurred on October 5, 2021.
12. We have discussed above the subject of the appeal before us and the same has nothing to do with the said approval of the implementation of the interconnection agreement.
13. It is trite law that parties are bound by their pleadings. The Appellant cannot now change tune and purport to challenge the approval vide this instant application. We therefore do agree with the interested party that the appellant has not challenged the respondent's decision of 5th October, 2021 approving the implementation of the interconnection.
14. Back to the issue of *res judicata*, this is a common law doctrine that the tribunal wishes to invoke in this instance. In the English case of *Henderson vs Henderson* (1843-60) All E.R.378, the court observed as thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
15. Though no party pleaded or invoked this doctrine we as a tribunal find that the instant Application is a replica of Application 1. To even delve into the issues raised will be an injustice to ourselves. The tribunal unanimously pronounced itself in the ruling of Application 1 and will not attempt to give the applicant an unjustified second bite of the cherry.
16. We therefore unanimously find that the application dated October 13, 2021 is *res judicata* and the same is struck out with costs.

DATED AND DELIVERED VIRTUALLY ON THE 5TH DAY OF NOVEMBER 2021 BY THE CHAIRPERSON, ROSEMARY KURIA AND THE HONOURABLE MEMBERS OF THE TRIBUNAL, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND RAMADHAN ABUBAKAR MUKIRA



ROSEMARY KURIA

CHAIRPERSON-COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL

In the presence of:

Maina Kimaru for the Appellant

Ojiambo for the Respondent

Lawson Ondieki for the Interested Party

Court Assistant-J. Kendi

