



**Tv Africa-Kenya Holding Limited v Communications Authority Of Kenya (Civil Case E061 of 2023) [2023] KEHC 26848 (KLR) (Civ) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26848 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL CASE E061 OF 2023  
AN ONGERI, J  
DECEMBER 21, 2023**

**BETWEEN**

**TV AFRICA-KENYA HOLDING LIMITED ..... PLAINTIFF**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA ..... DEFENDANT**

**RULING**

1. The defendant filed a notice of preliminary objection dated 24/4/2023 to the plaintiff's application dated 30/3/2023 on the following grounds;
  - i. The proceedings are offensive of the doctrine of exhaustion in so far as the matters raised are largely complaints within the meaning of Section 102A of the *Kenya Information and Communications Act* number 2 of 1998 the determination of which lies within the exclusive jurisdiction of the Communications and Multimedia Appeals Tribunal.
  - ii. The jurisdiction of this honourable court is not to be invoked to re-write contracts between parties and/or insulate parties from consequences of admitted breach of contractual obligations.
  - iii. Such other objections to be raised at the hearing hereof.
2. The parties filed submissions and supplementary submissions as follows;
3. The defendant submitted that the Authority is empowered under Section 5 of the *Kenya Information and Communications Act* to licence and regulate postal, information and communication services.
4. That the Plaintiff is holder of Licenses issued by the Authority allowing the Plaintiff to operate Radio and TV stations in Kenya through its subsidiary Mediamax Network Limited as regulated by the Act;



and is obligated to comply with the licensing conditions thereto amongst them the payment of the license fees.

5. The Act was established to govern the information and communications sector in Kenya. In doing so, it has established dispute resolution mechanisms. It established the Communications and Multimedia Appeals Tribunal. The role of the Tribunal is to determine complaints under Section 102A and to hear appeals against decisions made by the Authority under Section 102F.
6. It was the defendant's argument that therefore the plaintiff was obligated to file an appeal before the tribunal before approaching the High Court. The power of the Authority to enforce licence conditions is provided under section 83A of the *Kenya Information and Communications Act*. The suit herein violates the doctrine of exhaustion of remedies and thus the court has no jurisdiction to hear and consider the issues raised herein.
7. The defendant further argued that the plaintiff is attempting to circumvent the internal dispute resolution mechanism under the Act by clothing its appeal with prayers for injunctive reliefs and the same amounts to an abuse of court process and should not abide.
8. On the application for temporary injunction the defendant argued that in an agreement dated 2/11/2022 the parties agreed on a payment plan and in default the authority would revert to enforcement measures as against the plaintiff. The agreement dated 2/11/2020 the authority offered the plaintiff a suspension of the enforcement measures provided it met and complied with the payment of the debt. However, the plaintiff failed to honor its terms and the default clause came into effect.
9. The defendant argued that it is trite law that courts do not re-write contracts. The defendant's actions were within the confines of the law and agreement.
10. Further, that the court's jurisdiction should not be invoked to interfere with the exercise by the defendant of its powers and mandate in the Act and that the plaintiff failed to establish a prima facie case with the probability of success and in light of this failed to meet the threshold for the grant of temporary injunction.
11. The plaintiff on their part submitted that its suit is pegged on an agreement dated 2/11/2022 which provides for payment of the arrears by way of installments.
12. That the validity of the agreement is confirmed by the replying affidavit sworn by Ezra Chiloba and both parties agree that the defendant can only revert to enforcement when the plaintiff falls into arrears.
13. It is the plaintiff's submission that the defendants demand contained in the letter dated 22/3/2023 is not pegged on the plaintiff's default but seeks to unilaterally terminate a valid and binding agreement.
14. Further, that the defendant's letter dated 17/3/2023 acknowledged that the plaintiff had paid Kshs 34,975,000 against an expected payment of Kshs. 36,000,000 leaving a balance of Kshs. 1,025,000. Further, the seven days given on 17/3/2023 to settle a sum of kshs.1,025,000/- were expected to lapse on 24/3/2023.
15. However, the Defendant did not even wait for the lapse of seven days. The Defendant issued a letter dated 22/3/2023 terminating the Agreement and calling for payment of Kshs.164, 732,317.08. The plaintiff argued therefore that it has established a prima facie case of the existence of a valid agreement and attempted breach by the defendant.
16. The plaintiff argued that the amount demanded by the defendant accrued for a period of over 9 years. Both parties agreed that the amount was colossal and agreed on an instalment payment upto December



2024. The effect of Kshs. 164,732,317.08 to be paid within seven days has the effect of running the defendant out of business.
17. The net effect would lead other claims including loss of employment and termination of contracts with other suppliers. The plaintiff therefore faces irreparable injury, which would not adequately be compensated by an award of damages.
  18. On balance of convenience the plaintiff argued that it has demonstrated that it has faithfully adhered to the payment plan and the act of demanding full payment was not made on account of failing into arrears. The balance of convenience therefore tilts in favor of upholding the agreement dated 2/11/2022.
  19. The plaintiff argued that the facts in the instant case are disputed and the court will be required to weigh the facts and evidence of the case.
  20. Further, that the doctrine of exhaustion is not applicable in the instant case because the dispute in the plaint does not fall within the contemplated complaints mentioned in Section 102A of the [Kenya Information and Communications Act](#).
  21. The plaintiff submitted that the tribunal can only issue remedies listed in Section 102E which are not included in the Plaint and the remedies sought in the plaint can only be issued by the High Court.
  22. The plaintiff further argued that the suit herein seeks the power to enforce a written agreement dated 2/11/2022 and not to rewrite the contract as alleged by the defendant. The plaintiff maintains that there exists an instalment payment plan in respect of the arrears which agreement can only be terminated in case the plaintiff falls into arrears.
  23. The issues for determination in this preliminary objection are as follows;
    - i. Whether this suit offends the doctrine of exhaustion.
    - ii. Whether the preliminary objection should be allowed.
  24. On the issue as to whether this suit offends the doctrine of exhaustion the said document provides as follows; Section 102A of the [Kenya Information and Communications Act](#) provides that;

#### Complaints

1. A person aggrieved by—
    - a. any publication by or conduct of a journalist or media enterprise;
    - b. anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or
    - c. any action taken, any omission made or any decision made by any person under this Act, may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.(emphasis added)
25. I find that the parties have an internal mechanism of resolving disputes where the dispute resolution mechanisms exist, the same must be exhausted before the suit is filed in court.



26. It is clear from Section 102A of the *Kenya Information and Communications Act* that any action taken, any omission made or any decision made by any person under the Act, the recourse is to make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.
27. In the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR the Court held as follows;
- “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”
28. It is not the duty of the court to rewrite contracts between parties. In *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -
- “A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
29. In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
30. I allow the preliminary objection and direct that parties exhaust the internal mechanisms first.
31. The application dated 30/3/2023 is accordingly struck off for being premature with costs to the defendant.
32. The plaintiff also to bear the costs of the notice of preliminary objection.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER, 2023.**

**A. N. ONGERI**

**JUDGE**

