



Safaricom PLC v Communications Authority of Kenya; Iristel Kenya Limited(Interested Party) (Tribunal Appeal 3 of 2021) [2022] KECMAT 24 (KLR) (11 March 2022) (Judgment)

Safaricom PLC v Communications Authority of Kenya; Iristel Kenya Limited(Interested Party) [2022] eKLR

Neutral citation: [2022] KECMAT 24 (KLR)

REPUBLIC OF KENYA

IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL

TRIBUNAL APPEAL 3 OF 2021

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

MARCH 11, 2022

BETWEEN

SAFARICOM PLC APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

AND

IRISTEL KENYA LIMITED INTERESTED PARTY

JUDGMENT

1. The Appellant moved this tribunal vide a Memorandum of Appeal dated 26th May 2021 which was subsequently amended and replaced by the Amended Memorandum of Appeal dated 1st October 2021. The same was accompanied by an amended statement of facts, list of documents all dated the 1st of October 2021.
2. The gist of the Appeal is that it is against the decision made by the Respondent on 13th April, 2021 directing the Appellant to commence and conclude interconnection negotiations with the interested party. The appellant alleges that the decision ought to have been reached after addressing all the concerns raised.
3. The alleged concerns had to do with the interested party, Iristel Kenya Limited; The concerns were:
 - a. That the shareholding of the interested party was entirely foreign, and that it is a Canadian Company.



- b. That the interested party did not have an existing customer base in its network, neither did it indicate the product it would offer.
 - c. That there was a risk that the interested party would engage in simboxing thus causing a danger to national security.
 4. The Appellant then sought the following orders;
 - a. That the appeal be allowed and the agreement of 26th May 2021 be set aside.
 - b. In the alternative to Prayer (a) above, upon appeal being allowed, the matter be remitted to the Respondent for conclusive reconsideration of the valid concerns raised in the Appellant's letter of 12th November 2019 with specific directions upon the Respondent to look into the issues of;
 - i. The Interested Party's adherence to the National Information, Communications and Technology (ICT) Policy.
 - ii. The Interested Party to submit information/evidence in support of their purported local subscription and locally offered products which would necessitate local interconnection without the risk of Simboxing.
 - c. Costs of the Appeal.
 5. The Respondent opposed the Appeal vide a Replying Affidavit sworn on 22nd July 2021 by Matano M. Ndaró, who is the Director Licensing, Compliance and Standards Department with the Respondent, Communications Authority of Kenya.
 6. It was the Respondent's response that pursuant to the request from the Appellant touching on its concerns, the Respondent carried out its independent investigations of the alleged issues and on 13th April, 2021 responded to the Appellant appropriately and adequately on the said issues.

In particular, the Respondent alleged:

 - i. That it had considered the operations of the Interested Party and issued it with a licence to provide services in Kenya.
 - ii. That the Respondent, by virtue of its authority had vetted the shareholding of the Interested Party and found it to be in conformity with the Regulations.
 - iii. That the Respondent had inspected the Interested Party's facilities and its business plan and had satisfied itself that the services it intended to provide were within its licence.
 - iv. That, further, the Interested Party was already interconnected with other operators and no issues nor concerns had arisen.
 7. The Respondent was of the view that the concerns raised by the Appellant, though valid were unmerited and premature at that particular point, and therefore could not be a basis to deny or delay the interconnection between the Appellant and Interested Party.
 8. The Respondent on 13th April, 2021 thus directed the Appellant to commence and conclude interconnection negotiations with the Interested Party.
 9. Pursuant to the said directions from the Respondent, the Appellant proceeded to negotiate and conclude the interconnection Agreement with the Interested Party on 26th May, 2021.



10. It was also the Respondent's argument that the directions issued by it on 13th April 2021 have been fully complied with and have taken effect.
11. The Interested Party equally opposed the Appeal vide the Replying Affidavit of Isaac Ohany, Director of Iristel Kenya LTD. He averred that they first requested for local interconnection services on 24th May 2019.
12. On 12th November 2019 the Appellant wrote a letter to the Respondent explaining on the reasons it declined to interconnect with the interested party.
13. The Interested Party further averred that it still enjoys a grace period of 3 years when it comes to the required compliance of 30% local equity ownership.
14. The interested party further annexed the interconnection agreement arguing that the clauses were clear on termination of international traffic.

Analysis And Determination

15. Having considered the respective parties pleadings and the submissions thereto, we find that the main issue for this appeal concerns the decision made on 13th April, 2021 directing the Appellant herein to commence and conclude interconnection negotiations with the Interested Party within 6 weeks from the date of the letter.
16. The Respondent further stated that 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 \(Interconnections and Provision of Fixed links, Access and Facilities\) Regulation](#) 2010.
17. Acting on this letter the parties herein reached an agreement and executed the same on 26th May 2021. Annexure "IO3" is a copy of the agreement. It captures in detail the terms of the agreement.
18. Another main issue of concern in this appeal is whether this tribunal can set aside the agreement reached by the Appellant and Interested party on 26th May, 2021.
19. It is not in dispute that the relevant parties herein entered into an interconnection agreement. It is further not in dispute that the parties fully complied with the decision of the Respondent dated 13th April, 2021.
20. Can this tribunal, guided by the relevant laws, then interfere with an agreement entered into by the parties? Indeed they were directed by the Respondent, the same direction was within the ambits of the law i.e Kenya Information and Communications (Interconnections and Provision of Fixed links, Access and Facilities) Regulation 2010.
21. The Appellant has not demonstrated from where would we get the power to interfere with an agreement entered into by the parties?
22. "A Court of law cannot re-rewrite a contract between the parties. The parties are bound by the terms of their contract..." These were the words by the Court of Appeal in [National Bank Of Kenya Ltd Vs Pipeplastic Samkolit \(K\) Limited](#) Civil Appeal No. 95 of 1999
23. This is a specialized tribunal, the power granted under section 102F of the [Kenya Information and Communication Act](#) is strictly limited.



24. Then once you marry the tribunal's powers and the prayers being sought, no provision comes to the aid of this Appeal.
25. Having signed the agreement, the Appeal has been overtaken by events, and parties can therefore only be bound by the terms of the agreement.
26. If the Appellant would find that there is any breach on the agreement then it can invoke the relevant provisions as per the agreement. This tribunal cannot delve into the terms of the particular agreement. The less we say about it the better.
27. It is therefore our unanimous finding that the Appeal lacks merit and the same stands dismissed. There will be no orders as to costs.

It is so ordered.

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

In the presence of:-

Kimaru for the Appellant

Ojiambo for the Respondent

Lawson Ondieki for the Interested Party

C/A Joy Kendi

DATED THIS 11TH DAY OF MARCH, 2022

ROSEMARY KURIA

CHAIRPERSON-COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL

