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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 061 OF 2016

ONE STOP EVENTS CENTRE LTD (OSEC):..... PLAINTIFF

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VERSUS

1. UGANDA COMMUNICATIONS COMMISSION

2. MTN UGANDA:..... DEFENDANTS

BEFORE: HON. JUSTICE ESTA NAMBAYO

JUDGEMENT

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The Plaintiff, One Stop Events Centre Ltd (OSEC), filed this suit against the Defendants jointly and severally seeking for orders of this court that the Defendants compensate it 2,000,000,000/= (Two Billion Uganda Shillings only), being money arising out of wrongful allocation of short code 190 by the 1st Defendant to the 2nd Defendant. The plaintiff also seeks compensation for damages, interest and costs of the suit.

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Background to the suit

The brief background to this suit is that on the 12th January, 2012, the 1st Defendant licensed the Plaintiff to use short code 190 to provide directory services through short messages. Upon activation of the code, the plaintiff realized that the 2nd Defendant was already using the code and as such, it was not available for the Plaintiff's use. When the Plaintiff notified the 1st Defendant, it failed to reconcile the Parties until the Plaintiff's license to use the code expired, hence this suit.

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Representation

Learned Counsel Nathan Kasozi Kagezi appeared for the Plaintiff while Learned Counsel Augustine Idoot was for the 1st Defendant and Allan Waniale for the 2nd Defendant.

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The following issues were framed for trial: -

1. Whether there is a cause of action against the Defendants?
2. Whether the conduct of the Defendants jointly or severally infringed on the Plaintiff's right (if any) to use short code 190?

- 35 3. Whether the 1st Defendant is liable for failure to carry out its statutory duties of
restraining the 2nd Defendant from usage of short code 190 without a license?
4. If so, what remedies are available to the Plaintiff?

In addressing the issues Counsel for the Plaintiff addressed the 1 & 2 issues jointly, so did Counsel for the 2nd Defendant while Counsel for the 1st Defendant resolved the 1, 2 & 3 issues jointly. I will first address the 1st issue and then look at the rest of the issues separately if need arises.

40 **Resolution of issues**

Issue 1: Whether the Plaintiff has a cause of action against the Defendants.

Plaintiff's submissions

45 Counsel for the Plaintiff while citing the cases of *Sempa Mbabali –v- Kidza [1985] HCB and Auto Garage –v- Motokov [1971] E.A 314* submitted that a cause of action arises where a Plaintiff enjoys a legal right which is then violated by the Defendant and damages ensue out of that violation. Counsel also relied on Order 7 Rule 1 (e) of the Civil Procedure Rules which provides that a plaint shall contain the facts constituting the cause of action and when it arose.

50 He explained that in this case, the Plaintiff company applied for a license for usage of short code 190 to offer directory services to its customers and the 1st Defendant granted the Plaintiff the license. The Plaintiff paid all the licensing fees as reflected on pages 3-7 of Exhibit P1 – P6. Counsel further explained that the National Numbering Plan and Harmonization Policy introduced in 2006, required whoever wanted to use a particular short code to provide service to its intended customers to first apply for a license which could only be granted after payment of the requisite fees and this is exactly what the Plaintiff did. That there was no evidence
55 showing that the 1st Defendant granted the 2nd Defendant a license or permission to use the short code 190 for its business, neither was there evidence to show that the 2nd Defendant ever applied to use the short code 190; or that it ever received authorization from the 1st Defendant or paid the mandatory licensing fees since the introduction of the National Numbering Plan and Harmonization Policy for use of the short code 190. Counsel contended that the 2nd Defendant
60 illegally and without authorization by the 1st Defendant continued to use short code 190 when permission was actually granted to the Plaintiff and that as such, the Defendants' conduct amounted to encroachment on the Plaintiff's right, which establishes the Plaintiff's cause of action against the Defendants.

1st Defendant's submissions

65 In reply Counsel for the 1st Defendant submitted that one of the elements that must be present for a cause of action to be found is that the plaintiff must show that he enjoyed a particular justiciable right that the defendant is alleged to have breached. He relied on the case of *Auto Garage –v- Motokov No. 3 (1971) EA 541* and explained that in the instant case, the plaintiff did

not prove that it enjoyed any specific justiciable right that was breached by the 1st Defendant
70 and in respect of which it is entitled to receive any relief as pleaded or argued.

Counsel explained that while it is agreed that the plaintiff's sole basis of claim is hinged on the
grant of the authorization for the use of the short code 190, it should be noted that the plaintiff
does not enjoy any other contractual, common law or statutory rights outside the express
provisions of the authorization letter. That the authorization had specific obligations and terms
75 which were/ are equally binding on the plaintiff and it is not possible for the plaintiff to
approve and reprobate in relation to the authorization letter, as and when it suits it.
He explained that it is a common law principle of contract that one cannot take the benefits
under an instrument and disclaim the liabilities imposed by the same instrument. He referred
this court to the Oxford Law Dictionary, at page 28, for the definition of approve and
80 reprobate and the case of *Lissenden –v- C.A V. Bosch (1940) A.C. 412 per Lord Maugham at 417
& 418.*

Counsel submitted that the said doctrine estops one from accepting and rejecting the same
instrument at the same time and it is therefore, not open to the plaintiff, on one hand to claim
rights under the authorization while at the same time refuse to acknowledge that the
85 authorization was automatically revoked when it (the Plaintiff) failed to activate use of the short
code 190 on any of the telecommunications network after expiry of the time that was provided
as per Exhibit P10. That while it is true that the plaintiff had initially been authorized to use
short code 190 after meeting the necessary requirements, such a right was conditional on the
plaintiff meeting the mandatory requirement of activating the short code 190 within a period of
90 three months, which was extended by one month ending in May, 2012.

That throughout the proceedings, the plaintiff did not lead evidence to show or prove that the
1st Defendant breached or infringed any rights granted to the plaintiff.

Counsel emphasized that evidence on record points to a conclusion that the plaintiff lied about
its prior arrangements with the telecommunications companies and failed to meet any of the
95 authorization terms and conditions which triggered the automatic revocation of the
authorization. He relied on the case of *Interfreight Forwarders (U) Ltd –v- East African
Development Bank, SCCA No. 33 of 1992*, and invited this court to find that there was no act
of breach or infringement committed by the 1st Defendant against the plaintiff in relation to the
respective party rights and obligations provided under the authorization or the applicable
100 National Numbering Plans Guidelines or as a statutory body. That the plaintiff failed to
specifically plead and prove through evidence which exact/specific statutory duty the 1st
Defendant failed to exercise. Counsel prayed that this court be pleased to dismiss this case
against the 1st Defendant for failure to establish a cause of action against it.

2nd Defendant's submissions

105 For the 2nd Defendant, counsel relied on Section 10 of the Contracts Act, 2010 which defines a
contract as an agreement made with the free consent of parties with capacity to contract, for a

lawful consideration and with a lawful object, with the intention to be legally bound. He also cited Section 3 (1) and (2) of the same Act and explained that from the pleadings and evidence, there is no agreement, whether documentary, verbal or by conduct by or with the plaintiff to host code 190 on the 2nd Defendant's network. That the claim under paragraph 5 (d) of the
110 Plaintiff that the 2nd Defendant agreed to connect the plaintiff to its subscribers for Ugx. 200,000/= (Two hundred thousand shillings) was for provision of fixed lines and not to host code 190. That the plaintiff did not substantiate its claim by providing an agreement/or narrative on the receipt to clarify on the services paid for.

115 Counsel explained that the plaintiff tried to rely on a letter dated 5th September, 2012, (exhibit P9), from the 2nd Defendant to the 1st Defendant where it was stated in the last paragraph that; *"MTN Uganda therefore could not complete M/S One Stop Events Centre request because the code is already in use for a different service,"* to imply the presence of a connectivity contract to host code 190. He clarified that this phrase simply confirms that there was no agreement to host
120 the allocated code 190 on the 2nd Defendant's network because the 2nd Defendant was already using the code.

He submitted that Anson's Law of Contract, 29th Edition, at page 40 posits that for a contract to exist, the offeree must accept the offer either by words or conduct of assent to the terms of the offer. That the terms of the offer and the acceptance of such terms must be unequivocal. That in
125 this case, the plaintiff failed to adduce any evidence of the offer by the 2nd Defendant to host code 190, neither is there evidence of any acceptance by the plaintiff. That what has been proved is the 2nd Defendant's unequivocal refusal to host code 190 for the plaintiff as per Exhibit P9.

That the plaintiff obtained permission to use code 190 from the 1st Defendant before securing an
130 agreement with the 2nd Defendant (or any telecommunication provider) to host it. Counsel explained that PW1, Mitala Charles, conceded during cross examination that the plaintiff had nothing binding with the 2nd Defendant before the application for code 190 was made and this was corroborated by exhibit D5 (a letter dated 19 September, 2011) where the 1st Defendant advised the plaintiff to ensure that the short code 190 applied for could be
135 implemented by the service providers over whose network the application is to be accessed. That the plaintiff's response found in Exhibit D6 confirmed that the plaintiff did not have a legally binding agreement with any network provider.

Counsel submitted that by failing to secure an agreement with the 2nd Defendant as illustrated above, the plaintiff does not have a cause of action against the 2nd Defendant. He prayed that
140 this court be pleased to find that the plaintiff has failed to establish a cause of action against the 2nd Defendant and that this case be dismissed from court with costs.

Analysis

145 Order 7 rule 11 (a) of the Civil Procedure Rules mandates courts to reject a Plaintiff which does not disclose a cause of action.

In the case of *Kapeka Coffee Works Ltd –v- NPART, CA No. 3/2000*, Court held that in determining whether a plaintiff discloses a cause of action, the court must look at the plaintiff and its annexures, if any, and nowhere else.

150 In *Tororo Cement Co. Ltd –v- Frokina International Ltd, Civil Appeal No. 2/2001*, it was held that in order to prove that there is a cause of action, the plaintiff must show that;

(a) the plaintiff enjoyed a right;

(b) that the right has been violated; and

(c) that the defendant is liable.

155 If the three elements are present, a cause of action is disclosed.

In the instant case, when the Plaintiff applied for use of the short Code 190, the 1st Defendant advised the Plaintiff to ensure that the code could be implemented by the service provider(s) networks. The Plaintiff was required to first get clearance from the service providers before authorization to use the code by the 1st Defendant. (see exhibit PE1, dated 19th September, 2011).

160 On the 12th January, 2012, (Exhibit PE2), the 1st Defendant approved the Plaintiff to use the short code 190 for a period of one year on condition that the Plaintiff activated the code in a period of 3 calendar months from the date of approval. Failure to activate the code within the stipulated period would result into revocation of the Code assignment.

165 On the 10th April, 2012, the Plaintiff had not activated the Code. The 1st Defendant extended the period of activation by one month. There is no evidence on court record to show that the Plaintiff ever activated the code as was required of him.

170 On the 5th September, 2012, the 2nd Defendant wrote to the 1st Defendant confirming that it, (2nd Defendant) was still using Code 190 for the missed call alert services. That the 2nd Defendant had been using this Code even before the coming into force of the Short Code Harmonization Plan on the 1st of November, 2007. The 2nd Defendant explained that it was still facing challenges with the code harmonization process. In the last paragraph of this letter, the 2nd Defendant states that it could not comply with the Plaintiff's request because the code is already in use for a different service.

175 In another letter dated 10th February, 2006, MTN Uganda wrote to the 1st Defendant indicating the short codes in use on MTN Uganda Network. This letter was tender in court as exhibit PE24

on page 22 of the Plaintiff's trial bundle. On the next page of this exhibit, there is a list of short codes that the 2nd Defendant was using. Short Code 190 is listed as one of the Short Codes in use. I'm convinced that the 2nd Defendant was already using Short Code 190 by the time that the Plaintiff requested for it from the Plaintiff. It would also mean, on the balance of probabilities, that the Plaintiff did not first cross check with the service providers before it applied to the 1st Defendant to use Short Code 190 and yet it was a requirement clearly communicated by the 1st Defendant that;

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185 *"prior to submitting an application to UCC, applicants are advised to ensure that the planned application and short code applied for can be implemented by the service provider(s) over whose network the application is to be accessed by the targeted users"* (see the last paragraph of Exhibit PE1).

Had the Plaintiff followed the right procedure as guided by the 1st Defendant, it would have found that Short Code 190 was not available for use. I find that the Plaintiff had no right to use Short Code 190 as the 2nd Defendant was already using the code. The pleadings and evidence presented by the Plaintiff do not show that the Defendants infringed on the Plaintiff's right to use short code 190. The plaintiff failed to carry out due diligence to ensure that the Short Code 190 was available for use before filing its application with the 1st Defendant. Therefore, I find that the Plaintiff has not established a cause of action against the Defendants and do hereby dismiss this suit from court with costs.

195 I so order

Dated, signed and delivered by mail at Kampala this 20th day of November, 2023.

Esta Nambayo
JUDGE
200 20th/11/2023.