



Safaricom PLC v Communications Authority of Kenya; Iristel Kenya Limited (Interested Party) (Appeal 3 of 2021) [2021] KECMAT 311 (KLR) (17 September 2021) (Ruling)

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

Neutral citation: [2021] KECMAT 311 (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**

SEPTEMBER 17, 2021

BETWEEN

SAFARICOM PLC APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

AND

IRISTEL KENYA LIMITED INTERESTED PARTY

RULING

1. This is a ruling in respect of the Appellant's amended notice of motion dated 10th June 2021. The application seeks interlocutory orders pending the determination of an appeal from the Respondent's decision dated 13th April 2021 which directed the Appellant to commence and conclude interconnect negotiations with the Interested Party. The application is supported by the grounds on its face, the supporting affidavit of Kui Kinyanjui sworn on 10th June 2021 and her supplementary affidavit sworn on 8th July 2021. The Respondent opposes the application and has filed a replying affidavit sworn by Matano M. Ndaru on 22nd July 2021. The Interested Party opposes the application and relies on the grounds of opposition filed before the amendment, and the replying affidavit sworn by Isaac Ohanya on 21st June 2021. The application prays for the following orders:-
 1. Spent
 2. Spent
 3. 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.

4. That pending the hearing and determination of this application and appeal, an order be and is hereby granted maintaining the *status quo* by:-
 - (a) 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 26th May 2021.
 - (b) An order precluding the Respondent from penalizing or imposing any other coercive decision upon the Appellant in respect of the actual interconnection of the Appellant's and Interested Party's systems and network.
5. That the costs of this application be provided for.

Background

2. The circumstances of the appeal upon which this application is anchored are not in dispute. The Interested Party sent a request for interconnection to the Appellant by a letter dated 24th May 2019. The Appellant declined the request for interconnection. The Interested Party lodged a complaint with the Respondent, and the latter wrote to the Appellant on 7th November 2019 requiring an explanation for the refusal to interconnect. By a letter dated 12th November 2019, the Appellant gave its grounds for declining to interconnect. The Respondent wrote to the Appellant on 13th April 2021 saying that it had investigated the Appellant's grounds for the refusal to interconnect, and had concluded that said grounds did not have merit. By the same letter, the Respondent proceeded to issue the following directions (hereinafter called the decision) which the Appellant contests through this appeal:-

“The Authority hereby directs you to commence and conclude interconnect negotiations with Iristel within 6 weeks from the date of this letter. Failure to conclude the negotiations shall be deemed as a deliberate attempt to delay/obstruct the interconnection, in contravention of section 5(4) (c) of the [Kenya Information and Communications \(Interconnections and Provision of Fixed Links, Access and Facilities\) Regulations 2010](#)”.

3. It is also not disputed that the Appellant and the Interested Party executed an interconnection agreement on 26th May 2021. Now back to the Appellant's application.

Appellant's case

4. In its application dated 10th June 2021, the Appellant prays for the stay of the decision and maintenance of status quo in so far as it relates to the actual physical and logical interconnection of the Appellant's network with that of the Interested Party. In the affidavits in support thereof, it is deposed that the decision gave the Appellant six weeks to comply. Six weeks lapsed on 25th May 2021, and the Appellant was apprehensive that the Respondent would impose a fine for non-compliance. The Appellant deposes that to avoid this penalty, it executed an interconnection agreement with the Interested Party on 26th May 2021. The Appellant also deposes that despite the agreement, no actual, physical and logical interconnection has been undertaken. The Appellant therefore says that it stands in danger of being penalized for failing to implement an actual, physical and logical interconnection, and that if that happens this appeal will be rendered nugatory and the Appellant will be greatly prejudiced. Specifically, calls will have been made and messages sent through an interconnect link which would have been found to be unlawful. Additionally, the Appellant's interconnection with the Interested Party poses a threat



to national security where the latter terminates international traffic disguised as local traffic, which is SIM-box fraud.

The Respondent's case

5. In its replying affidavit, the Respondent deposes that the Appellant has already complied with the directions in the decision, and that there is therefore nothing to be stayed. It deposes that as such, there is no basis for the apprehension of a penalty on the basis of the decision. Concerning the question of interconnection, the Respondent says that no dispute on the performance of the interconnection agreement has been brought to its attention and that it has not made any decision on the same. The Respondent further deposes that such performance was not the subject of directions in the decision and cannot therefore be the subject of the appeal.

The Interested Party's case

6. The Interested Party's grounds of opposition are multi-pronged. First, the Interested Party says that the application has been overtaken by events in that the decision sought to be stayed has already been complied with. Secondly, the Interested Party says that the Appellant has not shown the substantial loss that it will suffer if the stay orders are not granted or that the interested party will be involved in terminating international calls as local calls or that interconnection with it will threaten national security. The Interested Party also urges that the Appellant's refusal to interconnect with the Interested Party contravenes sections 84Q of the *Kenya Information and Communications Act* by unfairly preventing and restricting competition from the Interested Party. In the replying affidavit, the Interested Party deposes that the Appellant's grounds for refusing to interconnect are not valid, and sets out the reasons for saying so. It also denies that the interested party will be involved in the termination of international calls masked as local calls, engage in fraudulent business or that its business poses a threat to national security.

Analysis and Finding

7. We have considered the pleadings and submissions by the parties, and find the following to be the issues for our determination, and will address each in turn:-
 1. Whether the application has been overtaken by events
 2. Whether orders for stay as regards the actual physical and logical interconnection of the respective networks of the Appellant and the Interested Party lie
 3. Whether orders for status quo by 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 26th May 2021 lie.
 4. Whether an order precluding the Respondent from penalizing or imposing any other coercive decision upon the Appellant in respect of the actual interconnection of the Appellant's and Interested Party's systems and network lies.
 5. Whether the Appellant will suffer substantial loss if this application is not granted

1. Whether the application has been overtaken by events:

8. The Respondent and the Interested Party urge that the Appellant's application has been overtaken by events on the ground that the decision the subject of this appeal has already been complied with. This tribunal has warned itself of the fact that as it considers an application for stay pending appeal, it must



not make definitive findings of either fact or law because doing so may embarrass the ultimate hearing of the main appeal (See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd* Civil Application No Nai 345 of 2014). To consider whether the decision the subject of the appeal has been complied with would be making definitive findings on the appeal. Consequently, at this interlocutory stage, we will not inquire into whether the Appellant's grounds for declining to interconnect with the Interested Party were valid or whether the Respondent properly decided this issue. Neither will we address the question whether the concerns that informed the grounds for declining to interconnect are already and sufficiently addressed by the interconnection agreement between the Appellant and the Interested Party.

2. Whether orders for stay as regards the actual physical and logical interconnection of the respective networks of the Appellant and the Interested Party lie

9. The application before us seeks orders specifically related to actual physical and logical interconnection, exemption from interconnection, the execution of the interconnection agreement with the Interested Party, and penalties from the Respondent for default thereof.
10. The procedure relating to interconnection of telecommunications services providers is found in the *Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010*-hereinafter called the regulations. Under Regulation 5, an interconnect licensee such as the Appellant, and an interconnecting licensee such as the Interested Party are expected to negotiate and conclude an interconnection agreement to document the terms of their interconnection. Under Regulation 6, parties to an interconnection agreement are required to file with the Respondent an application for approval of the proposed interconnection agreement at least fourteen days before the date of implementation of the interconnection agreement. The Respondent evaluates the terms and conditions, and charges set forth in the agreement, and may request for information to facilitate such evaluation, and may suggest modifications to the agreement. If the parties do not agree on the modifications, the Respondent may itself provide them with an interconnection agreement.
11. According to regulation 6 therefore, the question of the actual physical and logical interconnection of telecommunications services providers can only arise when the interconnection agreement has been approved by the Respondent as is, after modification or after the Respondent has provided the parties with such agreement. In addition, any dispute relating to an interconnection agreement is under regulation 6(7) subject to an appeal to this tribunal. We therefore take the view and agree with the Respondent's submission that it would be premature for the tribunal to assume jurisdiction over this issue at this stage. As a result, we decline to allow the prayer for stay as regards the actual physical and the logical interconnection of the respective networks of the Appellant and the Interested Party.

3. Whether orders for status quo by 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 26th May 2021 lie.

12. We are not persuaded to allow the Appellant's prayers for exemption from actual interconnection with the Interested Party or from performing the terms of the interconnection agreement dated 26th May 2021. To begin with, we have already found that the question of the actual interconnection has not arisen. Secondly, it does not appear to us that exemption of an interconnection licensee from obligation as contemplated by regulation 4(5) of the regulations would apply where a licensee has already executed an interconnection agreement like the Appellant has. Similarly, the question of the performance of the terms of the interconnection agreement is not a matter under the consideration of the tribunal in



this appeal or that which flows naturally therefrom, and hence it would be remiss for the tribunal to entertain it. Accordingly, we decline to allow this prayer.

4. Whether an order precluding the Respondent from penalizing or imposing any other coercive decision upon the Appellant in respect of the actual interconnection of the Appellant's and Interested Party's systems and network lies.

13. Having found that the process of the approval of the interconnection agreement has not started, we are not persuaded that any penalty in respect of actual interconnection would apply at this stage. We therefore decline to grant this prayer because the tribunal should not make orders in vain.

5. Whether the Appellant will suffer substantial loss if this application is not granted

14. The Appellant pleads that it will suffer substantial loss if the orders sought are not granted. In determining whether there will be substantial loss, this tribunal is guided by the principle that the purpose of stay of execution pending an appeal is to preserve the substratum of the appeal. In *Consolidated Marine v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the Court had this to say:-

" The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".

15. In its application, the Appellant expresses the substratum of the appeal to be the actual physical and logical interconnection with the Interested Party. Specifically, the Appellant urges that if no stay is granted it will get interconnected with the Interested Party in which case there will be the risk of SIM-boxing going unchecked and a resultant threat to national security. On the other hand, if it refuses to interconnect, it will be fined. Following our finding that actual, physical and logical interconnection is in fact not the subject of this appeal, we find that the Appellant has not proved that it will suffer any substantial loss as contemplated by law or more particularly such loss as would arise from the execution of the decision that it appeals from.

16. The upshot is that the Appellant's notice of motion dated 10th June 2021 is dismissed with costs.

DATED THIS 17TH DAY OF SEPTEMBER, 2021

DELIVERED VIRTUALLY IN THE PRESENCE OF THE HONORABLE MEMBERS OF THIS TRIBUNAL, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND RAMADHAN ABUBAKAR MUKIRA

ROSEMARY KURIA

CHAIRPERSON-COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL

