



**Maxwell v Airtel Networks Kenya Limited (Complaint
1 of 2021) [2021] KECMAT 447 (KLR) (9 July 2021) (Ruling)**

Walobwa Jacob Maxwell v Airtel Networks Kenya Limited [2021] eKLR

Neutral citation: [2021] KECMAT 447 (KLR)

**REPUBLIC OF KENYA
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL
COMPLAINT 1 OF 2021**

**ROSEMARY KURIA, CHAIR, VIVIENNE ATIENO, RAMADHANI
ABUBAKAR MUKIRA, DAMARIS NYABUTI, COLLINS WANDERI,
MBESA MALOMBE & MARGARET NYAMBURA NDUNG'U, MEMBERS**

JULY 9, 2021

BETWEEN

WALOBWA JACOB MAXWELL COMPLAINANT

AND

AIRTEL NETWORKS KENYA LIMITED RESPONDENT

RULING

1. This is a ruling in respect of a notice of motion dated 24th March 2021 by the Respondent against the Complainant. The cause of action giving rise to the application is the alleged irregular depletion of airtime and data bundles by the Respondent in the Complainant's account for mobile phone number 0732 543 308. The application dated 24th March 2021 is supported by the grounds on its face and the supporting affidavit of Lilian Mugo sworn on the same day. The Complainant opposes the application through his grounds of opposition dated 31st March 2021. The application prays for the following orders:-
 1. That a declaration be given that the Complainant, by filing this Suit/Complaint/Appeal is in breach and/or contempt of court for failure to obey/comply with the Honourable Court's ruling and/or order issued in Nairobi CMCC No 8927 Of 2018 Walobwa Jacob Maxwell v. Airtel Networks Kenya Limited.
 2. That a declaration be issued that the Complainant is in breach of express statutory provisions on transfer of suits from one court to another being section 18 of the Civil Procedure Act and pursuant to the court order issued on 21st August 2021 in Nairobi CMCC No 8927 Of 2018 Walobwa Jacob Maxwell v. Airtel Networks Kenya Limited.



3. , That a declaration be issued that the Complainant's suit/complaint/appeal as filed before this Honourable Tribunal is time-barred pursuant to section 102F (2) of the [Kenya Information and Communications Act](#), 2010 and Regulation 8(6) of the [Kenya Information and Communications \(Dispute Resolution\) Regulations](#).
4. That in the alternative and without prejudice to all of the above, a declaration be issued that Complainant's suit/complaint/appeal herein filed is subjudice and /or res judicata.
5. That the complainant's suit be dismissed with costs to the Respondent/Applicant.
6. That the costs of this application be provided for.

The Respondent/Applicant's case

2. To begin with, the Respondent urges that the Complainant is in contempt of court for failing to obey the court order in Nairobi CMCC no 8927 of 2018 directing the latter to file an application in the High Court for the transfer of said case to this tribunal within 30 days from 21st August 2020. The Respondent also submits that the proposed application would have had no chance of success because the High Court had no jurisdiction to transfer a suit that had already been declared incompetent by the lower court. He suggests that this is the reason that the Complainant did not bother to make the application for transfer.
3. Secondly, the Respondent submits that this Complaint is res judicata because the dispute in question was resolved by the Communications Authority of Kenya, where the authority directed the Respondent to resolve the matter, and the Respondent proceeded to credit the Complainant's mobile phone account with airtime worth KShs 22. The Respondent urges that the matters in issue in this matter were also in issue in the complaint to the Respondent and an appeal to the authority where the dispute was resolved.
4. Thirdly, the Respondent submits that this complaint is time barred contrary to section 102F(2) of the [Kenya Information and Communications Act](#)(KICA)because it was filed more than 60 days since 9th July 2018, when it could have appealed from the decision of the authority and the action taken by the Respondent.

The Complainant/Respondent's Reply

5. The Complainant submits that the court order he is said to have failed to follow was erroneous because a court without jurisdiction had no jurisdiction to order that the matter would stand dismissed if it was not transferred within 30 days, so as to give rise to the defence of res judicata. Similarly, he urges that the Respondent could not reasonably invoke both sub judice and res judicata because they are mutually exclusive. Additionally, the Complainant criticizes the ruling of the magistrate's court for having been issued in the absence of the parties contrary to law. The Complainant further submits that the original jurisdiction of the tribunal is embedded in statute and cannot be taken away by the ruling of the magistrate. The Complainant also contests the Respondent seeking declaratory orders in the application and urges us to strike out the application. He also challenges the Respondent's description of this matter as an appeal instead of a complaint. Finally, the Complainant submits that this complaint is not time-barred and urges that section 102F (2) of KICA applies exclusively to appeals.

Analysis and Finding

6. 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 Respondent's application should be struck out for praying for declaratory orders at an interlocutory stage.
2. Whether the complainant's non-compliance with the order in Nairobi CMCC no 8927 of 2018 invalidates this complaint, and whether the ruling thereof is irregular for having being delivered in the absence of the parties to the suit
3. Whether this complaint is res judicata/subjudice, and whether this is an appeal or a complaint
4. Whether this complaint is time-barred

1. Whether the Respondent's application should be struck out for praying for declarations at an interlocutory stage.

7. The Complainant is right in submitting that declaratory orders are typically sought and made as final orders in court proceedings, and that they should not be prayed for in an interlocutory application. The Respondent did not respond to this objection to its application. We have scrutinized the form of the notice of motion and found that it would have been better if the Respondent had applied for the striking out of the Complaint in a format akin to order 2 rule 15(b) (c) and (d) of the [Civil Procedure Rules](#) instead of applying for declaratory orders. This would have allowed it to adduce affidavit evidence, instead of filing a preliminary objection, as proposed by the Complainant, where only pure points of law can be considered. And certainly, it should not be too much to expect documents prepared by counsel to adhere to basic rules of drafting. Nevertheless, there is no ambiguity as to the kind of relief that the Respondent is asking from the tribunal. Consequently, notwithstanding the want of form, we find that this is a proper case to invoke Article 159(2) (b) of the [Constitution](#) to the effect that justice should be done without undue regard to procedural technicalities, and therefore decline to strike out the application.

2. Whether the complainant's non-compliance with the order in Nairobi CMCC no 8927 of 2018 invalidates this complaint, and whether the ruling thereof is irregular for having being delivered in the absence of the parties to the suit.

8. Both the Complainant and the Respondent are in agreement that the order in Nairobi CMCC no. 8927 of 2018 was incapable of execution because said suit had been found to be incompetent and the High Court has no jurisdiction to transfer an incompetent suit. We also agree and hold that the question of the complainant being in contempt of the court order does not therefore arise. The tribunal also disregards the complainant's submission that the ruling was irregular for having been delivered in the absence of the parties because we have already determined the order thereof to be inconsequential, and in any event this is a question of fact that was only introduced in the submissions.

3. Whether this complaint is res judicata/subjudice, and whether this is an appeal or a complaint.

9. We are unable to find support for the Respondent's submission that this is an appeal. The Complainant invoked the tribunal's original jurisdiction by filing a case he described as a civil suit, which would be referring to a complaint, and it is the Respondent who started referring to this matter as an appeal. Indeed, the direction by CAK on 9th July 2018 to the Respondent to resolve the dispute can hardly be deemed to have been a decision capable of being appealed from. Indeed, under regulation 5 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010, this direction was merely an initial step in the process of handling said dispute. Moreover, section 102A (1) (c) of KICA allowed the Complainant to approach this tribunal if he believed that the Respondent had not resolved the dispute in a satisfactory manner. As to whether that this complaint is res judicata or sub judice, we



find that no material has been placed before us showing that the issues directly and substantially in issue in this complaint have been determined by or are pending before a court of competent jurisdiction.

4. Whether this complaint is time-barred

10. As to whether this complaint is time-barred, we refer to section 102F (2) of KICA which reads as follows:-

Any person who is aggrieved by an action and decision of the Media Council, the Authority or a person licensed under this Act, may within sixty days after the occurrence of the event or making of the decision, against which he is dissatisfied, make a claim or appeal to the Tribunal.

11. The Complainant urges that the provision applies to only appeals, and not complaints. However, a systematic look at section 102F shows that to begin with, subsection (1) provides specifically for appeals from decisions of the Media Council and the Communications Authority of Kenya. Then subsection (2) gives a more general provision this time limiting to sixty days the period within which a person aggrieved by both actions and decisions of the Media Council, the Communications Authority of Kenya or persons licensed under KICA may make a claim or appeal to the tribunal. Finally subsection (3) proceeds to prescribe what the tribunal can do in respect of appeals only. We find that the word 'claims' in subsection (2) refers or applies to complaints because a claim necessarily refers to an action brought under the original jurisdiction of a court or tribunal, and the only such original action that KICA provides for is a complaint.

12. It is therefore our finding that section 102F (2) requires that complaints against any action of a licensee of the Communications Authority of Kenya such as the Respondent be filed within 60 days from its occurrence. The matters complained of by the Complainant occurred in the year 2018, and this complaint was filed in February 2021. This complaint is therefore time-barred. The result is that we unanimously allow the Respondent's application dated 24th March 2021 in the following terms-

1. This Complaint is struck out for being time-barred contrary to section 102F (2) of the [*Kenya Information and Communications Act*](#)
2. Each party will bear its own costs.

DATED THIS 9TH DAY OF JULY 2021

DELIVERED VIRTUALLY IN THE PRESENCE OF THE HONOURABLE MEMBERS OF THIS TRIBUNAL, MBESA MALOMBE, MARGARET NYAMBURA NDUNG'U, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND RAMADHAN ABUBAKAR MUKIRA

ROSEMARY KURIA

CHAIRPERSON-COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL

