## 

## REPUBLIC OF KENYA

IN THE COMPETITION APPEALS TRIBUNAL AT NAIROBI

REVIEW NO……OF 20..

HALISIMART LIMITED …………..…………….............................................1ST APPELLANT

UKWELIMART LIMITED ……………………...….........................................2ND APPELLANT

VERSUS

## COMPETITION AUTHORITY OF KENYA........................................................ RESPONDENT

**REPLYING AFFIDAVIT**

I, MKENYA HALISI of Post Office Box Number 22588-00100 Nairobi in the Republic of Kenya do solemnly swear and sate at follows;

1. THAT I am an adult female of sound mind and the Legal Manager of the respondent duly authorised to swear this affidavit in response to the appellants Notice of Motion application for review under Section 48 of the Competition Act No.12 of 2010.
2. THAT the Respondent through my office received a merger notification dated 13th October 2019 from the 1st Appellant. *Attached and marked MH-1 is a copy of the said notification.*
3. THAT upon receipt of the said merger notification, we commenced an analysis of the merger in accordance with Part IV of the Competition Act, No. 12 of 2010, as further guided by the Consolidated Guidelines on the substantive Assessment of Mergers herein attached and marked as MH-2.
4. THAT in reviewing the Merger Application, the Respondent worked in consultation with the Communications Authority of Kenya, and further consulted the National Treasury and Planning, market players, stakeholders and held several meetings with a view of coming up with a balanced and informed assessment of the Merger. *Attached and marked MH-3 is a bundle of notices for meetings and minutes of various meetings in proof.*
5. THAT the respondent further entered into a Memorandum of Understanding with the Communications Authority to address competition and consumer protection concerns in the telecommunications sector. *Attached and marked MH-4 is a copy of the Memorandum of Understanding in proof.*
6. THAT the Respondent engaged and consulted the Appellants throughout the review process through several meetings and correspondence via email and letters.
7. THAT in the course of the negotiations and consultations, the Appellants requested for a meeting with the Respondent on the 25th October 2019 which meeting gave rise to revised conditions of an even date. **Attached and marked MH-6 is a copy of the revised conditions.**
8. THAT the Appellants expected to consult and revert, failed to revert on the said conditions. The Respondent’s Board being constrained by statutory time limits ratified the conditions and informed the Appellants of the same.
9. THAT the appellants on receipt of the said communication, requested the Respondent not to publish the Determination vide Kenya Gazette but that request was not granted as once the Board issues a Notice of Determination, it becomes *functus officio*, and therefore proceeded to gazette the Notice of Determination in line with Section 46(6) (i) of the Competition Act, 2010.
10. THAT in regard to imposition of the conditions, the Respondent is a competent government body and acted within its powers pursuant to Section 9 of the Act and the Appellants were given time to review and revert on the said conditions during the meeting of 25th October 2019.
11. THAT the condition was imposed after the submission by the Appellants that they merged to avoid being forced to wind up as they were making losses in their business, and due to the Appellants’ confirmation that spectrum is not affected by the number of subscribers utilizing the material, the parties’ most probable interest was to hoard the spectrum with the aim of selling it to potential entrants into the telecommunications market.
12. THAT this condition was imposed on the apprehension that should the merged entity attempt to sell their spectrum or license after the merger, the market would certainly be exposed to a monopoly situation and of a dominant player, Sauti Halisi Communications and this would go against the object of competition law and the core of national competition law, policy and practice.
13. THAT the operating frequencies are licenses and not the Appellants’ property. They are reversible to the issuing authority upon lapse of time.
14. THAT the matters deponed to herein are true and to the best of my knowledge, and belief, save where I have relied on information whose sources I have disclosed.

SWORN AT NAIROBI

By the said ]

**MKENYA HALISI** ] \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

This …….. day of ………20… ] DEPONENT

]

BEFORE ME ]

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COMMISSIONER FOR OATHS ]

## DRAWN & FILED BY:

**TO BE SERVED UPON:**