



ATC Kenya Operations Limited v Telkom Kenya Limited (Environment and Land Case Civil Suit E157 of 2023) [2023] KEELC 18872 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E157 OF 2023
LN MBUGUA, J
JULY 13, 2023**

BETWEEN

ATC KENYA OPERATIONS LIMITED PLAINTIFF

AND

TELKOM KENYA LIMITED DEFENDANT

RULING

1. Before me is the Plaintiff's Notice of Motion application dated 9.5.2023, where they are seeking a temporary injunction compelling the Defendant to grant it full and unrestricted access to the property known as LR 3734/1402 Muthangari and all other properties leased to them by the Respondent as per Schedule A1. They also pray for a temporary order of injunction restraining the Defendant from interfering with its right of occupation and quiet possession over the said properties as well as costs.
2. The application is based on grounds on its face and on the supporting affidavit of one Lorna Nyandat, the Plaintiff's head of Legal and Regulatory affairs sworn on 9.5.2023. She avers that the Plaintiff is in the business of providing telecommunication infrastructure and in line with its business, it enters into lease agreements with landowners for purposes of constructing, maintaining, securing, operating and leasing base transceiver stations.
3. To this end, the Plaintiff has entered into 196 lease agreements with the Defendant for its various base transceiver stations throughout the country. She adds that various telecommunication companies have installed their transmitters on the infrastructure offered by the Plaintiff to enhance better network coverage for their respective customers in the respective areas.
4. She also avers that the Plaintiff regularly sends its employees, agents and licensees to the various sites for purposes of maintaining network infrastructure. She adds that on 4.5.2023, the Defendant denied the Plaintiff's servants and agents access to various leased sites and caused it loss and damage. A table



- containing the particulars of the various sites has been availed at paragraph 11 of the supporting affidavit.
5. She avers that the Defendant has further illegally accessed some of the leased properties and tampered with Plaintiff's equipments.
 6. She adds that by Gazette Notice No. 1043 of 2022, the Plaintiff was designated as a critical infrastructure owner offering services to other telecommunication companies other than the Defendant, thus the balance of convenience tilts in favour of allowing the orders sought.
 7. The deponent also states that they filed a case; Nairobi HCC E096 of 2022 *ATC Kenya Operations Limited v Telkom Kenya Limited* against the Defendant for payment of debts arising under separate tower leasing agreements. She adds that the Plaintiff has switched off the Defendant's equipment due to the Defendant's failure to pay maintenance costs, as stipulated under the contract.
 8. In response, the Defendant filed a Notice of preliminary objection dated 30.5.2023 stating that the Plaintiff's suit and Notice of Motion application dated 9.5.2023 offends the doctrine of res subjudice in violation of Section 6 of the *Civil Procedure Act*.
 9. The Defendant also filed a Notice of Motion application dated 2.6.2013 seeking orders that this suit be struck out with costs. In the Alternative, it seeks orders that this suit be stayed pending the hearing of Nairobi HCC No. E096 of 2022 *ATC Kenya Operations Limited v Telkom Kenya Ltd* and Mombasa ELC No. 044 of 2023 *ATC Kenya Operations Limited v Telkom Kenya Ltd*.
 10. The application is based on grounds on its face and on the supporting affidavit of Stella Wawira, Director, Legal Affairs of the Defendant sworn on 2.6.2023.
 11. She avers that the Defendant is a telecommunications operator and technology company providing integrated services including voice, data/connectivity and network services to members of the public, the government and security agencies. She adds that in undertaking its operations, the Defendant utilizes telecommunication infrastructure which it owns and telecommunication infrastructure from other operators.
 12. She avers that by various agreements between the Plaintiff and its predecessor in title, the Plaintiff agreed to provide telecommunication infrastructure services to the Defendant including access to sites for installation, maintenance and operation of its towers, ground apparatus and other telecommunication equipment, operation.
 13. She further avers that in breach of Tower agreements entered into between the Plaintiff and the Defendant, the Plaintiff failed to ensure a regular power supply to the sites licensed to the Defendants resulting in outages to the site, loss of connectivity and traffic causing serious loss of revenue to the Defendant. That in further breach to the tower agreement, the Plaintiff irregularly disconnected power to the Defendant's infrastructure thereby undermining the Defendant's business and operations.
 14. She states that on 24.3.2022, the Plaintiff instituted Nairobi HCC No. E096 OF 2022 seeking to enforce payments of alleged sums owed under tower agreements of which there is a pending application for stay of proceedings and referral to arbitration. She adds that the question as to whether any parties owe any amounts to the other parties as well as to any rights accruing to the parties for breach or default are questions which ought to be determined in the said suit.
 15. She avers that the Plaintiff is guilty of material non-disclosure because the issues of access arose when the Plaintiff switched of the Defendant's network from its telecommunication infrastructure and was threatening to continue doing so from the Defendant's site allegedly in enforcement of debts which are disputed and are the subject of HCC No. E096 OF 2022 ATC Kenya Operation Limited v Telkom



- Kenya Limited. She adds that Mombasa ELC Case No. 044 of 2023 ATC Kenya operations Limited v Telkom Kenya Ltd also relates to the same parties and the same subject matter thus this suit is subjudice.
16. In response to the Defendant's application dated 2.6.2023, the Plaintiff filed a Replying Affidavit sworn on 16.6.2023 by Lorna Nyandat, where she avers that Mombasa ELC Case No. 044 of 2023 relates to a property in Mombasa while Nairobi HCC E096 of 2022 relates to breach of a commercial agreement in relation to the tower agreements entered into between the parties. She points out that the Defendant breached the Tower Agreements by failing to pay the required license fees.
 17. She also avers that it is not correct that the Plaintiff breached the tower agreements by failing to provide regular power supply to the sites. The Defendant was responsible for payment of any energy charges for the use of its own equipment and that clause 11.2 of the Master Tower Agreement permits the Plaintiff to switch off the Defendant's equipment in the event of late payment.
 18. I have considered all the rival arguments. I find that the issues falling for determination are;
 - a. Whether the Preliminary objection dated 30.5.2023 is merited. Whether this suit should be struck out or stayed.
 - b. Whether the Plaintiff has made a case for grant of the orders sought in the application dated 9.5.2023.
 19. At the time of institution of this suit, there were 13 suit properties as outlined at paragraph 12 of the Plaintiff's claim dated 9.5.2023. However, by a partial withdrawal of the suit dated 19.5.2023, the Plaintiff withdrew the case relating to 11 properties filed outside Nairobi. Therefore as things stand, the Plaintiff's claim relates to properties known as Title Number LR 3734/1402 Muthangari and LR Number 209/5808 Jamhuri T. Exchange. It follows that this suit is not subjudice to the Mombasa case No. ELC 044 of 2023.
 20. There is no controversy that there exists the suit HCC E096 of 2022 in Nairobi, hence it is paramount to determine the question of subjudice raised in the Defendant's Notice of Preliminary objection dated 30.5.2023 and application dated 2.6.2023.
 21. A preliminary objection must raise a pure point of law as was stated in *Oraro v Mbaja* [2005] eKLR as follows;

"I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed."
 22. Sub – judice, is a pure point of law as it goes to the jurisdiction of the Court. Sub judice only applies when another suit or proceedings is pending in another court involving the same parties over the same subject matter.
 23. Upon perusal of the pleadings I find that the case Nairobi HCC E 096 of 2022 raises issues in the arena of commerce. In the instant suit, the Plaintiff seeks a permanent injunction against the Defendant, from in any other manner whatsoever interfering with its rights of occupation and quiet possession of property leased to it by the Defendant during the pendency of the lease terms. On the face of the foregoing analysis, it would appear that what is playing out in the various litigation platforms are mixed grill issues.



24. However, on close scrutiny of the averments set out by the plaintiff the notion of mixed grill is dispelled. To start with, I make reference to the supporting affidavit sworn on 9.5.2023 by Lorna Nyandat, the Plaintiff's head of legal & regulatory affairs (particularly paragraph 20 and 21) where she avers that that the Plaintiff has filed Nairobi HCC E096 of 2022 ATC Kenya Operations Limited v Telkom Kenya Limited against the Defendant for payment of a debt arising under separate tower leasing agreements and that the Plaintiff has switched of the Defendant's equipment due to the Defendant's failure to pay maintenance costs as it is entitled under the contract. She added that though the defendant protested the switching off, they did not explain why they denied the plaintiff access to the leased sites.
25. Further, in her replying affidavit to the Defendant's Notice of Motion dated 2.6.2023, the same deponent Ms. Nyandat avers that none of the tower agreements create an interest over land to trigger this Court's jurisdiction as they do not relate to any particular property. She points out that they are purely commercial telecommunication contracts between the Plaintiff and the Defendant to regulate the provisions of telecommunication services.
26. The Plaintiff appears to concede that this court has no jurisdiction to determine the issues herein.
27. The Defendant does not dispute that it has leased the suit properties to the Plaintiff. Under the Master Site license agreement, the master tower agreement and the site sharing agreement between the parties, the parties herein have respective obligations in respect of infrastructure erected on several sites.
28. I hold the view that the lease agreements cannot be read alone, this would amount to misconstruing the tower agreements between the parties. In the circumstances, Nairobi HCC E096 of 2022 ATC Kenya Operations Limited v Telkom Kenya Limited is not just about payment of a debt. I agree with the Defendant that the issue of rights accruing to the parties for breach or default are to be determined in that suit.
29. To this end, this court cannot order the switching off equipment or access to infrastructure erected on the suit properties based on the leases herein alone as the leases herein are tied to the tower agreements. The dispute is not just about the suit properties where the parties' infrastructure are standing on. Thus it is not about a lessee asking for possession/access.
30. In view of the foregoing analysis, I decline to allow the plaintiff's application dated 9.5.2023 as well as the defendant's preliminary objection dated 30.5.2023. Instead, I find that the appropriate orders to give is the alternative prayer (3) in defendants application dated 2.6.2023 in respect of the high court matter only.

Final orders:

1. The application dated 9.5.2023 is dismissed.
2. The Preliminary Objection dated 30.5.2023 is dismissed.
3. I hereby issue an order of stay of the proceedings herein pending the hearing and determination of the suit Nairobi HCC No. E096 of 2022 ATC Kenya Operations Limited v Telkom Kenya Ltd.
4. No orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA



JUDGE

In the presence of:-

Kahura for Plaintiff

Odhiambo holding brief for Nyambura for Defendant

Kahura Court Assistant: Eddel

