



Safaricom Kenya Limited v Communications Authority of Kenya; Homeland Group (Interested Party) (Appeal 1 of 2021) [2021] KECMAT 229 (KLR) (1 October 2021) (Judgment)

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

Neutral citation: [2021] KECMAT 229 (KLR)

**REPUBLIC OF KENYA
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL
APPEAL 1 OF 2021
ROSEMARY KURIA, CHAIR
OCTOBER 1, 2021**

BETWEEN

SAFARICOM KENYA LIMITED APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

AND

HOMELAND GROUP INTERESTED PARTY

Assurances by a regulatory body to a body it regulated creates a legitimate expectation that the assurance will be met.

The dispute revolved around the legal implication of a regulator making an assurance to a regulatee that it would address issues the regulatee raised before issuing a decision affecting it. In particular, it concerned the assurance by the Communications Authority (the respondent) of Kenya to Safaricom Kenya Limited (the appellant) that it would look into issues of SIM Card registration and the subscribers of Homeland Group (the interested party) before compelling the appellant to enter into an interconnection agreement with the interested party. The Communication and Multimedia Appeals Tribunal held that the assurance by the respondent created a legitimate expectation and exempted the appellant from interconnection with the interested party, until all the concerns raised by the appellant were addressed satisfactorily and in adherence to the law.

Reported by John Ribia

Administrative Law – legitimate expectation – where a regulatory statutory body gave an assurance to a body it regulated that it would look into matters raised by the regulatee – where the regulatory body issues a directive that ignores the regulatee’s concerns without addressing the matters it assured it would look into - whether a statutory regulatory body that gave an assurance to one of the bodies it regulated that it would look into a matter created a legitimate expectation that it would issue a decision stating how it looked into the



matter and the conclusions that it reached - whether Safaricom Kenya Limited (the appellant) had a legitimate expectation that the Communications Authority of Kenya (the respondent) would address its concerns regarding the interconnection with Homeland Group (the interested party), particularly in light of the respondent's assurance it would look into the issue of the interested party's SIM card registration - , section 4(2), and 79.

Communications Law – telecommunications – mobile network operators – directive for an established telecommunications company to enter into an interconnection agreement with a new market entrant in telecommunications – where the established player raised concerns with the regulatory body concerning the registration of SIM Cards by the new market entrant and the new market entrant's projections of its subscribers - whether the Communication Authority of Kenya's decision to compel the appellant (Safaricom) to enter into an interconnection agreement with the a new market entrant without adequately addressing the appellant's concerns on Sim Card registration was a breach of the respondent's statutory duties - whether the Communications Authority of Kenya had a duty to address all the outstanding issues raised by the respondent concerning the interested party before issuing a directive to conclude an interconnection - section 27D —, regulations 4 and 6.

Brief facts

The appellant had moved the Communication and Multimedia Appeals Tribunal vide a memorandum of appeal contending the Communications Authority of Kenya's (the respondent) directive that the appellant and the interested party conclude an interconnection agreement within two weeks. The appellant sought for the directive to be set aside and for an order to exempt them from the directive.

The appellant believed that in terms of regulation 4 (5) of the (exemption of interconnected licence), the appellant should not be compelled to interconnect with the interested party as doing so had the potential to endanger life or safety or result in injury of any person or their property by jeopardizing national security.

Issues

- i. Whether a statutory regulatory body that gave an assurance to one of the bodies it regulated that it would look into a matter created a legitimate expectation that it would issue a decision stating how it looked into the matter and the conclusions that it reached.
- ii. Whether Safaricom Kenya Limited (the appellant) had a legitimate expectation that the Communications Authority of Kenya (the respondent) would address its concerns regarding the interconnection with Homeland Group (the interested party), particularly in light of the respondent's assurance it would look into the issue of the interested party's SIM card registration.
 1. Whether the Communications Authority of Kenya had a duty to address all the outstanding issues raised by the respondent concerning the interested party before issuing a directive to conclude an interconnection
- iii. Whether the Communication Authority of Kenya's decision to compel the appellant (Safaricom) to enter into an interconnection agreement with the a new market entrant without adequately addressing the appellant's concerns on Sim Card registration was a breach of the respondent's statutory duties.
- iv. Whether the Communication Authority of Kenya's decision to compel the appellant to enter into an interconnection agreement with the interested party without adequately addressing the appellant's concerns on Sim Card registration was a breach of the Fair Administrative Action Act.

Relevant provisions of the Law

4. Rights and obligations to interconnect

- (5) *The Commission may exempt an interconnection licensee from the obligation under paragraph (1), where—*
- (a) *an interconnection agreement is prohibited by law;*
 - (b) *the licence issued to a licensee does not permit a licensee to offer the services for which the interconnection is requested;*
 - (c) *the requested interconnection is rendered impossible as a result of technical specifications; or*



(d) *the interconnection would endanger the life or safety or result in injury of any person or harm to the interconnect licensee's property or hinder the quality of the services provided by the licensed service provide*

Held

1. Legitimate expectation arose when a body, by representation or by past practice, had aroused an expectation that was within its power to fulfil. Therefore, for an expectation to be legitimate, it had to be founded upon a promise or practice by public authority that was expected to fulfill the expectation.
2. The respondent was the regulator. As the regulator it had powers to address the concerns raised by the appellant under KICA. The respondent assured the appellant that it was looking into the issue of SIM card registration, the appellant had an expectation of getting this concern addressed which was indeed legitimate.
3. Litigation should be predictable. The finding by the respondent that it was looking into the issue of SIM card registration regulations was what guided the appellant to raise the concerns to avoid violating any of the regulations. The respondent indicated that the determination may be relied upon in the future. The appellant relied upon that assurance and determination thus legitimately expected the respondent to adhere to its own finding.
4. The respondent's letter of January 23, 2021 was an attempt to approbate and reprobate in the same vein. The respondent did not categorically address or clearly explain the manner in which it had resolved the concerns raised by the appellant. The invitation to the appellant to seek more information from the interested party was akin to an abdication of the respondent's statutory mandate. The issues that the appellant had raised related only to the interested party and not any other players but the respondent seems to have offered a blanket response about all licensees. The appellant was justified to rely on the doctrine of legitimate expectation. The respondent was under a duty to address all the outstanding issues they had raised concerning the interested party before the directive to conclude an interconnection agreement within 2 weeks was issued.

Appeal allowed.

Orders

- i. *The respondent's directive dated January 23, 2021 that the appellant and the interested party conclude an interconnection agreement was set aside.*
- ii. *The appellant was exempted from interconnection with the interested party, until all the concerns raised by the appellant were addressed satisfactorily and in adherence to the law.*
- iii. *Parties were at liberty to apply.*
- iv. *Each party was to bear its own costs*

Citations

Cases

1. Accounting Officer Kenya Ports Authority (Ex Parte) v Public Procurement Administrative Review Board & 3 others (Interested parties) (Judicial Review Application 37 of 2019; [2019] KEHC 2229 (KLR)) — Mentioned
2. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR) — Explained
3. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR)) — Explained
4. Spte Stephen Odede v Court Martial At Kahawa Garisson & another (Petition 149 of 2016; [2016] eKLR) — Mentioned
5. National Director of Public Prosecutions v Phillips and Others ((043/2004) [2004] ZASCA 111; [2005] 1 All SA 635 (SCA); 2005 (5) SA 265 (SCA); 2005 (1) SACR 360 (SCA)) — Explained
6. President of the Republic of South Africa and Others v South African Rugby Football Union and Others ((CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059) — Explained



7. Canada (Attorney General) v Mavi ([2011] 2 SCR 504) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 31, 47, 50 — Interpreted
2. Fair Administrative Action Act, 2015 (Act No 4 of 2015) — section 4 (2); 79 — Interpreted
3. Kenya Information And Communications Act, 1998 (Act No 2 of 1998) — section 27D — Interpreted
4. Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010 (Act No of 1998 Sub Leg) — regulation 4 (5) — Interpreted
5. Kenya Information and Communications (Registration of SIM-Cards) Regulations — regulation 4, 6 — Interpreted

Advocates

None mentioned

JUDGMENT

1. The appellant has moved this tribunal *vide* a memorandum of appeal dated February 17, 2020.
2. The appellant seeks the following orders:
 - a. The appeal be allowed.
 - b. The respondent's directive that the appellant and the interested party conclude an interconnection agreement be set aside in terms of this appeal.
 - c. Spent
 - d. An order compelling the respondent to exempt the appellant from interconnecting with the interested party.
 - e. Such other orders as the Honourable Tribunal may deem fit to grant in the circumstances.
 - f. Costs of the appeal.
3. The appeal was supported by a statement of facts by Kui Kinyanjui and a list and bundle of documents.
4. The respondent here is the regulator charged with the responsibility of licensing and regulation of *inter alia* the telecommunications industry within the Republic of Kenya.
5. The Interested party is an application service provider and a content service provider licensed by the respondent.
6. The crux of the appeal is a directive by the respondent dated January 23, 2020 to the effect that the appellant should conclude an interconnection with the interested party within 2 weeks.
7. The appellant had raised concerns regarding the interested party's business model and subscriber base on February 7, 2019 and December 16, 2019. The concerns revolved around the provisions of section 27 D of [Kenya Information and Communications Act](#)(KICA), regulation 4(5) of the [Kenya Information and Communications \(Interconnection and Provision of Fixed Lines, Access and Facilities\) Regulations](#) and regulations 4 & 6 of the [Kenya Information and Communications \(Registration of SIM-Cards\) Regulations](#).



8. The request for interconnection had been made on April 6, 2016 and the appellant had carried out due diligence so as to establish the nature of business operations. The appellant alleges that after the due diligence it realized that:
 - a) The interested party did not have a pre-existing on-net customer base and their initial traffic forecast was untenable;
 - b) The interested party had provided inflated figures on traffic projection;
 - c) There was no notable marketing campaign by the Interested Party.
 - d) The interested party business model was to commence operations using VOIP and this did not require external connection like the one they had requested with the appellant;
 - e) The interested party had not complied with section 27D of KICA and SIM card registration regulations;
 - f) There were no customer onboarding plans by the interested party;
 - g) The intended interconnection posed physical and economic risks
9. The appellant believes that in terms of regulation 4(5) of the interconnection regulations, the appellant should not be compelled to interconnect with the interested party as doing so has the potential to endanger life or safety or result in injury of any person or their property by jeopardizing national security.
10. The appellant contends that the respondent had pronounced itself on a similar matter in an interconnection dispute between *Safaricom Limited v Geonet Communications Limited*, Determination 1 of 2018 and the appellant had a legitimate expectation that the issues they had raised regarding the interested party would be considered in the same vein.
11. The respondent had in the past fined the appellant and the appellant alleged that their misapprehension that they would be fined again was not misplaced.
12. The appellant thus contended that the decision issued on January 23, 2020 compelling the conclusion of the interconnection was hasty, premature and disregarded vital provisions of the Act as well as key regulations thereto., and that it also went contrary to the respondent's previous determination.
13. The respondent filed a response to the memorandum of appeal vide the affidavit of Maxwell Mosoti.
14. He deponed that the respondent received a complaint vide the letter dated December 13, 2019 from the interested party in relation to the delayed interconnection agreement between the appellant and themselves. They stated that they inquired from the appellant the cause of the delay, and the appellant gave various reasons and the respondent responded as follows:
 - a. That the concern raised by the appellant with regard to SIM card registration was being addressed with individual licensees.
 - b. That the appellant could seek further information, if need be, and gave adequate timelines within the stipulated regulations (2 weeks) to conclude the interconnection agreement.
15. The respondent then stated that negotiations on an interconnection agreement should not exceed 6 weeks and any extension can only be granted by the respondent, under section 5(9) and 5(9) b of the interconnection regulations.



16. The respondent then averred that any further delay of the interconnection infringes upon the rights of the interested party as a licensee requiring the intervention of the respondent.
17. It was then deponed that the determination 1 of 2018 is not relevant or in support of the actions of the appellant as against the interested party.
18. The respondent prayed that the appeal be dismissed with costs as the appellant only wants to delay and obstruct the negotiations which is contrary to section 5(4)(C) of the interconnection regulations.
19. The Interested party opposed the appeal *vide* a replying affidavit sworn by Hon Joe Musyimi Mutambu on 25th February 2020. He deponed that under the interconnection regulations the interested party has a right to a local interconnect with other licensed operators. That it is under this premise that it wrote the letter dated 6th April 2016 requesting for an interconnection.
20. The interested party averred that they had meetings and email communications with the appellants with a view to reach an agreement on the interconnection.
21. Hon Mutambu further averred that they were issued with a license by the respondent authorizing the interested party to operate under Hometel Voip Service.
22. The interested party stated that they had written various letters done various letters seeking the matter to be concluded without any formal response from the relevant office.
23. On December 4, 2019 the interested party filed a complaint with the respondent against the appellant in relation to the interconnection agreement.
24. The interested party further averred on some of the information that the appellant was requesting from them was within the interested party's right to privacy and intellectual property enshrined in article 31 of the *Constitution of Kenya*, and to determine on what information it can share with the appellant in so far as the Interested Party's business model is concerned.
25. It was also deponed that that the appellant delayed the interconnection agreement for more than 6 weeks which was in violation of the interconnection regulations. The interested party also stated that under the regulations parties should negotiate in good faith.
26. The interested party closed its affidavit by stating that the appeal was frivolous, vexatious and an utter abuse of the tribunal process and time.
27. The appellant filed a supplementary affidavit reiterating its averments on its concerns. Then indicated that a licensee can be exempted from an interconnection obligation where there are compelling reasons not to interconnect.
28. The appellant stated that the respondent's letter dated January 23, 2020 stated "We have taken note of the concerns raised in your letter and wish to assure you that the Authority is addressing the issue of SIM Card registration with the individual licensees so as to ensure strict compliance and adherence to the SIM registration Regulations." That from a plain reading of the sentence it can be discerned that the Respondent had not conclusively addressed the concerns raised.
29. The appellant further stated that the respondent failed to give reasons as per section 79 of the *Fair Administrative Action Act* and article 47 of the *Constitution of Kenya*.
30. That further since the respondent was still addressing the concerns it would be contrary to interests of justice to require the appellant to interconnect in the pendency of the concerns.



Appellant's Submissions

31. Parties canvassed the appeal via written submissions which the tribunal gave them time to highlight. The appellant filed its submissions on July 8, 2021 in support of the appeal.
32. The appellant reiterated what their concerns were with the operations of interested party before they entered into any interconnection agreement, the following were their concerns as captured *verbatim*:
 - a. The interested party's projected traffic raised alarm since it submitted forecasts of 15 million minutes which were expected to rise to 30 million minutes by Quarter 3 of Interconnection, despite it being a new entrant. When the applicant expressed its suspicion regarding the inordinately high forecasts, the interested party revised the projected traffic to 1 Million minutes, rising to 5 Million minutes by Quarter 4. This was still suspicious especially because the Interested Party was a new entrant who disclosed no pre-existing on net customer base. Ordinarily, a new entrant would be expected to have organic growth since it takes advertisement and promotions for a new entrant to on-board subscribers capable of terminating the said amount of traffic as projected by the interested party. The Interested Party had done none of the above, hence the projected high traffic was untenable within the short span of 12 months.
 - b. The interested party intends to make use of one or more calling applications (apps) on Voice over Internet Protocol (VoIP) technology which enables a provider to commence services without first establishing external connections with other operators. Its model therefore hinges on terminating traffic to other networks with no intra-network traffic. This is contrary to established network operations where there is on-net and off-net traffic.
 - c. No customer on-boarding plan was provided by the interested party, including how they assign numbers to their subscribers.
 - d. The lack of a customer subscription model, among other issues.
33. The appellant in its letter dated December 16, 2019 sought an exemption, citing national security concerns with the proposed interconnection.
34. The appellant submitted that the respondent *vide* a letter dated January 23, 2020 directed the appellant to conclude the interconnection agreement with the interested party within 2 weeks from the date of the letter or face an unspecified penalty. This was in spite of the glaring concerns raised which were lightly considered by the respondent.
35. From the onset the appellant submitted that the respondent never considered the issues raised. That the respondent never addressed any of the concerns and if it did no reasons were communicated as to why the reasons were found to be inconsequential.
36. On the first concern of the legitimacy of the interested party's projected traffic being a new entrant. The appellant submitted that the Respondent never addressed its mind on this issue as new entrants like the interested party are expected to have organic growth of customers and hence incapable of terminating such a high number of minutes per quarter in their first interconnection.
37. The appellants submitted that on the second concern - the unorthodox model of the interested party- the same was also not addressed by the respondent. The appellant posited questions in their submission which we proceed to regurgitate: whereby it disclosed no intra-network traffic which means it lacked on-net traffic (traffic originated and terminated within the same network) How then could the interested party opt for an interconnection which would allow it to have off-net (one network to



another) traffic? Lack of on-net traffic implies lack of existing local subscribers. Where then would the subscribers come from once an interconnection has been made? To put it differently where were these subscribers of the interested party that necessitated an interconnection agreement in order to exchange calls with the known subscribers of the appellant?

38. On the third concern, counsel to the appellant submitted that the interested party had not shown what its subscriber on-boarding model was. That the interested party did not intend to sell SIM cards, that much was not contested. It was understood that telecommunication service providers who sell SIM cards are enjoined to follow the Kenya Information and Communications (Registration of SIM Cards) Regulations. What about those operators who do not sell SIM Cards, like the interested party? The appellant counsel answered their own question, by stating that telecommunications service providers who do not use SIM Cards are still bound by the provisions of the Kenya Information and Communications (Registration of Subscribers of Telecommunications Services) Regulations 2014. According to counsel Regulation 4 of the Kenya Information and Communications (Registration of Subscribers of Telecommunications Services) Regulations 2014 enjoins all licensees to their subscribers.
39. The appellant also described their fears on SIM box fraud/bypass where the source of network traffic is concealed by the network from whence a call is originated. That they were therefore right to conduct the necessary due diligence.
40. The appellant argued that they had a legitimate expectation that the respondent would apply its devices to look into the concerns and give substantive response on the concerns raised. Contrary to the legitimate expectation the respondent directed the appellant to proceed the interconnection without first addressing those issues.
41. The appellant further submitted that the letter of January 20, 2020 the respondent indicated that it is addressing the issues. But why would the authority direct the appellant to interconnect without addressing the issues raised? The appellant's counsel wondered.
42. The appellant further challenged the respondent's letter which stated that the SIM registration concern was not a ground enough to justify the failure to interconnect. Counsel submitted that regulation 4(5) of the interconnection regulations state that a licensee may be exempted from the obligation to interconnect when the proposed interconnection would endanger the life or safety or result in injury of any person or harm to the interconnect licensee's property or hinder the quality of the services provided by the licensed service provider.
43. The appellant then relied on Determination 1 of 2018 to buttress their point where they quoted the respondent's findings as follows;

Clause "It is also noted that whereas different technologies confer different benefits that should be leveraged for the benefit of consumers, the Authority regulates based on a technology neutral approach, which does not treat different technologies differently. The Authority wishes to remind all licensees on the need for strict compliance with the Kenya Information and Communications (SIM Card Registration) Regulations, 2015 and that failure to do so would attract serious legal and regulatory consequences."

"It is to be noted that the observations and determinations contained herein have gone on record and may be relied upon in other future regulatory undertaking..."

Clause "It is instructive to note that such a practice amounts to SIM-Boxing which apart from degrading quality of services, conceals the true identity of a caller, which could easily compromise national security."



44. From the determinations above by the respondent the appellant stated that it was well in order to raise the concerns and the respondent ought to have addressed them as an issue of national security.
45. The appellant further submitted that failure to interrogate the concerns violated article 50 of the Constitution which guarantees the right to a fair hearing. Counsel relied on the authority of Spte Stephen Odede V Court Martial at Kabawa Garisson & Another [2016]eKLR, Accounting Officer Kenya Ports Authority (Exparte) V Public Procurement Administrative Board & 3 others (interested parties) [2019].
46. The appellant further submitted that to give reasons of the decision is a command to public bodies entrenched in article 47 of the Constitution and section 4(2) of the Fair Administrative Action Act.
47. In conclusion they prayed that the appeal be allowed and the tribunal does make orders as it deems appropriate.

Respondent's submissions

48. The respondent filed its submissions on July 22, 2021 to advance its opposition to the appeal and also highlighted the same.
49. The respondent submitted that as a regulator it is mandated to ensure that all licensees comply with the law and regulations governing them and such mandate includes consideration and enforcement action.
50. The respondent submitted that it addressed the concerns raised by the appellant comprehensively and by virtue of its letters dated December 13, 2019 and January 23, 2020 responded to the same. It was further submitted that the concerns raised would be addressed should the same arise as the mandate lies with the Respondent under Regulations 4 and 5 of the SIM card regulations.
51. Further that if the interested party breaches any of the regulations and terms of the interconnectivity agreement the respondent has the means capacity and mandate to investigate, revoke or penalize it.
52. The respondent submitted that the appellants concerns are a creation of their mind as it has taken the public safety concerns into account.
53. The respondent relied on section 25(3)(b) of the Kenya Information and Communications Act arguing that the section gives the Respondent the powers to set conditions to licensees: "To interconnect to the telecommunication system to which the licence relates, or to permit the connection to such system, of such other telecommunication systems and apparatus as are specified in the licence or are of a description so specified"
54. The respondent then submitted that the issues raised by the appellant are baseless, unfounded, premature and merely speculative. Secondly, they do not fall within the appellant's remit, as the sole authority to determine the suitability of a licensee resides with the respondent, who is the industry regulator.
55. They prayed that the honourable tribunal takes judicial notice that before granting the interested party the licence to operate, the respondent had validated and approved all the progress and applications to get interconnectivity with the appellant. As such, it is evident that the respondent performed all its obligations owed to the appellant and that it did not owe the latter any further explanation.
56. The respondent further submitted that the appeal is not brought in good faith on the grounds that the appellant was granted time to seek further information from the interested party which would help in concluding the interconnection agreement and which information has never been sought to date.



57. The respondent further submitted that the Determination 1 of 2018 was not applicable as the facts were distinguishable. That even if the facts were relevant the respondent is not bound by its past decisions as each case merits its own considerations. They relied on the paper done by Paul R Jeffrey titled Regulatory Laws and Procedure.
58. The respondent closed its submissions by praying for a dismissal of the appeal with costs as the appellants conduct is purely to delay and obstruct the negotiations.

Interested Party's Submissions.

The interested party never filed its submissions but during the highlighting applied to rely and buttress the respondent's submissions and the said leave was granted.

Analysis

59. The tribunal has considered the memorandum of appeal, the responses thereto, the submissions and has marked the following issues for determination:
1. Whether the appellant had a legitimate expectation to have the concerns raised addressed by the respondent?
 2. Whether the respondent addressed the concerns?
 3. Whether the appeal is merited?
60. We have identified the above issues after looking at the grounds of appeal raised and the pleadings before us and it is our considered view that if the above issues are resolved, the appeal will have been adequately considered.
61. On the first issue, whether the appellant had a legitimate expectation to have the concerns raised addressed by the respondent?
62. We begin addressing this issue by looking at the letter dated December 13, 2019 written by the respondent. The respondent acknowledged receiving a complaint from the interested party where the interested party expressed its frustrations in getting interconnected with the appellant. The respondent requested the appellant to submit a status update on the interconnection, to enable the regulator check compliance of both parties and to fully understand the challenges the appellant was facing in executing the interconnection request.
63. On December 16, 2019 the appellant responded to the letter dated December 13, 2019 by the respondent where they explained that after conducting due diligence on the interested party, they established the following:
1. Homeland's local traffic forecast of One (1) Million minutes per quarter increasing to Five (5) Million minutes by end of quarter four raises suspicion as to the source of traffic given that there is no evidence of a pre-existing on-net customer base compared to other partners that we have interconnected with.
 2. The use of Calling App on VoIP technology enables a provider to commence services without first establishing external interconnections with other operators. We are concerned that Homeland's business model hinges on terminating traffic to other networks with no intra-network traffic. This is contrary to established network operations where there is on-net and off-net traffic.



3. Homeland has not provided a customer on-boarding plan to support their subscriber registration process, including assigning of numbers to customers. Since they do not intend to sell SIM cards, it is our view that a defined customer subscription model should be availed to the Authority for reference by other licensees for purposes of determining compliance with existing Regulations and attendant security concerns.
64. The appellant continued in the letter by quoting Determination 1 of 2018 to buttress its frustration. It stated that the respondent emphasized that subscriber registration mechanism adopted by an operator should comply with section 27D of KICA and the SIM card registration regulations.
65. In the letter the appellant also stated that the mode of customer acquisition applied by the interested party would give rise to national security concerns due to inability to identify the origin of the calls and the identity of the customer assigned to a certain number. Further that it may be an attempt by the interested party to terminate international traffic disguised as local contrary to clause 3.2.4 of the determination.
66. The appellant then requested the respondent to request the interested party to provide disclosure on how they intended to comply with the provisions of the Determination, the [KICA](#) and SIM card registration regulations.
67. In response to the above letter the respondent wrote the letter dated January 23, 2020 where they indicated as follows:

We have taken note of the concerns raised in your letter and wish to assure you that the Authority is addressing the issue of SIM card registration with the individual licensees so as to ensure strict compliance and adherence to the SIM Registration Regulations. It is, however, our considered opinion that is not ground enough to justify failure to interconnect with them and thereby contravening regulation 5 sub-section 4(c) of the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010.

In the view of the foregoing, you are required to seek any additional information you may require from Homeland Media Group and conclude the interconnection agreement within 2 weeks of being furnished with the information.

Take notice, that failure to comply with this requirement may lead to enforcement action including penalty being preferred against you.

68. It is this response that provoked the appeal herein.
69. To properly address this issue we must look at what a legitimate expectation is and whether it existed in this circumstance. This principle was well articulated by the Supreme Court of Canada in [Canada \(Attorney General\) v Mavi](#), [2011] 2 SCR 504, thus;

“(68) Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite”



70. In *National Director of Public Prosecutions v Phillips and others*. [2002](4) SA 60 (W) para 28, Hehe J, stated;

“The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:

- (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification';
- (ii) The expectation must be reasonable;
- (iii) The representation must have been induced by the decision-maker;
- (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.”

(See also *President of the Republic of South Africa and others v South African Rugby Football Union and Others* [2000] (1) SA 1 (CC) para 216, and *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others* [2014] e KLR)

71. Here in Kenya, in the Supreme Court case of *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 others* SC Petition Nos 14, 14A, 14B & 14C of 2014. where the Supreme Court stated that:-

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfill the expectation.”

72. The respondent is the regulator. As the regulator it has powers to address the concerns raised by the appellant under KICA. In the letter dated January 23, 2020 the respondent made an assurance and stated;

“We have taken note of the concerns raised in your letter and wish to assure you that the Authority is addressing the issue of SIM card registration with the individual licensees so as to ensure strict compliance and adherence to the SIM card registration regulations.” (Emphasis ours)

73. The respondent assured the appellant that it was looking into the issue of SIM card registration, the appellant had an expectation of getting this concern addressed which was indeed legitimate.

74. The appellant also relied on Determination 1 of 2018 where the respondent stated:

Clause 3.2.6: “It is also noted that whereas different technologies confer different benefits that should be leveraged for the benefit of consumers, the Authority regulates based on a technology neutral approach, which does not treat different technologies differently. The Authority wishes to remind all licensees on the need for strict compliance with the Kenya Information and Communications (SIM Card Registration) Regulations, 2015 and that failure to do so would attract serious legal and regulatory consequences.”

“It is to be noted that the observations and determinations contained herein have gone on record and may be relied upon in other future regulatory undertaking...” (Emphasis ours)



75. Litigation should be predictable. The finding is what guided the appellant to raise the concerns to avoid violating any of the regulations. The respondent argued that the said determination cannot bind itself. But it has failed to explain why it now wishes to move away from its earlier determination? What has changed? The respondent indicated that the determination may be relied upon in the future. Well, the appellant relied upon that assurance and determination thus legitimately expected the respondent to adhere to its own finding.
76. On to the next issue, whether the respondent addressed the concerns? Having found that the appellant had a legitimate expectation to have the concerns addressed. This issue will be a little straight forward.
77. The respondent's letter of January 23, 2021 is an attempt to approbate and reprobate in the same vein. The respondent did not categorically address or clearly explain the manner in which it had resolved the concerns raised by the appellant. The invitation to the appellant to seek more information from the interested party is akin to an abdication of the respondent's statutory mandate. The issues that the appellant had raised related only to the interested party and not any other players but the respondent seems to have offered a blanket response about all licensees. The appellant is justified to rely on the doctrine of legitimate expectation. The respondent was under a duty to address all the outstanding issues they had raised concerning the interested party before the directive to conclude an interconnection agreement within 2 weeks was issued.
78. Having reached the above findings we do find the appeal to merited and the same is allowed as follows:
1. The respondent's directive dated January 23, 2021 that the appellant and the interested party conclude an interconnection agreement is hereby set aside.
 2. The appellant is exempted from interconnection with the interested party, until all the concerns raised by the appellant are addressed satisfactorily and in adherence to the law.
 3. Parties are at liberty to apply.
 4. Each party to bear its own costs.

DATED THIS 1ST DAY OF OCTOBER 2021

DELIVERED VIRTUALLY IN THE PRESENCE OF THE HONOURABLE MEMBERS OF THIS TRIBUNAL, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND R. MUKIRA

ROSEMARY KURIA

CHAIRPERSON - COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL

