



**Ashford Koome v Airtel Network Ltd; Communications Authority of Kenya (Interested Party) (Complaint 3 of 2019) [2021] KECMAT 365 (KLR) (6 August 2021) (Ruling)**

*Ashford Koome v Airtel Network Ltd; Communications Authority of Kenya (Interested Party) [2021] eKLR*

Neutral citation: [2021] KECMAT 365 (KLR)

**REPUBLIC OF KENYA  
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL  
COMPLAINT 3 OF 2019  
ROSEMARY KURIA, CHAIR, MBESA MALOMBE, MARGARET  
NYAMBURA NDUNG’U, COLLINS WANDERI, VIVIENNE ATIENO,  
DAMARIS NYABUTI & RAMADHANI ABUBAKAR MUKIRA, MEMBERS**

**AUGUST 6, 2021**

**BETWEEN**

**ASHFORD KOOME ..... COMPLAINANT**

**AND**

**AIRTEL NETWORK LTD ..... RESPONDENT**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA ..... INTERESTED PARTY**

**Jurisdiction of the Communication and Multimedia Appeals Tribunal to determine complaints by consumers against service providers before the same has been determined by the Communications Authority**

*The respondent filed a notice of preliminary objection on among other grounds that the Tribunal lacked jurisdiction to entertain and/or determine the complaint. The Tribunal held that the Communications Authority had original jurisdiction to handle matters concerning a consumer and a service provider. The Tribunal found that it could not conduct an investigation on the complaint and that the Authority was better placed to handle the matter. The Tribunal had jurisdiction to handle the matter, but to exercise that jurisdiction at that moment would be premature. The Tribunal also noted that the failure by the Authority to give a decision on the complaint was also a decision, and the same was appealable.*

Reported by Kakai Toili

***Jurisdiction*** – jurisdiction of the Communication and Multimedia Appeals Tribunal (the Tribunal) vis a vis the Communications Authority of Kenya (the Authority) – jurisdiction to conduct investigations on complaints by consumer against service providers - whether the Tribunal could conduct an investigation on a complaint by a consumer against a service provider - whether the Tribunal had the jurisdiction to determine a complaint by a



*consumer against a service provider before the same had been determined by the Authority - whether failure by the Authority to give a decision on a complaint was also a decision – Constitution of Kenya, 2010, article 47; Kenya Information and Communications Act, Cap 411A, section 102A; Kenya Information and Communications (Dispute Resolution) Regulations, 2010, section 3.*

**Civil Practice and Procedure** – preliminary objections – nature of preliminary objections - what was the nature of a preliminary objection.

### **Brief facts**

The complaint concerned an alleged depletion and consumption of airtime on different occasions without corresponding service being rendered by the respondent. The complainant thus sought among other prayers that; the respondent had failed to account for the data charges imposed on the complainant's Airtel account for the period in issue or complained; and that the respondent's mode of data consumption computation was materially flawed. The respondent filed a notice of preliminary objection on among other grounds that the Tribunal lacked jurisdiction to entertain and/or determine the complaint.

### **Issues**

- i. Whether the Communication and Multimedia Appeals Tribunal had the jurisdiction to determine a complaint by a consumer against a service provider before the same had been determined by the Communications Authority of Kenya.
- ii. Whether failure by the Communications Authority of Kenya to give a decision on a complaint was also a decision.
- iii. What was the nature of a preliminary objection?

### **Held**

1. A preliminary objection consisted of a pure point of law which had been pleaded, or which arose by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples were an objection to the jurisdiction of the court, as was the instant case. The preliminary objection before the court was on a pure point of law on jurisdiction which must be determined before everything else.
2. Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed its tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.
3. The Kenya Information and Communications Act under section 102A defined when an aggrieved person may make a written complaint. From a reading of section of 102A(c), the Tribunal had a very wide jurisdiction. The dispute was between a consumer and a licensee. Under section 3 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010, the Authority had powers to resolve disputes between; a consumer and a service provider; a service provider and another service provider; or any other persons as may be prescribed under the Act. The Authority had original jurisdiction to handle matters concerning a consumer and a service provider.
4. The complainant wrote several letters alleging disappointment with the services of the respondent. The complaints were addressed to the interested party but the interested party failed either by sheer inadvertence or omission to respond to the complaint. Article 47 of the Constitution obligated every administrative body to deal with matters effectively, efficiently, lawfully, reasonably and be procedurally fair. The complainant had a complaint and the same ought to have been heard expeditiously. The Authority erred on that front.
5. Section 3(3) of the Dispute Resolution Regulations stipulated that the Authority may, for the purpose of resolving any dispute hold hearings, inquiries and investigations, it considered appropriate in the discharge of its functions under the Kenya Information and Communications Act. Section 3(3) was



- cited because it showed the powers given to the Authority by statute when it came to resolving dispute. Interestingly was the power to investigate.
6. The Tribunal could not conduct an investigation on the complaint. The Authority was better placed to handle the matter and issue the appropriate remedies, if any. The Tribunal had jurisdiction to handle the matter, but to exercise that jurisdiction at that moment would be premature. Article 159(2)(c) of the Constitution had been interpreted by the courts to mean that courts and tribunals must promote other forms of dispute resolution mechanisms.
  7. The failure by the Authority to give a decision on the complaint was also a decision, and the same was appealable. However, the Tribunal was reluctant to exercise its jurisdiction at that level in compliance with the exhaustion doctrine.
  8. Regulation 4(7) of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 stated that the Authority may decline to accept a letter or memorandum of complaint that had been filed with any other authority or body that had jurisdiction to hear and determine the dispute.

*Preliminary objection allowed.*

### **Orders**

- i. *The interested party had the requisite jurisdiction to handle the matter in the first instance.*
- ii. *The matter was referred to the interested party for handling and disposal.*
- iii. *Each party would bear its own costs.*

### **Citations**

#### **Cases**

##### **Kenya**

1. *Muthinja, Geoffrey & another v Samuel Muguna Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Followed)
2. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989 [1989] eKLR; [1989] KLR 1- (Followed)
3. *Republic v Authority of Lands, ex parte Lake Flowers Limited, The Rent Restriction Tribunal and ZN Shah, SM Shah ex parte MM Butt* Court of Appeal No 47 of 1980 - (Followed)
4. *Republic v County Government of Kiambu ex parte Fechim Investments Limited* Miscellaneous Application 73 of 2015; [2016] eKLR - (Followed)

##### **Regional Court**

*Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EALR 696 - (Followed)

#### **Statutes**

##### **Kenya**

1. Constitution of Kenya, 2010 articles 47, 159 (2) (c) - (Interpreted)
2. Consumer Protection Act (cap 501) In general - (Cited)
3. Kenya Information and Communications (Amendment) Act (cap 411A) section 102 (1)- (Interpreted)
4. Kenya Information and Communications (Dispute Resolution) Regulations, 2010 regulations 3, 3(3); 4(7); 8(6) (cap 411A Sub Leg) - (Interpreted)

#### **Advocates**

None mentioned



## RULING

1. The complaint before us has been brought by one Ashford Koome (complainant) against Airtel Networks Kenya Limited (respondent). The complaint concerns an alleged depletion and consumption of airtime on three different occasions i.e. January 20, 2019, March 21, 2019 and July 19, 2019, without corresponding service being rendered by the respondent.
2. The complainant thus seeks the following prayers:
  - a. That the respondent has failed to account for the data charges imposed on the complainant's Airtel account for the period in issue or complained.
  - b. The respondent's mode of data consumption computation is materially flawed for want of measurability and verifiability by consumers, exploitative and in breach of the Complainant's consumer rights under the [Constitution of Kenya 2010](#), the [Consumer Protection Act 2012](#) and the [Kenya Information and Communications \(Amendment\) Act 2013](#)
  - c. That the interested party has failed to exercise its supervisory mandate under the [Kenya Information and Communications \(Amendment\) Act 2013](#) and the [Consumer Protection Act 2012](#) with regard to the subject complaints.
  - d. That the honorable tribunal do direct the authority to exercise its mandate accordingly.
  - e. That the honorable tribunal be pleased to make any other order or further order(s) as it may deem appropriate in the circumstances.
3. The respondent filed its response dated June 3, 2021 raising objections to the jurisdiction and the complaint. The same was accompanied by the notice of preliminary objection dated June 4, 2021, the subject of this instant ruling. The objection is on the following grounds:
  - a. That this tribunal lacks jurisdiction to entertain and/or determine this complaint.
  - b. That the complainant's claim as presented before this tribunal is time barred.
  - c. That the complainant's claim herein is unprocedural and has not complied with the necessary steps before lodging the complaint.
  - d. That for the aforesaid reason the entire complaint is incurably/fatally defective, a non-starter, an utter abuse of the hallowed tribunal process.
4. The respondent therefore prays that the complaint dated August 12, 2019 be struck out with costs to the Respondent.
5. The preliminary objection was canvassed *via* written submissions and all parties filed their respective submissions.

### **Respondent's submissions.**

6. The respondent whilst supporting its preliminary objection relied on regulation 3 of the [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#), arguing that the dispute ought to have been presented to the Authority at the first instance. Regulation 3 of the said regulations provides in mandatory terms that "The Authority shall have power to resolve disputes between- (a) a



- consumer and a service provider; (b) a service provider and another service provider; or (c) any other persons as may be prescribed under the Act...”
7. The respondent also relied on regulation 8(6) of the [Dispute Resolution Regulations](#). Stating that it is only after one has lodged a complaint before the authority and the authority has rendered its decision that a party has the liberty to lodge an appeal to this tribunal. The regulation provides that: any party dissatisfied by the decision of the authority may appeal to the appeals tribunal established under section 102 of the Act within fifteen days of the decision
  8. Therefore, the respondent argued, that the tribunal does not have original jurisdiction over consumer disputes such as the one presented by the complainant. It was submitted that such disputes are reserved to the authority.
  9. The respondent also argued that the suit is time barred. That under the Dispute Resolution Regulations, the complainant would have been duty-bound to make the complaint within 60 days from the date of the complaint. Serializing the dates, the respondent Stated that the complaint of 20/21 January 2019 should have been filed by 19/20 March 2019. The second complaint of 21 March 2019 should have been filed by 20th May 2021. On the final complaint of 19/20 July 2019 the same should have been filed by September 18, 2019.
  10. The complaint herein having been lodged on August 19, 2019, the respondent argued that the first two incidences are time-barred even if the tribunal is inclined to treat the complaint herein as an original complaint.
  11. The respondent closed their submissions by stating that the dispute herein is a consumer/licensee dispute governed by [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#), and that the Tribunal does not have original jurisdiction over consumer/licensee dispute.
  12. The respondent prayed that the appeal/complaint be struck out with costs to the respondent.

### **Complainant’s Submissions**

13. The complainant *vide* its submissions dated June 17, 2021 opposed the preliminary objection. The complainant indicated that on all the three occasions (January 20, 2019, March 21, 2019 and July 19, 2019) he did a complaint letter and email to the interested party and copied the respondent. He stated that both the respondent and the interested party ignored the complainant’s letters and that is what made him file the instant complaint.
14. The complainant relied on section 102(1) of the [Kenya Information and Communication Act](#) which provides “There shall be established an appeals tribunal for the purpose of arbitrating in cases where disputes arise between the parties under this Act...”
15. The complainant also relied on the wordings on the tribunal’s website to argue that we indeed have jurisdiction.
16. The complainant also relied of regulation 4(7) of the [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#) stating that the Authority may decline to accept a letter or memorandum of complaint that has been filed with any other authority or body that has jurisdiction to hear and determine the dispute. The complainant interpreted this to mean that the law contemplates that complaints may be filed before bodies other than the Communications Authority.
17. On the issue of the complaint being time barred the complainant submitted that the complaint concerns breach of contract, which under the law the time limit is 6 years.



18. The complainant closed his submissions by urging the tribunal to be guided by the need to dispense substantive justice and ignore the technical objections raised by the respondent.

### **Interested Party's Submissions**

19. The interested party, which is the authority herein, also filed its submissions dated July 8, 2021. The authority submitted that the matter before the tribunal concerns a consumer and a service provider and as such the dispute ought to be adjudicated by the authority and not the tribunal. Further it was submitted that the party dissatisfied by the decision of the authority may appeal to this instant tribunal.
20. The interested party then submitted that the complainant has offended the doctrine of exhaustion of alternative remedies. They relied on the authorities of *Republic v County Government of Kiambu Ex Parte Fechim Investments Limited* [2016] eKLR, *Republic v the Authority of Lands, ex parte Lake Flowers Limited*, *The Rent Restriction Tribunal and ZN Shah, SM Shah ex parte MM Butt* (Court of Appeal No 47 of 1980).
21. The interested party also argued that the complaints are time barred as they were brought outside the 60 days stipulated under rule 4 of the Dispute Resolution Regulations.
22. The interested party then submitted that the letters (dated March 21, 2019, April 14, 2019 and May 8, 2019) written by the complainant did not meet the threshold of filing a complaint before the authority. The interested party further stated that it never received a letter or memorandum of complaint accompanied with the prescribed fees as required and such it did not receive a request from the complainant or respondent to intervene in the alleged dispute. The interested party then prayed for the striking out of the complaint in limine with costs to the interested party.

### **Analysis.**

23. Having gone through each party's respective submissions and authorities we now move to make a finding on the preliminary objection.
24. Before we delve into the instant preliminary objection, we must be guided by the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EALR 696 on whether the preliminary objection meets the criteria. It was stated in this case which we respectfully agree, that a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, as is the case here.
25. The preliminary objection dated June 4, 2021 before us is on a pure point of law on jurisdiction which we must determine before everything else.
26. The landmark case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR is also of importance, where Nyarangi JA stated  

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
27. It is for the above reasons that we must make a finding on whether the tribunal has jurisdiction to adjudicate over this matter.



28. The mother Act in these proceedings is the [Kenya Information and Communications Act](#) (KICA). Under section 102A of KICA it defines when an aggrieved person may make a written complaint, that is when he is aggrieved by:
- a. Any publication by or conduct of a journalist or media enterprise;
  - b. Anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or
  - c. Any action taken, any omission made or any decision made by any person under this act.
29. A reading of section of 102A(c) of [KICA](#) it is visible that the Tribunal has a very wide jurisdiction. The question that then begs is whether the complaint herein should have been filed at the authority in the first instance? Or was it properly filed before the tribunal because of the authority's omission? Omission to consider the matter, omission to inform the complainant whether there are any fees to be paid, omission to inform the complainant why they delayed in handling the matter, omission to acknowledge receipt of the matter, omission to hear the matter, And or omission to make a decision on the matter.
30. It has not been denied that this is a dispute between a consumer and a licensee. We therefore rightly treat it as such.
31. Under section 3 of the [Kenya Information and Communications \(Dispute Resolution\) Regulations, 2010](#), the authority has powers to resolve disputes between-
- a. a consumer and a service provider
  - b. a service provider and another service provider; or
  - c. any other persons as may be prescribed under the Act.
32. From the above provision it is as clear as daylight that the authority has original jurisdiction to handle matters concerning a consumer and a service provider.
33. What makes the instant case stand out is that the complainant wrote several letters alleging disappointment with the services of the respondent. The complaints were addressed to the interested party but the interested party failed either by sheer inadvertence or omission to respond to the complaint. It is this suit that has jolted them into action.
34. Article 47 of the [Constitution](#) obligates every administrative body to deal with matters effectively, efficiently, lawfully, reasonably and be procedurally fair.
35. We find that the complainant had a complaint and the same ought to have been heard expeditiously. The authority erred on this front.
36. Section 3(3) of the [Dispute Resolution Regulations](#) stipulates that the Authority may, for the purpose of resolving any dispute hold hearings, inquiries and investigations, it considers appropriate in the discharge of its functions under the Act,
37. We cite the above provision because it shows the powers given to the authority by statute when it comes to resolving dispute. Interestingly is the power to investigate. Should the authority have investigated the complaint? Or can this tribunal conduct an investigation on the complaint? Our answer is in the negative on the latter.
38. The authority is better placed to handle this matter and issue the appropriate remedies, if any.



39. Reliance placed on section 102A we do find that we have jurisdiction to handle the matter, but to exercise this jurisdiction at this moment would be premature. Article 159(2)(c) of the *Constitution* has been interpreted by the courts to mean that courts and tribunals must promote other forms of dispute resolution mechanisms.

40. In the Court of Appeal case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR the three judge bench observed:

“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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”

41. It has also been argued that the failure by the authority to give a decision on the complaint is also a decision, and the same is appealable. We are in total agreement. But however we are reluctant to exercise our jurisdiction at this level in compliance with the exhaustion doctrine.

42. Regulation 4(7) of the *Kenya Information and Communications (Dispute Resolution) Regulations, 2010* states that the authority may decline to accept a letter or memorandum of complaint that has been filed with any other authority or body that has jurisdiction to hear and determine the dispute. To avoid any invocation of the said regulation we do order as follows:

- i. That the interested party has the requisite Jurisdiction to handle the matter in the first instance.
- ii. That the matter herein is hereby referred to the Interested Party, namely the Communications Authority of Kenya for handling and disposal.
- iii. That each party will bear its own costs.

**DATED THIS 6TH DAY OF AUGUST, 2021. DELIVERED VIRTUALLY IN THE PRESENCE OF THE HONOURABLE MEMBERS OF THE TRIBUNAL, MBESA MALOMBE, MARGARET NYAMBURA NDUNG’U, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND RAMADHAN ABUBAKAR MUKIRA**

**ROSEMARY KURIA**

**CHAIRPERSON-COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL**

