



**Chania Executive Cool Limited v Ahmed & another (Appeal E002 of 2021)
[2022] KECMAT 666 (KLR) (Civ) (19 August 2022) (Judgment)**

Neutral citation: [2022] KECMAT 666 (KLR)

**REPUBLIC OF KENYA
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL
CIVIL
APPEAL E002 OF 2021
ROSEMARY KURIA, CHAIR, COLLINS WANDERI, VIVIENNE ATIENO,
DAMARIS NYABUTI & RAMADHANI ABUBAKAR MUKIRA, MEMBERS
AUGUST 19, 2022**

BETWEEN

CHANIA EXECUTIVE COOL LIMITED APPELLANT

AND

SAKINA AHMED CONSUMER

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

JUDGMENT

1. The appellant has moved this tribunal *vide* a memorandum of appeal dated April 27, 2022 upon being dissatisfied by the decision of the respondent delivered on September 15, 2021 in Consumer Complaint No 101237676.
2. On May 20, 2022 parties agreed to canvass these appeal via written submissions and directions were issued by the tribunal to that effect.

Brief Background:

3. The gist of the complaint is that the appellant, a courier service provider, had lost a parcel belonging to the consumer which had been booked to be transported to Mombasa from Nairobi. A complaint was then lodged on the loss and the respondent delivered its ruling to the effect that;
 - a. The consumer erred by failing to declare the contents of her valuable parcel as well as insuring the same against loss or damage.
 - b. The appellant is fully culpable for the loss of Miss Sakina Ahmed's parcel.



- c. The appellant to fully compensate Miss Sakina Ahmed for the loss of her parcel as per approved compensation policy within 30 days from the date of adjudication.
 - d. The authority takes an appropriate regulatory action against the appellant for breach of license condition.
 - e. Any party aggrieved by the decision to appeal to the tribunal.
4. It will be noted that the loss of goods also provoked criminal proceedings (Mombasa Magistrate's Court Crim Case 1034 of 2020) which are still pending and a civil case which was struck out vide a ruling by Hon JM Nyariki in Mombasa CMCC E014 of 2020.

Appellant's Submissions:

5. The appellant filed its submissions and began by distilling the eight grounds of appeal to two general heads, namely:
 - a. The respondent had no jurisdiction to hear the consumer's complaint.
 - b. The appellant's right to be heard was obliterated.
6. In summary the appellant argued that the respondent misinterpreted Hon Nyariki's ruling striking out the claim against the appellant by deeming such striking out as a transfer of the case from the Magistrate's Court to the respondent's. It was argued that according to section 18 (b) of the [Civil Procedure Act](#) it is only the High Court that has the power to transfer a matter.
7. Secondly, that the respondent entertained a stale complaint as the consumer never sought leave to lodge the complaint after lapse of 60 days from the date the dispute arose. That the complaint was lodged after 118 days in breach of regulation 4 (1) of the [Kenya Information and Communications \(Dispute resolution\) Regulations, 2010](#). It was further presented that no leave was sought before filing.
8. The appellant also argued that the jurisdiction of the respondent was ousted by virtue of there being a criminal case pending. The appellant relied on regulation 7 of the [Kenya Information & Communications \(Dispute Resolution\) Regulations, 2010](#).
9. On the right to be heard the appellant submitted that it was never served with the complaint letter, nor any of the respondent's correspondence to the consumer's advocates. Further, the appellant said that it was not forewarned when it was contacted that a hearing was to take place, there were separate hearings on different dates, was locked out of the hearing on August 4, 2021, was denied an opportunity to cross-examine the consumer on her *viva voce* evidence and was subjected to a trial by ambush.
10. The appellant concluded by urging the tribunal to allow the appeal.

Respondent's & Consumer's Submissions

11. The parties also filed their submissions in opposition to the appeal, adopting the issues raised by the appellant.
12. On jurisdiction, it was submitted that the allegations that Hon Nyariki ousted the jurisdiction of the respondent in CMCC No E014 of 2020 is misconceived. The tribunal was referred to paragraph 4 of



the ruling where the court referred to the submissions of the appellant where it argued that the dispute should be governed by the respondent. The court agreed with this submission and stated;

“The CA is authorized under regulations 3 to resolve disputes between a consumer and a service provider.”

Therefore, the appellant cannot turn around and argue that decision by court ousted the jurisdiction of the respondent to hear the dispute.

13. On the question as to whether rule 4 (1) of *Kenya Information and Communications (Dispute Resolution) Regulations, 2010* ousts the jurisdiction of the authority, the respondent submitted on its discretionary powers under the said regulations to waive technicalities or procedural requirements set by any of the rules. The respondent relied on rule 3(4) which provides that in resolving disputes between a consumer and a service provider,

“The Commission shall not emphasize on technicalities or rules of procedure in resolving disputes filed under these regulations and may waive any rule or requirement where necessary.”

It was therefore the respondent’s submission that it exercised its discretion in adjudicating the matter.

14. Further the respondent stated that the Criminal Case Number 1034 of 2020 never ousted the jurisdiction of the civil proceedings. The respondent has a discretionary power on whether to assume jurisdiction under section 47 (e) of *Kenya Information and Communications Act* (KICA).
15. On the issue as to whether the appellant was accorded an opportunity to be heard the parties averred that indeed the appellant was heard and there was a witness present.
16. The parties closed by inviting the tribunal to find that the appeal is unmerited and the same be dismissed.

Analysis And Determination

17. We have considered each, and every party’s submission and we wish to crystalize the issues before us as follows:
 - I. Whether the respondent had jurisdiction to determine the dispute?
 - II. Whether the appellant was heard?
18. It is now trite law that jurisdiction is everything and without it a court must down its tools. The respondent is established under section 3 of *KICA*. Under regulation 3 of the *Kenya Information and Communications (Dispute Resolution) Regulations, 2010* the respondent 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 the as may be prescribed under the *Act*.
19. The dispute herein falls under regulation 3 (a), a dispute between a consumer and a service provider.



20. Regulation 3 (4) is also of importance on resolving this appeal. It provides as follows;

“The commission shall not emphasize on technicalities or rules of procedure in resolving disputes filed under these Regulations and may waive any rule or requirement where necessary.”

21. We agree with the submissions by the respondent that the above regulation enhances the discretionary power of the respondent to entertain the dispute even after the said expiry of the period for filing.

22. We as a tribunal cannot interfere with this discretionary power, we are guided by the *classicus* case of Mbogo & another v Shah [1968] EA 93, where it was held, *inter alia*, that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

23. The appellant has not satisfied the above to warrant this tribunal to interfere with the respondent’s discretion.

24. The appellant also argued that the matter by a ruling of Hon Nyariki, the respondent interpreted this as a transfer of the dispute. We agree that it is only the High Court with the power of such transfer, but upon perusing the ruling by Hon Nyariki and the decision by the respondent, we see nowhere where such interpretation or conclusion was made. The respondent assumed jurisdiction as donated by KICA.

25. The appellant also stated that there being a criminal case the respondent lacked jurisdiction to handle the matter. This argument has not been supported by any law or provision and the same falls on its face. It is trite law that existence of a criminal case does not estop a civil tribunal or court from assuming jurisdiction, in fact, the matters can run concurrently.

26. On the issue as to whether the appellant was heard, we have gone through the decision of the respondent, and we do find that indeed the appellant was heard. The appellant tendered evidence through one Ann Njeri on August 5, 2021, and to now claim otherwise is being dishonest.

27. On the basis of the foregoing, the tribunal unanimously dismisses the appeal with no orders as to costs.

DELIVERED VIRTUALLY ON 19TH AUGUST 2022 BY THE CHAIR OF THE TRIBUNAL, ROSEMARY KURIA AND THE HONOURABLE MEMBERS OF THE TRIBUNAL, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND RAMADHANI ABUBAKAR MUKIRA

In the presence of: -

Masore for the appellant.

Nyboma appearing with Ojiambo for the respondent.

Ms Ondieki holding brief for Omwenga for the consumer.

C/A Isaac Kapelkenei.



ROSEMARY KURIA
COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL

