

IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL



ACCRA

AD 2018

APPEAL NO: ECT/APP/013/2018

AIRTELTIGO GHANA LTD

APPELLANT/APPLICANT

VERSUS

NATIONAL COMMUNICATIONS AUTHORITY

Accra

RESPONDENT/RESPONDENT

31<sup>st</sup> January 2019

CORAM: PROFESSOR JUSTICE DATE-BAH (PRESIDING), PROFESSOR  
QUAYNOR, MR AKPADZI

RULING ON MOTION ON NOTICE FOR STAY OF EXECUTION PENDING APPEAL

**PROFESSOR DATE-BAH, JSC (RETIRED):** This is the unanimous Ruling of the Tribunal. The Applicant, on the 18<sup>th</sup> day of December 2018, filed a Notice of Appeal expressing dissatisfaction with a decision of the National Communication Authority dated the 21<sup>st</sup> day of November 2018. The Appellant/Applicant has pleaded that this decision imposed a sanction

on it for non-compliance with quality of service requirements in the amount of eleven million, six hundred and thirty-five thousand Ghana Cedis. The Appellant/Applicant contends that this decision is wrongful and invalid. In support of this contention, the Appellant/Applicant has filed six grounds of appeal. These are:

1. The Respondent's decision to impose sanctions on the Appellant per its letter dated 21<sup>st</sup> November 2018 is contrary to the rules of natural justice.
2. The Respondent erred in law when it determined that the Appellant had breached the KPIs in its 3G Licence without recourse to best regulatory practice as required by law.
3. The Respondent erred in law when it failed to exercise its discretion and power to impose fines judiciously by applying sanctions to days for which it had no evidential basis to accuse the appellants of failure to comply with Quality of Service Requirement.
4. The Respondent erred in law by applying sanctions not based on prior published notices in the Gazette and on its website specifying the circumstances under which a pecuniary penalty may be imposed and the basis on which they may be calculated as required by law.
5. The Respondent failed to act fairly, reasonably and proportionately by excluding from its consideration the impact of the Appellant's network integration and fibre cuts on its Quality of Service (QoS) assessment leading to the sanctions.
6. The imposition of the sanctions by the Respondent's letter dated 21<sup>st</sup> November 2018 is unconstitutional as the Respondent has failed to meet the procedural requirements of article 296 of the 1992 Constitution requiring Regulations governing the exercise of discretionary power to impose such sanctions.

On the 20<sup>th</sup> day of December 2018, the Appellant/Applicant filed a Motion on Notice for Stay of Execution, praying this Tribunal to stay the execution of the decision of the National Communication Authority dated 21<sup>st</sup> November 2018, which is the subject-matter of the appeal lodged by the Appellant/Applicant. In an affidavit in support of the Motion, Joyleen Mante, Legal Manager of the Applicant, contends that the Applicant's appeal has a good chance of succeeding, because, *inter alia*, the imposition of the fine complained of was in contravention of fundamental constitutional and administrative legal principles. The affidavit

contains other assertions in support of the Appellant's application for stay of execution, pending the determination of its appeal.

The Respondent, on the 18<sup>th</sup> day of January 2019, filed an affidavit in opposition to the Motion for Stay of Execution. In this affidavit sworn to by Robert Apaya, Chief Manager of the Legal Division of the Respondent, he contends that this application is without legal basis and has no merit. He further contends that, in line with the Respondent's mandate to protect the interest of the consumer, it carried out monitoring exercises to ascertain whether the Appellant was complying with its licence obligations. It was after the Respondent had found that the Appellant had failed to comply with its quality of service obligations under its licence that the Appellant had been sanctioned. Prior to the imposition of the prescribed penalty, the Appellant was given the opportunity to cure its infractions identified in the first monitoring exercise, but had failed to do so. The Respondent had followed all the laid down procedures before imposing the penalty that the Appellant was complaining of and that penalty was embodied in the Appellant's licence. The deponent asserted that the Appellant's appeal was without legal basis and had no chance of success.

The Tribunal heard arguments from counsel on January 21<sup>st</sup> 2019 and adjourned the case for ruling on 31<sup>st</sup> January 2019, ordering counsel to file their oral submissions in writing before 25<sup>th</sup> January 2019 .

In this Tribunal's Ruling dated 25<sup>th</sup> January 2018 in *Ghana Independent Broadcasters Association v National Communication Authority* (Appeal No. ECT/APP/002/17), we set out extensively the principles which we think govern the exercise of our discretion in cases like this. The interests of the Applicant and the Respondent have to be balanced by the Tribunal so as not to render a successful appeal nugatory, while at the same time not unnecessarily depriving the Respondent of the benefits of its regulatory authority. Attention has to be paid to the balance of hardship, on the facts of each particular case. The cases we cited in support of these principles were: *Republic v Court of Appeal, ex parte Sidi* [1987-88] 2 GLR 170; *Joseph v Jebeille* [1963] 1 GLR 387; *Saunders v Awuku (No. 2)* [1962] 1 GLR 545 and *NDK Financial Services Ltd. v Yiadom Construction & Electrical Works* [2007-2008] 1 SCGLR 93.

Counsel on both sides made submissions on the principles to be applied in cases like this, which converged with the principles referred to above. Counsel for the Appellants relied,



*inter alia*, on the *dictum* by Akufo Addo JSC in *Joseph v Jebelle & Anor* [1963] 1 GLR 387 at 390 that:

“While we do not wish to say anything that may be interpreted as a fetter on the exercise of the discretion of a trial judge when he considers an application for stay of execution pending appeal we think it necessary in the interest of justice to say generally that when such an application is considered in a case involving, *inter alia*, the payment of money, the main consideration should be not so much that the victorious party is being deprived of the fruits of his victory, as what the position of a defeated party would be who had had to pay up or surrender some legal right only to find himself successful on appeal. In this respect it is wholly immaterial what view a trial judge takes of the correctness of his own judgment or of the would-be appellant's chances on appeal, if the position (it is not of course suggested that that is the position in the case before us) is that the victorious party is unlikely to be able to refund the amount paid to him, or the defeated party to be restored to the status quo ante, in the event of a successful appeal (and it should not be difficult to determine the likelihood of such an event), then it would be palpably unjust to refuse stay of execution, or, when stay of execution is refused, not to order the judgment creditor to give good, substantial and realisable security for the refund of the money involved.”

Counsel, in his submission, focused on four factors as the most relevant to the current application. These are: the exceptional circumstances of this case; the balance of hardship; irreparable harm or damage or disruption; and the chances of success of the instant appeal.

Counsel for the Respondent, in his oral submissions reduced into writing by the order of the Tribunal, submitted that a successful party ought not to be prevented from enjoying the fruits of the judgment and that an appeal, if successful, must not be rendered nugatory. He enumerated the factors that should be taken into account in determining whether or not to grant the stay as:

1. If the court is satisfied on consideration of affidavit evidence that the appeal has not been brought in good faith, the application for stay of execution should be refused;

2. Unless there are exceptional circumstances or the existence of good reasons justifying grant of stay of execution, the successful party is not to be deprived of the fruits of his judgment;
3. The court is to consider the issue of who would suffer greater hardship or greater irreparable loss if the stay is granted or refused.

Applying the principles outlined above by counsel on both sides and previously by this Tribunal and after carefully considering the evidence contained in the affidavits before this Tribunal, we have come to the conclusion that the application for stay of execution should be granted and it is hereby granted.



**PROFESSOR JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)**



**PROFESSOR NII NARKU QUAYNOR (MEMBER)**



**BIADELA MORTEY AKPADZI (MEMBER)**

**COUNSEL:**

**Anthony Forson (with Kwesi Coleman, Susanna Nyampong and Dennis Armah) for the Appellant**

**Robert Apaya for the Respondent.**