

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

HCT - 00 - CC - CS - 297- 2008

MTN UGANDA LIMITED ::
PLAINTIFF

VERSUS

UGANDA TELECOM LIMITED ::
DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The Plaintiff M/s MTN Uganda Limited (hereinafter referred to as “MTN”) a telecommunications company sued M/s Uganda Telecom Limited (hereinafter referred to as “UTL”) another telecommunications company for the sum of UShs.3,482,303,277/= for breach of contract arising from an Interconnection Agreement between them.

It is the case for the Plaintiff’s MTN that they entered into an Interconnection Agreement with the Defendant UTL on the 1st February, 2001 which set out the terms and fees by which the parties would interconnect their networks. MTN then over time billed UTL for the period March to December, 2007 the sum of UShs.6,967,993,089/= out of which UTL only paid UShs.3,475,689,812/= leaving an outstanding unpaid amount of UShs.3,482,303,277/=. The said sum of UShs.3,482,303,277/= arises out of a dispute as to the treatment of telecommunications traffic to a Southern Sudan telecom company called M/s Gemtel Limited (hereinafter called Gemtel) through UTL.

The Defendant disputes liability for that sum and contends that the same is arrived at by the Plaintiff wrongly applying domestic/local rates to traffic originating from the Plaintiff's network transiting through the Defendant's network and terminating onto the network of Gemtel a third party operating in and out of Southern Sudan. The Defendant contends that if international transit traffic rates were applied instead of domestic rates, then, there would be no amount due from it to the Plaintiff.

The two parties do not dispute a business relationship in the form of a telecommunications Interconnection Agreement. It is also not in dispute that traffic to Gemtel was routed through the Defendant UTL.

Pre trial conferencing

At the pre trial conference and subsequently during the trial, it was evident that there was no consensus on the wording of at least one issue. The main question in dispute that the parties have a problem phrasing relates to how the traffic on code +256 477 xxx through UTL to Gemtel should be treated i.e. is it local or International traffic. The Plaintiff's proposed the issue

"Whether telephone traffic originating or terminating on code +256 477 xxx is local or International traffic?"

The Defendants on the other hand proposed the issue

"Whether traffic originating from the Plaintiff's network and terminating on code +256 477 xxx terminated on the Defendant's network or terminated on the network of Gemtel in Southern Sudan ...?"

The Defendants take the view that they pleaded a material proposition of fact, that it was not liable for the suit sum claimed because the traffic to

which it related was in fact International transit traffic terminating on the network of Gemtel a telecom service provider in Southern Sudan operating under license from the Ministry of Telecommunications and Postal Services of the Government of Southern Sudan (hereinafter called "GOSS"). The Defendants further contend that the Plaintiffs did not respond to this material fact thus putting the material fact in issues pursuant to Order 15 Rule (1) and (2) of the Civil Procedure Rules (CPR) and Order 8 Rule 18 (5) of the CPR.

The framing of this issue was then left to the court under Order 15 Rule 5 of the CPR which provides

"... The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit and all such amendments or additional issues on such terms as it thinks fit and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed ..."

The test to be applied by Court in the application of Order 15 rule 5 is the determination of the matters in controversy between the parties.

A review of the pleadings and the joint case scheduling conference memorandum dated 24th April, 2010 shows that the real matter for determination is whether or not the sum of Shs.3,482,303,277/= is payable by UTL to MTN. The answer to this question lies in a series of interpretations of sub questions culminating in the most important one of whether the traffic to Gemtel is local or International traffic. I shall address in more detail later in my Judgment. The rest of the issues were not in controversy and so the issues to be addressed by court are;

1. Whether the code +256 477 xxx was assigned to Southern Sudan, and if so, whether such an assignment was valid.

2. Whether the Defendant is liable to pay the Plaintiff the sum claimed or not?
3. Whether the Plaintiff is entitled to the interests as claimed in the plaint or not?
4. What remedies are available to the parties?

Mr. Joseph Matsiko appeared for the Plaintiff while Mr. Didas Nkurunziza appeared for the Defendant. The Plaintiff called three witnesses namely Mr. Anthony Katamba (PW1) the General Manager Legal and Corporate Services of the Plaintiff Mrs. Martha Kanene Onyeajuwa (PW2) a telecommunication expert and member of the International Telecommunications Union (ITU) Study Group 2 and Mr. Chijloke Obuna (PW3) Head Carrier Relations of the Plaintiff. The Defendant called one witness Mr. Donald Nyakairu (DW1) The Chief Legal Counsel and Corporate Affairs Officer of the Defendant.

In making findings on the above stated issues, I shall start with the second issue first as it provides the basis for the dispute as a whole.

Whether the code +256 477 xxx was assigned to Southern Sudan, and if so, whether such assignment was valid.

The facts.

It is an agreed fact that by a letter dated 22nd June, 2006 (Exh. D.10) the Defendant UTL informed the Plaintiff MTN that it had set up Interconnection with Gemtel a telecommunications' operator in Southern Sudan.

Secondly, that Gemtel was in the process of acquiring their own code. In the meantime, they had been assigned code +256 477 xxx for all their traffic.

Thirdly, that the rates applicable to traffic terminated on the said numbers with that code will be International traffic and the termination rate shall be US\$ 0.50 with effect from the 1st June, 2004. From the evidence on record

Gemtel was introduced to the world telecom operators by a letter dated 3rd June, 2005 (Exh. D.2) signed by **KUOL MANYANG JUUK** Chairman Sudan People's liberation movement (SPLM) Economic Commission. The letter sought to recommend Gemtel as a "suitable partner for providing ... essential telecommunications services to the people of Southern Sudan". Almost a year later the Minister of Telecommunications & Postal services of GOSS **Maj. Gen Gier Chuang Aluong** in a letter dated 24th April, 2006 (Exh. D. 3) wrote to his Ugandan counter part **Hon. John Nasasira** Minister of Works, Transport and Communications also introducing Gemtel to Uganda and UTL. Exhibit D.3 raised important requests by GOSS. It reads in part

"... Southern Sudan is in the process of procuring an assignment of a telecommunications country code from the International Telecommunications Union (ITU), in the meantime however, Gemtel is ready to launch services but lacks a country code ..."

The letter further reads

"... Uganda Telecom has expressed its willingness to allow Gemtel network to interconnect with the Uganda Telecom network to allow the flow of traffic routed to and from the Gemtel network. This interconnection is only possible if we are allowed to use the Uganda Country Code (+256).

In the interest of the development of the region and assisting the Southern Sudanese people, in accessing telecommunication services we would like to request you to authorize the appropriate authorities to allow Gemtel to use the Uganda country code (+256) in the interim ..."

In response to this letter **Hon. John Nasasira** on the 26th April, 2006 (Exh. D. 4) wrote to The Director of Transport and Communications and the Executive Director Uganda Communications Commission seeking technical advice to enable him to take up the issues.

On the 10th May, 2006 (Exh. D. 5) Hon. John Nasasira wrote to his GOSS colleague and wrote

“... Uganda Telecom Ltd and indeed all Uganda operators can provide services to Southern Sudan either by extending their network coverage to the area or by using the Gemtel network, as long as the Government of Southern Sudan permits them to. In the latter case, the Uganda operators would in conjunction with Gemtel and/or other operators in Southern Sudan install facilities in Southern Sudan such that the traffic into and out of Southern Sudan is routed through the Ugandan operator’s gateways. This means that the subscribers in Southern Sudan would have numbers beginning with the code (+256).

In such a scenario however, all the concerned parties shall agree that this is a TEMPORARY measure as Southern Sudan awaits their country code from ITU. If they agree, Uganda Communications Commission advises that for fixed lines, a special area code different from the existing area codes shall be used for Southern Sudan, while for the mobile subscribers, a special group of numbers derived from the existing operator code shall be used ...”

This letter was copied to the Uganda Communications Commission (hereinafter referred to as the “UCC”), Gemtel Ltd and UTL.

On the 16th May, 2006, UTL wrote to Gemtel (Exh. P.8) and stated

“Uganda Telecom will grant Gemtel usage of the following code beginning with +256 477 for use by subscribers in Southern Sudan ...”

This letter was copied to UCC.

On the 23rd May, 2007, UTL wrote a letter to MTN (Exh. P.10) regarding Southern Sudan traffic and stated

“... We did write to you on June 22, 2006 informing you of the interconnection arrangement we had entered into with Ms. Gemtel, a telecommunication operator in Southern Sudan.

We did inform you that the traffic from MTN terminated on the number range +256 477 xxx which was temporarily assigned to Gemtel, would be international traffic terminating in Southern Sudan and the termination rate would be US\$ 0.50 with effect from June 1, 2006. We are concerned that MTN has refused to accept this rate although the traffic from MTN and being terminated on the Gemtel network is growing and also includes international traffic transiting MTN and terminating on Gemtel via UTL.

We have blocked the traffic as we have failed to come to an understanding on this matter. We therefore seek to negotiate and agree on this rate as soon as possible, we therefore propose a meeting on Friday May 25, 2007 at 12:00 noon at our offices at Rwenzori Court ...”

It is therefore clear that by 23rd May, 2007, a significant amount of traffic to Southern Sudan had already commenced. However, it was also clear that there was no mutual agreement between UTL and MTN how to handle the traffic. Instead there was a lot of back and forth correspondence on the matter. Nearly two years later, MTN wrote to UTL on the 29th February, 2008 (Exh. P. 13) and stated

“... the MTN invoices make no reference whatsoever to traffic to Southern Sudan as the current interconnect agreement with UTL has no provision for this route. It has always been the position of MTN Uganda that all traffic terminating on the UTL network code +256 47 xxx is local traffic and this has not changed. All reconciliations in our invoices are based on this position which is consistent with the interconnect agreement ...”

These are the brief facts

The legal arguments

MTN

It is the position of MTN that the code +256 477 xxx was never assigned to Southern Sudan. Counsel for MTN submitted that only the Regulator UCC by virtue of its functions under Section 4(g) and (j) of The Uganda communications Act (Cap. 106 hereinafter referred to as The “UCA”) could allocate a numbering plan and implement international communication agreements on the matter.

Counsel for the MTN further submitted that the assignment and/or the permission to use a country code while the preserve of a national regulatory authority (like UCC) required the authorization of the ITU which was not done in this case. He took the view that the Minister of Works Housing and Communication purported to allocate Uganda’s country code

+256 to Southern Sudan which powers the Minister did not have. He submitted that the Minister could only issue guidelines to UCC exercisable through a statutory instrument that was to be published in the national gazette which was also not done in this case. In this regard, I was referred to Section 11 of the Uganda Communications Commissions Act which provides

- “ 1. *The Minister may, after consultation with the commission give the commission guidelines on sector policy as may be appropriate.*
2. *The guidelines referred to under subsection (1) shall be in writing and shall be published by the commission in the gazette. “*

Counsel for MTN further submitted that; the usage of Uganda's country code +256 47 xxx in Southern Sudan breached both ITU regulations and the Laws of Uganda. That being the case, UTL could not rely on an illegal arrangement to claim that the traffic in issue is international traffic, when under the UTL regime the code is a local Ugandan code.

UTL.

Counsel for UTL submitted that the dispute did not involve the assignment of a country code in the common sense of the word. He submitted that what happened was that the GOSS requested the Government of Uganda to allow traffic destined to or from its territory through Gemtel a licensed operator to use the country code of Uganda +256 while it processed the application for its own code. Counsel for UTL submitted that the Minister in Uganda stated that this was possible but only as temporary measure. He submitted that this was a policy guideline from the Minister to which UTL complied with and assigned one of its codes 477 to Gemtel.

Counsel for UTL submitted that this action was perfectly legal and valid. In this regard counsel for UTL referred me to the Constitution of The International Telecommunications Union (hereinafter referred to as the “*The ITU Constitution*”) which provides in its preamble that

“...while fully recognizing the sovereign right of each state to regulate its telecommunications and having regard to the growing importance of telecommunication for the preservation of peace and the economic and social development of states ... with the object of facilitating peaceful relations, international cooperation among peoples and economic social development by means of efficient telecommunication services ...”

This preamble it was argued showed that the ITU Constitution is not intended to interfere with sovereign rights. Counsel for UTL further drew court’s attention to Article 5,1 of the ITU Constitution which provides

“... Each member state reserves for itself and for the recognised operating agencies the right to fix the conditions on which it admits
telecommunications exchanged with a state which is not a member state of the union. If a telecommunications originating in the territory of such a member state is accepted by a member state, it must be transmitted and in so far as its follows the telecommunications channels of a member state, the obligatory provision of this constitution, of the convention and of the Administrative, Regulations and usual charges shall apply to it ...”

Court’s attention was further drawn to Article 9 of the International Telecommunication Regulations (hereinafter referred to as “ITU Regulations” - Exh. D.28) which allow member states to allow special arrangements and provides

“... subject to national laws, member states may allow administrative or other organisations or persons to enter into such special mutual arrangements with members, administrations or other organisations or persons that are allowed in another country for the establishment, operation and use of special telecommunications networks, systems and services, in order to meet specialised international telecommunications needs within and / or between the territories of the members concerned and including, as necessary, those financial, technical or operating conditions to be observed ...”

Counsel for UTL submitted that Article 51 of the ITU Constitution and Regulation 9 of the ITU Regulations allowed telecommunications into and out of Southern Sudan through operators in Uganda and there is no evidence that this arrangement was objected to by the Government of Sudan. The only caveat was the compliance with local laws.

As to the provisions of the UCA, Counsel for UTL submitted that Section 11 of The UCA that requires that guidelines issued by the Minister to UCC shall be published by the UCC, in the Gazette is directory and not mandatory. In this regard, I was referred to the case of

Sitenda Sebalu V Sam K. Njuba & Another Election Petition Appeal No. 26 of 2007.

where the reference to the words “shall” in legislation was held to be directory and not mandatory. That being the case, the Minister acted within his powers under the UCA.

As to Uganda’s obligations under the ITU, Counsel for the UTL submitted that nothing illegal was done in the arrangement between the Government of Uganda and GOSS. He challenged the reference made by PW2 to the

ITU – Telecommunications Recommendation E. 190 (Exh. P.26) which, required under Principle No. 6 that numbering resources will only be utilized by the assignee for the specific purpose for which they have been assigned by ITU-TSB.

Secondly, the fact that PW2 represented Nigeria on the ITU study Group 2 which was responsible for the publication of the document did not make her an expert that court could rely on.

Furthermore, Counsel for UTL submitted that though S.40 of The UCA required an operator to comply with international conventions, regulations and recommendations; this too was directory but not mandatory. He submitted that National Courts are enjoined to apply the national laws in preference to international laws or obligations when the two conflict. He pointed out that the breach by the state of its obligations under an international treaty or law is not justiciable in its national courts but elsewhere. In this regard, I was referred to the case of

Saloman V Commissioner of Customs & Excise 1966 3 All E.R 871 and the learned author **Ian Brownlie** in his book **Public International Law** (publication details were not cited). In this regard, Section 11 of the UCA took precedence over Recommendation E. 190 of the ITU.

Lastly, Counsel for UTL took the view that it was the Minister in Uganda who granted a licence to UTL under Section 33 of the UCA and therefore it is difficult to see how UTL could have violated its licence by doing what the Minister who issued the licence in the first place had authorized it to do.

Resolution of the issue.

I have addressed my mind to the pleadings, the evidence before court and the submissions of both Counsels for which I am grateful.

The issue and how it was crafted by the parties refers to assignment and I shall address that question. However, I am also cognizant of Order 15 rr (1) and (5) regarding the framing of issues. The purpose of framing issues is for court to determine the matters in controversy between the parties. Section 33 of The Judicature Act also enjoins the court to grant remedies so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters is avoided.

This is the true purpose of litigation and any issue so framed by the parties must achieve that effect and where it does not, the court may on its own motion amend the issue accordingly.

To my mind, the present issue is more than a question of assignment. It rests on whether it was lawful for code +256 477 xxx to be used by Gemtel in Southern Sudan.

What is Code +256 477 xxx?

The code +256 477 xxx is not defined in law. However, guidance can be obtained from Exhibit D.26 entitled. “The international public telecommunication number Plan (ITU-Telecommunications Recommendation E.104)”. Paragraph 4.16 thereof provides (Page 232 of the joint scheduling bundle).

“International Public Telecommunication number ... A string of decimal digits that, for a geographic country code, uniquely identifies a subscriber or a point where a service is provided. For the case of a global service code, it identifies the subscriber of the service, for networks it identifies a subscriber of the network ...

...The number which includes the country code and subsequent digits, but not the international prefix, contains information necessary to route the

call to this termination point on a public network (it may also contain supplementary information necessary to forward it on a private network). It is sometimes referred to as an E.164 number or international number ..."

Exhibit D.2 (Page 195 of the joint scheduling bundle) entitle "list of ITU-Telecommunications Recommendation E. 164 Assigned Country Codes (Position as at 15th April, 2009)" lists country code 256 to Uganda (Republic of) and country code 249 Sudan (Republic of).

There is no assignment of country code to GOSS. It is significant to note from this document that a country code can be allocated to a country, geographical area or Global service. There are even spare unallocated codes like 287, 288 and 289.

It is not in dispute between the parties that code +256 is the country code for Uganda. However, based on the ITU numbering plan documentation, it is safe to find that +256 477 xxx is a country code for Uganda with subsequent digits containing the information necessary to route a call to this termination point on a public network or forward it on a private network.

What is Gemtel?

According to GOSS in their letter referenced M.T. x PS/GOSS/A-05/06 of 24th April, 2006 (Exhibit P.5), M/S Gemtel Ltd is "... a licensed Telecommunication operator in Southern Sudan ...". It would appear that M/S Gemtel Ltd is not a state run company but rather a private telecommunications operator (based in, yei, Southern Sudan according to the letter) whose chairman/CEO is called Mr. Augustus Mulenga.

Could Gemtel use Uganda's country code?

This question is at the heart of the dispute. Having found that Gemtel is a private telecommunication operator in Southern Sudan, it is important to note that the request by GOSS to the Government of Uganda was for Gemtel to use Uganda's country code +256. This in my view is different from GOSS asking Uganda to use its country code. Exhibit P.5 was clear it reads

"... we would like to request you to authorize the appropriate authorities to allow Gemtel to use the Uganda country code (+256) in the interim for provision of our services in Southern Sudan ..."

The same letter states earlier

"... Southern Sudan is in the process of procuring an assignment of telecommunications country code from the International Telecommunications Union (ITU). In the meantime however, Gemtel is ready to launch services but lacks a country code ..."

The communication industry in Uganda is regulated by the Uganda Communications Act (Cap. 106 "UCA"). The parties to the dispute are all agreed on this point. Unless exempted under Section 25 of The UCA, no person shall establish a telecommunications station, provide such services and or contract, maintain or operate telecommunications apparatus. The Minister under Section 33 of the UCA upon recommendation of The Uganda Communication Commission (UCC) can grant such a licence. Such a licence once granted under Section 41 of The UCA shall not be used for a purpose other than that for which it was issued. These provisions would

affect telecommunication companies operating in Uganda. The UCA does not expressly provide for licensing operators outside Uganda or for the use of the country code +256 by an operator outside Uganda.

The above notwithstanding Gemtel was allowed to use Uganda's country code of +256 and was assigned by UTL the subsequent digits of 477 xx which originally were reserved for traffic to Northern Uganda. There was no opposition whether by The Government of Uganda, the UCC as regulator or MTN for that matter to this arrangement. Traffic began to flow for purposes of this dispute from MTN to Gemtel subscribers on +256 47 xxx. Whether this was an assignment or an allocation or a loan of the code to my mind is more of an academic than a substantive issue. The facts on record are that this occurred. The parameters of this arrangement can be derived from the letter of Ugandan Minister Eng. Nasasira referenced MIN/PERs/63 of the 10th May, 2006(Exh. P.6). It appears that the Minister had received professional advice on the matter most likely from UCC as he refers to them at the end of his letter. There are four points to note out of the Ugandan Minister's letter.

First he writes:-

"... Indeed all the Uganda operators can provide services to Southern Sudan either by extending their network coverage to the area or by using the Gemtel network, as long as the Government of Southern Sudan permits them to ..."

The point the Minister is making here is that UTL or indeed any other operator in Uganda can extend telecommunication services to Southern Sudan. Of course this means that Uganda's country code +256 would have to be used to achieve this purpose. To my mind, the Minister states a purely technical possibility but does not ground it in any legal authority either clothed on him or otherwise.

Secondly, the Minister states:-

“... In the latter case, the Ugandan operators would in conjunction with Gemtel and/or other operators in Southern Sudan install facilities in Southern Sudan such that traffic into and out of Southern Sudan is routed through the Ugandan operator’s gateways ...”

Here the Minister is offering a possibility of Uganda operators installing their facilities in Southern Sudan.

Thirdly, and most importantly, the Minister states:-

“...All concerned parties agree that this is a TEMPORARY measure as Southern Sudan awaits their country code from ITU ...”

Here the Minister in capital letters states that; this is temporary measure. It is interesting that he does not use the term assignment which the parties to this dispute have spent a lot of time submitting on. I feel fortified therefore in my reference to arrangement as opposed to assignment as the true description of what happened.

Fourthly, as to the country code use, the Minister writes:-

“...Uganda Communications Commission advises that; for fixed lines, a special area code different from the existing area codes shall be used for Southern Sudan, while for the mobile subscribers a special group of numbers derived from the existing operator code shall be used ...”

Clearly, here the Minister is making the point that the digits used should contain enough information to route the call to the desired termination point namely Gemtel subscribers.

Counsel for the MTN submitted that the above did not amount to an assignment of code +256 to Southern Sudan, nor a guideline by the Minister under the UCA and therefore was an illegal arrangement that could not be referred to as International traffic.

If this arrangement was illegal, then in my view, the parties UTL and MTN are in *pari delicto* (i.e. in equal fault) as they used the said questionable arrangement.

I agree with both Counsel that this arrangement was not an assignment because under the ITU Constitution and Recommendation E. 190 (both parties rely on it in the scheduling bundle), only the ITU can assign country codes. This was also recognised by the Ministers of Uganda and GOSS.

The Uganda Minister's letter I find also does not qualify as guidelines to the UCC as this was not published in the gazette. This is a matter of industrial Regulation that must be transparent and public. With the greatest of respect to Counsel to UTL such gazetting of guidelines cannot be directory within meaning of the **Sitenda Sebalu case** (supra). If guidelines were not gazetted, the communications industry cannot be deemed to have knowledge of them.

Such guidelines can only be effective when in writing and published by the UCC in the gazette. In any event, the said letter (Exhibit P.7) was in principle written to **Maj. Gen. Gier Ghuang Aluong** The Minister of Telecommunications and Postal Services of GOSS and only copied to UCC and therefore further falls short of a guideline within the meaning of Section 11 of The UCA.

That being the case, the said arrangement with Gemtel was also not done in conformity with Ugandan law. Counsel for UTL submitted that the arrangement was an exercise of sovereign or executive power of a state to break or breach its obligations under an International treaty or law and is not justiciable in national courts but elsewhere. He further submitted that; national courts are enjoined to apply the national laws as opposed to International laws or obligations when the two are in conflict.

In this regard, I was referred to the speech of **Diplock L. J.** in the case of ***Saloman V Commissioner of Customs & Excise*** [1966] 3 ALL E.R. 871.

If the arrangement, however called, was a breach of Uganda's International obligations under ITU, then, I agree that such breach of an International obligation under ITU then is not justiciable in our national courts unless the ITU treaty had been domesticated under Ugandan law. That notwithstanding, it does not put Uganda in good stead to claim that breached its international treaty obligations. That is by deliberately exercising sovereign or executive power to break its ITU obligations to enter into an arrangement with Gemtel! However, as found above, this arrangement also failed the test of national law which coincidentally is the minimum requirement of Article 9 of the ITU Regulations in such a situation.

At best the arrangement with Gemtel was an ad hoc temporary measure between the parties and players involved.

Before I leave this issue, I need to express my surprise over the way this arrangement was handled as though there was no precedent for it; whereas there is. The GOSS is an autonomous region in the Southern part of the Sudan as a result of the Comprehensive Peace Agreement (CPA) of 2005 signed in Nairobi. Following a nation wide referendum held on the 7th

February, 2011, the GOSS shall become an independent state on the 9th July, 2011. This information is all in the public domain. A direct parallel can be made with the Palestinian Authority (PA) which as a result of the Oslo Accords of 1993 has limited autonomy over certain territories whose telephone calls were routed through the Israel Country Code 972 (See Exhibit D.24).

However, in 1998, the PA was granted an observer status as a non voting member of the ITU.

In 1999 over the objections of Israel, the ITU reserved the use of ITU – Recommendation E.164 code 970 for the PA as a preliminary step towards permanent assignment. Country Code 970 will be permanently assigned to the PA by the ITU at a later date. Furthermore, from Exhibit P. 25, it is clear that two other non members of the ITU namely; Hong Kong and Taiwan had country codes. To my mind therefore, a solution for GOSS as a non member of ITU was to go the way of the PA and not get a temporary arrangement with the Government of Uganda.

In answer therefore to the issue whether the code +256 47 xxx was assigned to Southern Sudan the answer is; no. That being the case, I need not answer the question of validity save for noting that this was an ad hoc arrangement between the parties.

Whether telephone traffic originating or terminating on code +256 47 xxx is local or International traffic?

I have already above referred to the difficulty the parties had in framing this issue.

The facts.

The facts are the same as in the last issue, so I shall not restate them here.

The arguments.

MTN.

Counsel for the MTN submitted that GOSS is part of the Sudan which had its own country code of +249 xxx. He relied heavily on the evidence Mrs. Martha Kanene Onyeajuwa (PW2) who MTN brought in as a telecommunications expert on the subject. In her evidence PW2, testified that a call made to MTN (+256 77 xxx) from a number +256 477 xxx would be treated as a local call and a call from MTN to +256 477 xxx would still be a local call.

This is a process she referred to as “housing”. The code +256 477 xxx was for Uganda and UTL. Therefore Gemtel having the code +256 477 xxx was part of the UTL network. In his evidence, PW1 testified that UTL had been assigned by UCC the digits 477 xxx to Northern Uganda and so for example digits 476 xxx was for Arua, 473 xxx was for Lira and 471 xxx was for Gulu all of which was local traffic. There was no logic therefore for traffic to 477 xxx (Gemtel) to be International traffic.

Counsel for MTN submitted that the guiding principle behind interconnection is reciprocity for like and like traffic. I was referred to Reg. 17 of The Telecommunications (Interconnection) Regulations SI No. 25 of 2005 which provides

“... (1) Each interconnects provider shall establish reciprocal compensation arrangements for transport and termination of telecommunication traffic with any interconnect seeker ...”

Counsel for MTN submitted that the principle of reciprocity is offended by UTL charging USD 0.5 cents yet for the same service MTN was to pay US\$ 100.

UTL

Counsel for UTL asked court to dismiss the evidence of PW 2 as unreliable. He submitted that the evidence of DW1 emphasized that the digits 477 xxx pursuant to the permission of the Government of Uganda operated only in and out of Southern Sudan and could not operate inside Uganda.

The traffic to 477 xxx was Gemtel traffic in Southern Sudan and did not terminate on the UTL network and this was illustrated in the traffic flow diagram Exhibit D. 29.

Counsel for UTL submitted that the definition of what, International, local, regional or premium traffic will depend on what is provided for in the Interconnection Agreement (Exh. P.1). In this particular case, Counsel for UTL drew court's attention to the Interconnection Agreement which provides

"6.1. The interconnect rates applicable to this agreement are contained in the Rates Appendix/Tariff appended to this agreement.

6.4 For transit traffic from other parties network via the other party's network to a third party operator the price shall be the transit traffic rate as agreed between the parties and recorded in the Rates Appendix/Tariff appended to this Agreement ..."

Counsel for UTL submitted that the Interconnection Agreement should be construed as it is written as was held Hon. Justice Kanyeihamba (JSC as he then was) in the case of

MTN (U) Ltd V Uganda Telecom Limited [2005] EA 225.

Counsel for UTL submitted the relevant rates in the Appendix/Tariff Table are found in Section A1 and A4. This is because traffic originating from the +256 477 xxx code and terminating on MTN can only be charged by MTN in accordance with Section A1 being locally terminated tariff. On the other hand, local traffic terminating on the code +256 477 xxx Gemtel is governed by Section A4 and is International. This is because all the International Bands are in respect to traffic to (and not from) places outside Uganda.

Gemtel operating in and out of Southern Sudan is in a country other than Uganda. Counsel for UTL relied on the testimony of Dw1 where he testified how traffic from the UTL network ended up on the Gemtel network. DW1 testified that traffic from the UTL network to Gemtel passed through the UTL International gateway at Mpoma Uganda via satellite (International link) and down to the International gateway of Gemtel at Yei in Southern Sudan. This is how he testified other international traffic was routed.

Counsel for UTL referred me to Exhibit D.27 an ITU publication entitled "The Cost of International telephone calls" which explains how cost of an International call is made up; Exhibit D. 27 reads in part

"... The call flows over three distinct types of infrastructure the International link, the International gateway and the local loop. The cost of each of these components forms the basis for the price of an international call ..."

Counsel for UTL submitted that since UTL to Gemtel calls passed through the three distinct types of infrastructure as named above, this was further evidence that this was an International call.

Resolution of the issue.

The real issue for determination

The parties did not agree to the actual wording of this issue.

The Plaintiff's as stated earlier framed the issue *"whether telephone traffic originating or terminating on code +256 477 xxx is local or International traffic?"*

On the other hand, the Defendant's framed the alternative issue *"whether traffic originating from the Plaintiff's network and terminating on code +256 477 xxx terminated on the Defendant's network or terminated on the network of Gemtel in Southern Sudan ...?"*

It was suggested that the court invoke its powers under Order 15 rule 5 of the Civil Procedure Rules (CPR) to frame an appropriate issue that would determine the real matters in controversy in this suit. This is a correct case for the court to do so. Each party framed an issue that was geared to afford them a favourable result.

What then is the real issue in controversy for determination in this case? To my mind the real issue for determination is which rate should be applied to MTN calls made to subscribers of Gemtel i.e. local or International rates and that is what I shall determine while taking into account what the parties also had framed.

The relationship between MTN and UTL

In order to determine whether the calls in this suit are local or International one has to define the legal relationship between MTN and UTL.

It is the requirement of the Telecommunications (Interconnection) Regulations (supra) that each provider enter into reciprocal compensation

arrangements. This arrangement is popularly referred to as an Interconnection Agreement. In this suit, UTL and MTN entered into an Interconnection Agreement for reciprocal compensation effective 1st February, 2001. Both parties admit this agreement and so it is not in dispute. The Interconnection Agreement does not define what an International or local call is. However, what an International or local rate is provided for under Article 6 of the said agreement. The rates are contained in the Rates Appendix/Tariff Table appended to the said agreement. That notwithstanding Article 28 of the Interconnection Agreement provides

“... This Agreement represents the entire understanding between the parties in relation to Interconnection and supersedes all previous understandings, agreement or commitments whatsoever, whether oral or written. All references to ... annexes shall be deemed references to such part of this Agreement, unless the context shall otherwise require ...”

This to my mind means that one must look to this Agreement to establish what rate should be applied between MTN and UTL unless amended pursuant to Article 21 of the Interconnection Agreement. Any such amendment is subject to mutual negotiation after receipt of a 30 day notice to vary the agreement.

The applicable rate.

The parties are not agreed on the applicable rate on calls to Gemtel from MTN on the +256 477 xxx numbers. Counsel for MTN summarized the disagreement well. He submitted that the gist of UTL's argument was that traffic originating from the MTN network destined for code +256 477 xxx did not terminate on the UTL network but the net work of Gemtel in Southern Sudan. This issue in the eyes of the court is a technical one.

The expert evidence on the issue.

Expert witness for MTN PW2 is a Telecom Consultant (a holder of an MSC in Electrical Engineering plus has a Tele-traffic post graduate certificate) and worked for eight years with the Nigeria Communications Commission and did consulting work with ITU.

She testified that a call made from MTN to +256 477 xxx would be a local call. To my mind, her testimony boiled down to one point that is code +256 477 xxx was a Ugandan code belonging to UTL and not Gemtel. Gemtel in Southern Sudan had no other code for itself it had to use the UTL network.

The evidence of PW1 did not vary much from that of PW2. PW1 is a lawyer with a Masters Degree in Telecommunications and IT.

For UTL, the only witness was DW1 a lawyer with a Masters of Laws Degree. DW1 testified at length how calls from MTN to Gemtel through code +256 477 xxx had to be routed through UTL's International infrastructure at Mpoma via satellite to Gemtel's network and so the call was International.

Both sides raise compelling arguments. The court in such a situation of technical dispute can rely on an expert opinion. Section 43 of The Evidence Act (Cap. 6) provides

"... When the court has to form an opinion upon a point ... of science ... the opinions upon that point of persons specially skilled in that science ... are relevant facts. Such persons are called experts ..."

The opinions of experts therefore are relevant facts; but still the court has to make the final findings for itself. One important opinion that is missing in this dispute is that of the sector regulator UCC. There is no significant correspondence by UCC on this dispute and neither was it called by any other parties as an expert who regulates the telecommunications sector. This is worth noting because the functions of the UCC under the UCA are set out in Section 4.

These include;

“(a) To monitor, inspect, license and regulate communications services ...

(b) To draw up, establish, amend and enforce a national numbering plan and perform block number allocations ...

(c) To receive and investigate complaints relating to communication services and to take necessary action upon them ...

(d) To safe guard the rights of operators and enforce the performance of their obligations

(e) To regulate interconnect Interconnection and access systems between operators and users of International services.

(f) To advise the Government on communication policy.

(g) To carry on any other function that are related or connected to the foregoing ...”

The above functions put this current dispute squarely on the door step of the UCC. Indeed all significant correspondence relating to this dispute was copied to UCC including one dated 23rd May, 2007 (Exh. D.13) when UTL blocked MTN traffic. What is lacking is action by UCC which could have regulated this process and averted this suit. I shall refer more to this at the end of the Judgment.

The aforementioned notwithstanding, I am persuaded by the opinion of PW2 on this matter. She had the best qualifications and experience to

handle the technical issues. Her testimony was clear and consistent. She also had the added advantage of having worked as a telecom regulator in Nigeria. The compelling testimony of DW1 notwithstanding of how MTN traffic to +256 477 xxx would have to be routed through their Mpoma Satellite as would other International calls, the evidence shows that in reality, the UTL and Gemtel network were one and the same. This conclusion is akin to the company law principle of “lifting the veil” to ascertain the reality of the transactions. Gemtel had no network outside that of UTL and without the code +256 477 xxx which was a local code for Ugandan purposes, Gemtel could not operate. As found earlier, this was an ad hoc arrangement of a temporary nature that had been sanctioned by the Minister in Uganda. Everything technical about the said arrangement was Ugandan and I accordingly so find.

As to the rate, UTL had notified MTN that a rate of USD 0.50 would be applicable to them from 1st June, 2006. A perusal of the Interconnection Agreement and especially the tariff table Section A4 on International transit traffic shows that no such tariff existed. Article 28 of the Interconnection Agreement makes it impossible to apply the rate of USD 0.50 without a variation of the agreement as envisaged under Article 21. No evidence of a variation was presented to court. In any event, my aforementioned findings leave only one logical conclusion that the said traffic to Gemtel from MTN was locally terminated within the meaning of Section A1 (i.e. at US\$100) of the tariff table of the Interconnection Agreement and so I find accordingly.

Remedies

The last three issues framed by the parties relate to remedies and I shall collectively address them as such though I shall also address the said issues in the process.

Whether the Defendant is liable to pay the Plaintiff the sum claimed or not?

The computations

MTN

MTN is their pleadings sought to recover the UShs.3,482,303,277/= being the unpaid balance on the sum invoiced for the Interconnection fees for telephone traffic between the parties for the periods March 2007 to December 2007. This computation was based on reconciled figures shown in exhibits D.16 and D.17.

However, even as this case progressed, UTL has been paying the outstanding debt on account though it refused to accept that traffic to code +256 477 xxx i.e. Gemtel was local traffic. Such a determination then became critical to any final reconciliation.

As to interest MTN sought to recover UShs.401,176,506/= which was contractual interest which stood at UShs.1,495,506,359/= as at 7th October, 2010 the time of the hearing. Contractual interest is provided for under Article 7.1.3 of the Interconnection Agreement. This is computed at prime rate for debts from 1st September, 2001 to 31st March, 2002 and prime rate plus 1%p.a for debts from 1st April, 2002 onwards. Prime rate is defined as the prime overdraft rate charged by Citibank Uganda Ltd.

Counsel for MTN submitted that the due date for invoices is 22nd April, 2008 and the rate would be 18% plus 1% i.e. 19% p.a.

UTL.

UTL maintains that the Gemtel traffic is International and the US\$3,482,303,277/= only arises because domestic rates are applied to it.

UTL does not therefore disagree with the MTN computation if the traffic is found to be domestic/local.

Counsel for UTL however adds a new argument that; if the traffic to Gemtel is found to be local, then, MTN is estopped from so stating it. This is because UTL notified MTN by letter dated 22nd June, 2006 that the traffic was International and instead of protesting this MTN simply sent its traffic through the system. UTL therefore relied on MTN's actions and transmitted their traffic as such; until a year later in May, 2007 when MTN made a formal protest.

Resolution of the issue.

In light of my findings, that traffic from MTN to Gemtel via code +256 477 xxx was local, it follows that the computations of MTN are correct both in terms of the outstanding amount and the interest due. Of course this has to be adjusted against payments made on account by UTL during the course of the trial.

As to the issue of estoppel, I find that in line with the Interconnection Agreement reliance on correspondence outside it, would offend the parole evidence rule and not meet the test set out by the Supreme Court in the case of

Bank of Uganda V Masaba [1999] 1 EA 2

The definite and distinct terms entered into by the parties by their own consent regarding Interconnection are embodied in the Interconnection Agreement signed by the parties.

The supremacy of the Interconnection Agreement was also further emphasised in the case of

MTN (U) Limited V Uganda Telecom Limited [2005] E.A 225 (SCU)

Estoppel will therefore not operate here.

General damages

Assessment of quantum by MTN

Counsel for MTN submitted that this is a proper case for the assessment of general damages. I was referred to the case of

STOMS V HutchinSon [1905] AC 515 where **Lord MacNaghten** held that general damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of. Counsel for MTN submitted that UTL had unjustifiably held large portions of MTN's money which could have reinvested. He submitted that an award UShs.500,000,000/= in general damages would be in order.

UTL

Counsel for UTL did not address court on the subject of general damages.

Courts assessment

I agree with parameters of assessment of general damages as stated by Counsel for MTN. This case is however unique in that the parties participated in an ad hoc arrangement involving Gemtel that created a difficult reconciliation problem. It was hastily entered into without adjusting the Interconnection Agreement to deal with this temporary

arrangement. I would therefore give general damages of UShs.100,000,000/=.

Uganda Communications Commission

Before I finalize this case it is important that I make mention of the UCC and how as regulator it could have intervened to avert this particular dispute. I have already mentioned how UCC could have used its functions under section 4 of the UCA to intervene but did not. I can only add that the telecommunication industry is still relatively young in Uganda and this calls for stronger intervention and regulation than we have seen in this case which is unfortunate.

Secondly, given the technical nature of these type of disputes I make an urgent call for the establishment of the Uganda Telecommunication Tribunal under Section 75 of the UCA. This will greatly assist in disputes such as this one as the tribunal shall have the technical competence to address these complaints in a more faster, efficient and effective manner.

Final orders

Given my findings above I now make the following orders.

I order that UTL pays MTN the sum of UShs.3,482,303,257/= less what has been paid on account during this trial being unpaid interconnection fees. The outstanding amount is due and payable immediately.

I further order that UTL pay MTN interest of UShs.1,495,506,359/= at the rate of 19% p.a. from the 6th April, 2008 up to 7th October, 2010.

I further order that delayed payments on the above sum attract interest at 19% p.a. from the date of judgment until payment in full.

I order that UTL pay MTN general damages of UShs.100,000,000/= with interest at 8% p.a. from the date of this judgment until payment in full.

I also order UTL to pay the costs of this suit.

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Geoffrey Kiryabwire
JUDGE

Date: 28/04/2011

28/04/11

9:45 a.m.

Judgment read and signed in open court in the presence of;

- D. Nkurunziza for Defendant
- J. Matsiko with P. Kutesa for Plaintiff

In Court

- A. Katamba - G/M Legal - MTN
- T. Balinda S/M Commercial / Legal - MTN
- R. Zakamumpa S/M Legal - MTN
- D. Nyakairu Ag. GM - UTL
- Rose Emeru - Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date: 28/04/2011