



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL CASE NO.02 OF 2020

IBSE RADIO LIMITED.....PLAINTIFF

VERSUS

BIFTU RADIO LIMITED.....1ST DEFENDANT

ANGAAF RADIO LIMITED.....2ND DEFENDANT

COMMUNICATION AUTHORITY OF KENYA.....(INTERESTED PARTY)

RULING

The plaintiff filed this suit before this court on 4.6.2020 seeking orders of injunction restraining the defendants from interfering with its use of frequency 100.3 MHz in Marsabit and 102.5MHz in Moyale. The suit was accompanied by an application of the same date which seeks the same orders ex parte pending the hearing and determination of the application. The application is supported by the affidavit of Said Mohamed Chute sworn on the 4th June, 2020.

The 2nd defendant (Angaaf Radio Limited) entered appearance on 8th June 2020 and also filed a notice of Preliminary Objection based on the following grounds:

- 1. That this suit is sub-judice as there is another matter between the same parties seeking to canvas the same issues that is pending before the Chief Magistrate's Court in Nairobi. Case Number MCC 2063 (ANGAAF RADIO LIMITED VERUS IBSE RADIO LIMITED)***
- 2. That the monetary value of the frequencies, which are the subject matter of this suit, and indeed the radio stations hereof, are way less than Kshs.20,000.00; therefore, the High Court has no jurisdiction over this matter.***
- 3. That since all the defendants hereof have their registered office in Nairobi, this case should therefore have been filed in Milimani Law Courts.***

The second, third and fourth interested parties filed an application dated 7th June 2020 seeking to be enjoined as parties to the suit. The plaintiff's application was certified as urgent and listed for hearing inter-parties on 8th June 2020. On that date counsels for both the plaintiff and the 2nd defendant agreed to have the three interested parties enjoined in the suit. Counsels also agreed to determine the Preliminary Objection first before having the main application by the plaintiff heard. This ruling is therefore in relation to the Preliminary Objection.

Mr. Mathenge and Mr. Odero appeared for the 2nd defendant. Counsels submitted that the Preliminary Objection is based on the fact that there is another suit pending before the Nairobi Chief Magistrate's Court between the 2nd defendant and the plaintiff herein. The 2nd defendant's suit is CMCC 2063 of 2020 and it was filed in May 2020 in Nairobi. The plaintiff's suit herein is therefore sub-judice and the court is barred by section 6 of the Civil Procedure Code from hearing the current suit. The matter is substantially in issue before the Nairobi Magistrate's Court. The pleadings in both cases seek orders of injunction. The 2nd defendant obtained temporary orders against the plaintiff herein and this suit was filed in order to circumvent the orders issued by the Nairobi Chief Magistrate's Court. Both cases involve interference with radio frequencies. To avoid conflicting decisions and multiplicity of suits the Nairobi case must be heard first. It will be waste of time and resources to have both suits heard. It also demonstrates forum shopping on the part of the plaintiff. The plaintiff was served with the orders issued by the Nairobi Court but has not responded to that suit. The plaintiff has also not complied with the interim orders. The Nairobi suit was listed for hearing on the 9th June, 2020.

It is further submitted that the Preliminary Objection raises the issue as to whether there is another existing case. The principal of subjudice is basically aimed at preventing Courts from embarrassment by producing two different decisions. The plaintiff herein rushed to the High Court at Marsabit trying to urge the Court to wrestle it muscles against the Chief Magistrate's Court. The Chief Magistrate's Court is competent to determine the suit. Counsels further contend that due to the Covid 19 pandemic the suit in Nairobi was filed on-line. The complicated nature of a dispute cannot bar the Magistrate's Court from hearing the case.

Mr. Abdurizak appeared for the 2nd, 3rd and 4th interested parties. Counsel support the Preliminary Objection. It is submitted that the interested parties were served with Court orders from the Chief Magistrate's Court. The registration documents of the companies show that the principal registered offices are in Nairobi. Even the plaintiff herein resides in Nairobi. It will be an abuse of the Court process if this Court was to issue orders contrary to those issued by the Nairobi Court. The plaintiff herein added two other parties so as to make it appear that the two suits are different. The first defendant operates under the 2nd defendant. If there is any allegation that the orders in Nairobi were obtained through non disclosure of material facts the plaintiff can raise those issues before that Court.

Mr. Wakoko and Mr. Kiogora appeared for the plaintiff. Counsels opposed the Preliminary Objection. It is submitted that a Preliminary Objection should be based on a point of law. The Preliminary Objection as framed relates to issues of facts and not of law. The Court has to interrogate and determine the veracity or truthfulness of the issues being raised by the objection. The 2nd plaintiff alleges to have filed a suit in Nairobi on 22nd May, 2020. The plaintiff herein has not been served with the pleading of that case. The plaintiff in that suit only sort to serve the Court order without the pleadings. The non service of the pleadings was done intentionally as the plaintiff was fully aware that their offices are in Isiolo and the defendant in that suit operates in Marsabit. The plaintiff in the Nairobi suit was aware that the Communication Authority of Kenya had already dealt with the issues being raised in the Nairobi suit and had already advised that Biftu Radio Station was to be switched off. The plaintiff was also aware that due to the restriction in movement due to the Corona virus, the defendant would have had problems in travelling to Nairobi. The orders issued by the Court in Nairobi does not make any reference to the Communication Authority of Kenya's directions in relation to Biftu or Ibse Radios. There was material non-disclosure that Biftu radio was to be closed.

It is further submitted that the issues in dispute are not the same. The frequencies were transferred to Ibse radio and this was not disclosed to the Chief Magistrate's Court. The Nairobi suit has only two parties whereas the Marsabit case has three parties. The Chief Magistrate Court's jurisdiction is limited to Kshs.20million. The issues at hand are complicated and shall involve the interpretation of the Communication Authority Act and the regulations made thereunder. The Magistrate's Court will not be in a position to deal with all those issues. If there is any suit pending before the Chief Magistrate's Court in Nairobi it can be recalled by this Court. It is also submitted that the pleadings before the Chief Magistrate's Court in Nairobi are not signed and also do not bear the Court stamp. It is difficult to conclude that there is any suit before the Milimani Magistrate's Court. There is no proof of payment of Court filing fees. The affidavit of service is not also stamped by the Court.

The Preliminary Objection is grounded on the provisions of Section 6 of the Civil Procedure Code. Section 6 states as follows:-

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Other relevant provisions of the law are section 11 of the Civil Procedure Code which states as follows:-

11. Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts.

Provided that-

(i) If a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and

(ii) Nothing in this sections shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.

Section 15 of the same Act states as follows:

15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or (emphasis added)

(b) Any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) The cause of action, wholly or in part, arises.

Similarly Section 17 and 18 of the Act states as follows:-

17. Where a suit may be instituted in any one or two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.

18. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage-

(a) transfer any suit, appeal or proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter –

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

The contention in the Preliminary Objection is that there is a similar matter pending before the Milimani Chief Magistrate's Court between the same parties and involving the same issues. A Preliminary Objection is supposed to be grounded on a point(s) of law and not one which depend on the Court's discretion on analysis of the facts of the case. In the case of **ORARO –V- MBAJA (2005) I KLR 141**, Ojwang J held:

1. A preliminary objection correctly understood, is 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 process of evidence.

2. 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.

In the case of **MUKISA BISCUIT CO. –V- WEST END DISTRIBUTORS LTD 1969 E.A. 696** the Court of Appeal for East Africa held (Law J.A.) at page 700 as follows:-

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

In the same Mukisa Biscuit case, **SIR CHARLES NEWBOLD**, President of the then Court of Appeal for East Africa stated at page 701:-

A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.

The Court has to consider whether there is indeed another suit involving the same parties and revolving around the same issues. Counsels for the plaintiff contend that there is no proof that there is a suit pending before the Milimani Commercial Law Courts. That contention is grounded on the fact that the pleadings in support of that suit are not stamped by the Court. I do take Judicial Notice of the fact that in view of the prevailing Corona virus pandemic, filing of suits is being done on-line. Even the plaintiff's pleadings in the current suit before me do not bare the Court stamp. They were sent on-line and printed by the court registry. I do further note that the ex-parte order issued by the Chief Magistrate's Court bares the seal of the Court and is certified by that Court. The pleadings for the Chief Magistrate's Court have been provided by Counsels for the respondents. As officers of this court, it would be imprudent on their part to give wrong information to the Court about an existing suit while knowing that the same does not exist. There is proof of service of the court order and I am satisfied that there is another suit pending before the Milimani Chief Magistrate's Court.

The next issue is whether both suits relate to the same issues and involve the same parties. The main prayers for civil suit No.2063 of 2020 are as follows:-

- 1. The honourable Court be pleased to issue a permanent injunction restraining the defendants either by themselves and or their agent/employers/servants from illegally using frequency 100.3 and radio equipment's belonging to the plaintiff.**
- 2. The honourable Court be pleased to issue an order compelling the defendant to unconditionally and immediately return all the radio equipment's in its possession belonging to the plaintiff.**
- 3. General damages for the illegal use by the defendant of frequency and radio equipment's belonging to the plaintiff.**

The plaint in the suit before this Court seeks the following prayers.

- (a) An order of permanent injunction restraining the defendants either by themselves, employees, agents and/or any other person working under their instructions from interfering, using, converting, trespassing and or in any way dealing with the plaintiff's frequency 100.3 MHz in Marsabit & 102.5MHz in Moyale.**
- (b) A declaration that frequency 100.3MHz in Marsabit & 102.5 MHz in Moyale belong to the plaintiff.**

It is evident that the dispute involves the use of radio frequencies. The Nairobi suit makes reference to only frequency 100.3 while the Marsabit suit refers to both frequency 100.3 and 102.5. However, the dispute is basically the same. The plaintiff herein contend that he was allowed by the second defendant to use the frequencies. I am satisfied that parties are litigating on the plaintiff's right to use the frequencies that were allocated to the 2nd defendant by the Communication Authority of Kenya way back in February, 2015. That is the core of the dispute in both cases.

Concerning the parties in both cases, it is clear from the pleadings that the Nairobi suit is between the 2nd defendant and the plaintiff. The Marsabit suit has two other defendants namely Biftu Radio Limited and the Communications Authority of Kenya. In my considered view the 3rd defendant was enjoined simply due to the fact that it regulates the Communication Industry and will be called upon to implement whatever orders that will be issued by the Court. The 1st defendant is alleged to be using the same frequencies that are being used by the plaintiff. In essence therefore the 1st defendant can only make a claim through the 2nd defendant and that relationship falls within the provisions of Section 6 of the Civil Procedure Code.

The plaintiff herein annexed searches from the Registrar of Companies. The search for **ANGAAF** Radio Limited indicate its the registered office is City Square, Muindi Mbingu street, City Hall Annex Building, plot number 627, P.O. Box 3482 Nairobi. With regard to the search for **IBSE** Radio Limited, the search indicate that the registered office is City Hall Annex, Muindi Mbingu street, plot No. LR 792, room 2, P.O Box 3482 – 00100, Nairobi.

I do therefore find that basically the plaintiff herein and the 2nd and 3rd defendants are based in Nairobi. I am satisfied that the three companies are based in Nairobi and they do carry on business from their registered offices. Section 15(a) of the Civil Procedure Code will be satisfied if the dispute is heard in Nairobi. Even though Biftu Radio Limited is based in Marsabit, that cannot be the main reason for having the matter heard in Marsabit since Biftu seems to be benefitting from the frequencies through the authority of the 2nd defendant.

Another fundamental issue for consideration is whether the Chief Magistrate's Court has jurisdiction to determine the dispute between the parties. As stated herein both suits are seeking orders of injunction revolving around the use of radio frequencies. Article 169 of the Constitution of Kenya establishes the subordinate courts. Section 5 of the Magistrates' Courts Act (Chapter 10 laws of Kenya) provides for the Civil jurisdiction of Magistrates Court. There is no provision under the law which prohibits the Magistrates Courts from dealing with disputes involving orders of injunction or radio frequencies.

The sub-judice rule under Section 6 of the Civil

Procedure Act is satisfied if the following conditions are established:-

- (a) Existence of two or more suits**
- (b) Issues in contention in one sit should be directly and substantially in issue in the other suit or suits.**
- (c) The suits should be between same parties or parties who are litigating under the same title.**
- (d) Each of the two or more Courts should have competent jurisdiction to determine all issues in the suits.**

In the case of **TOTAL KENYA LIMITED –V- FANANA INVESTMENTS LIMITED, NAIROBI HCCC NO.734 OF 1999** (unreported) Waki J held:-

Where the issues in two suits are substantially the same, the law requires that the latter suit be stayed (found in Odunga's Digest on Civil Case Law and Procedure, Vol.4 para 8560 (Page 3942)

Similarly, in the case of **ISMAIL S MBAYA AND OTHERS –V- MOHAMED HAJI AND OTHERS, KISUMU HCCC NO.106 OF 2003** (unreported) Gacheche J (as she then was) held:-

Where there is a matter pending in Court of competent jurisdiction been substantial the same parties touching on

same issues, the court lacks jurisdiction to entertain a similar matter. (Odunga's digest, Supra).

The plaintiff is disputing having been served with the pleadings for the Nairobi case. There is an affidavit of service sworn by Abdirizak Roba advocate on 1st June, 2020. Paragraph 2 and 3 of that affidavit reads as follows:

2. That on 29th December, 2018 I received an order dated 27th May, 2020 together with an applications dated the 22nd of May, 2020 from the firm of Bernard Odera Advocates located along Utalii Street, Viewpark Towers, 9th Floor with instruction to serve the same upon the respondent IBSE Radio.

3. That I proceeded to the offices of the Respondent, located Kaisut Building in Marsabit town, on the 1st June, 2020 accompanied by Police officers. I served one of the employees of the Respondent's one of the copies of the order and affixed another copy on the door of the offices of the Respondent. (Find attached a copy of the print-out of the order affixed on the door of the offices belonging to the respondent marked as "AR1")

From the pleadings herein I am satisfied that both suits directly and substantially deal with the same issue relating to the use of radio frequencies by the plaintiff herein. I am equally satisfied that the Nairobi Suit was filed before the Marsabit suit and that both suits involve the same parties. Further still, I do find that the Chief Magistrate's Court is competent enough to hear and determine the dispute. That Court has jurisdiction to hear the dispute. Both the plaintiff herein, the 2nd and 3rd defendants have their registered offices in Nairobi. The effect of the registration is that those companies carry on business in Nairobi. The letter dated 25.9.2019 addressed to the 3rd defendant seeking authority to allow the plaintiff use the frequencies in dispute gives the 2nd defendant's physical address as per the official search. This is 14th floor, City Hall Annex, Nairobi.

I find no good reason to recall the file pending before the Chief Magistrate's Court in Nairobi. Section 11 of the Civil Procedure Code requires cases to be initiated from the lowest Court with jurisdiction to determine a given dispute. Having found that the Chief Magistrate's Court has jurisdiction to determine the dispute, I do find that this matter cannot proceed in Marsabit.

The underlying objective of section 6 of the Civil Procedure Code is to have the second suit stayed instead of having it struck out. Section 6 of the Civil Procedure Code was introduced in order to avoid duplicity of cases and also avoid conflicting decision on the same issue between the same parties. This suit is hereby stayed pending the hearing and determination of Nairobi CMCC 2063 of 2020.

The upshot is that the Preliminary Objection is merited and is hereby granted as prayed. Costs shall follow the outcome of the suit before the Milimani Chief Magistrate's Court.

Dated, Signed and Delivered at Marsabit this 17th day of June, 2020

S. CHITEMBWE

JUDGE