



**Geonet Communications Ltd v Communications Authority of Kenya; Safaricom PLC
& another (Interested Parties) (Petition E368 of 2022) [2022] KEHC 16411 (KLR)
(Constitutional and Human Rights) (16 December 2022) (Directions)**

Neutral citation: [2022] KEHC 16411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E368 OF 2022
HI ONG'UDI, J
DECEMBER 16, 2022**

BETWEEN

GEONET COMMUNICATIONS LTD PETITIONER

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

AND

SAFARICOM PLC INTERESTED PARTY

TELCKOM KENYA PLC INTERESTED PARTY

DIRECTIONS

1. Counsel for the petitioner, Mr Rosana at the mention sought the following orders:
 - i. To be issued with an early judgement date for the instant petition; and
 - ii. An injunctive order be issued against the 1st interested party.
2. Mr Rosana submitted that the injunctive order was sought because the 1st interested party had blocked the petitioner's calls hence denying them revenue. Further, counsel relying on rule 9 of the *Advocates' Practice Rules* stated that it would be improper for him to adduce evidence to that effect. He however informed that the petitioner had deponed an affidavit to that effect.
3. Counsel relying on rule 21 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* emphasized that if the matter was not adjudicated on expeditiously, the petitioner would go out of business.



4. Miss Leila, counsel for the 1st interested party submitted that the parties herein were engaged in a Commercial Case No E207 of 2019 Nairobi. Additionally, that the petitioner had failed to comply with the orders that had been granted in that case which led to a disconnection that begun from March 18, 2021. She opposed the injunctive order being sought stating that the petitioner ought to file a formal application to grant them an opportunity to file a response. She was not opposed to the first prayer and requested for an earlier judgment date.
5. The 2nd interested party through its counsel, Mr Ngugi opposed the petitioner's prayer for injunctive orders. The reason being that it was a substantive issue which could not be canvassed during a court mention unless through the consent of the parties.
6. Further he noted that the request offended the rules of natural justice and the right to fair hearing as all the parties must be given a chance to respond. In support reliance was placed on the Court of Appeal case of *Rift Valley Water Services Board v Oriental Construction Company Limited (2018) eKLR*.
7. In rejoinder, Mr Rosana submitted that a formal application would have compromised the security of the petitioner and the 1st interested party. He stressed that the instant matter and the commercial suit were distinguishable, as the commercial suit was based on the losses suffered by the petitioner while the instant suit was premised on the 1st interested party's regulatory inaction.
8. He in addition opposed Mr Ngugi's argument stating that rule 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* allows an application for interim orders. He as such submitted that refusal to grant the orders without seeing the affidavit would be unjust yet opposed its admission as would be prejudicial to the 1st interested party. In closing he prayed for an early judgment date.
9. As a starting point, it is trite law that an applicant seeking such orders ought to satisfy the set threshold for their grant. The law on interim orders in constitutional matters finds its basis under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. Rule 23(1) states as follows:

Conservatory or interim orders.

23.

(1) Despite any provision to the contrary, a judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.
10. The same has been discussed and determined in a plethora of cases. See *Peter Kairu Gitu v KCB Bank Kenya Limited & another [2021] eKLR*, and *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR*.

Evidently, grant of the injunctive orders is not an automatic right. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person, who would fail if no evidence at all were given on either side as held in the case of *Stanley Maira Kaguongo v Isaac Kibiru Kabuthia [2022] eKLR*.
11. The petitioner has not made out a case to warrant grant of the said orders. An allegation of existing facts does not operate in isolation. The same must be accompanied by evidence to ascertain that the stated facts do exist. Even then the rules of a fair trial dictate that the opposing party should be given an opportunity to be heard and make its response. The best way to do this is to file a formal application.



12. Additionally, the Court of Appeal in the case of *Rift Valley Water Services Board (supra)* while handling such matters cautioned courts as follows:

“...We are guided by the case of:

Central Bank of Kenya v Uhuru Highway Development Ltd & 3 Others, Civil Appeal No 75 of 1998 where the Court of Appeal held that where a matter is fixed for mention the judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties.

Further, in *Mrs Rabab Wanjiru Evans v Esso (K) Ltd* Civil Appeal No 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties.

See: *AG v Simon Ogila*, Civil Appeal No 242 of 2000 and *Peter Nzioki & Another v Aron Kivuva Kitusa*, Civil Appeal No 54 of 1982; [1984] KLR 487.2”

13. I therefore decline to grant the *ex parte* injunctive orders sought by the petitioner as counsel took the other parties by ambush.
14. Be that as it may, rule 3(4) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* beseeches this court in exercise of its jurisdiction to facilitate the just, expeditious, proportionate and affordable resolution of all cases. In light of this, I find that an early judgment date would serve this objective appropriately, considering that all parties have filed submissions.
15. Owing to the loaded desk of this court and considering the urgency of this matter I hereby direct that this matter be mentioned on January 16, 2023 for allocation of an early judgment date.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 16TH DAY OF DECEMBER 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H I ONG’UDI

JUDGE OF THE HIGH COURT

