



ATC Kenya Operations Limited v Telkom Kenya Limited (Environment & Land Case E044 of 2023) [2023] KEELC 20990 (KLR) (24 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20990 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E044 OF 2023
NA MATHEKA, J
OCTOBER 24, 2023**

BETWEEN

ATC KENYA OPERATIONS LIMITED APPLICANT

AND

TELKOM KENYA LIMITED RESPONDENT

RULING

1. The first application is dated 30th May 2023 and brought under Order 40, Rule 3 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, seeking the following orders;
 1. That this Application be certified as extremely urgent and the same be heard ex parte in the first instance.
 2. That this Honourable Court be pleased to issue an order that police assistance be provided to the Plaintiff/Applicant and/or its agents and/or the Court Bailiff during the enforcement of the interim Court Order in this matter.
 3. That this Honourable Court be pleased to order the OCS Nyali Police Station to ensure the provision of police assistance during the exercise.
 4. That the costs of the Application be provided for.
2. It is based on the grounds that the Court, vide an Order issued on 23rd May 2023, inter alia restrained the Respondent, its servants, agents, or any person under the direction of the Respondent, from interfering with the Applicant's quiet possession and use of the demised premises. It compelled the Respondent, its servants, agents to allow access to the demised premises to the Lessee, its sub-lessees, customers, servants, agents, contractors or any persons under the direction and instruction of the Applicant for the purposes of installing, using, operating, maintaining, repairing, renewing or carrying out any other action consistent with the terms of the Lease.



3. That the Applicant duly extracted the Order on 23rd May 2023 and duly served it upon the Respondent, through its Head of Legal Services, one Stella Wawira, vide her email snwariwa@telkom.co.ke. Furthermore, the Applicant's agents delivered a physical copy of the Court Order to the demised premises situate in Nyali, and handed yet another physical copy to the head of the private security firm at the site. The Order was also communicated to the Administration Police Service, as their officers also provide security at the site, and the AP verified the Court Order as genuine. However, the said police officers are reluctant to get actively involved in the implementation of the Honourable Court's order unless the Honourable Court makes an Order that provision for police assistance be provided. The demised property is heavily barricaded and guarded by private security firm, agents of the Respondent, who have, likewise have been served but have failed/refused to comply with the Court Order.
4. The second application is dated 6th June 2023 and is brought under Sections 1A, 1B, IC and 3, 4 of the [Civil Procedure Act](#); Order 2 Rule 15(1)(d) and Order 40 Rules 1 (a), and 7 of the [Civil Procedure Rules](#), 2010 seeking the following orders:
 1. That this Application be certified as urgent and be heard ex parte in the first instance.
 2. That pending the hearing and determination of this application, this Honourable Court to restrain Plaintiff, it's servants and/or agents from tampering with, switching off the Defendant's network and/or in any manner interfering with the Defendant's telecommunication infrastructure set up at I-R No. MN/1/3590-Nyali Telephone Exchange or any other sites.
 3. That in the alternative, pending the inter partes hearing and determination of this application, this Honourable Court be pleased to suspend, set aside and/or vacate the interim orders granted on 23rd May 2023.
 4. That this Honourable Court be pleased to strike out the Plaintiffs suit with costs.
 5. That in the alternative, this Honourable Court be pleased to stay the proceedings in this matter pending the hearing and determination of Nairobi HCC No. E096 of 2022 ATC Kenya Operations Limited vs Telkom Kenya Ltd and Nairobi ELC No. E157 of 2023 [ATC Kenya Operations Limited vs Telkom Kenya Ltd](#).
 6. That costs of this Application be provided for.
5. It is premised on the grounds that the Plaintiff herein has obtained ex parte orders by making misrepresentations and by non-disclosure of material facts. The suit herein is filed in abuse of the Court process by failing to disclose the existence of two other suits filed prior to this suit. The suit herein offends the doctrine of sub judice in violation of Section 6 of the [Civil Procedure Act](#). The Plaintiff has approached this Honourable Court with unclean hands as it has switched off the Defendant's telecommunication infrastructure in other sites and is now intending to use this Honourable Court's Orders to access the Defendant's telecommunication infrastructure set up at I-R No. MN/1/3590-Nyali Telephone Exchange for purposes of switching off the Defendant's telecommunication infrastructure. In the event the Plaintiff switches off the Defendant's telecommunication equipment, the Defendant and its customers who include critical security agencies and government operations will be gravely prejudiced as they will experience service outage, rendering communication impossible as well as transfer of critical data and monies which rely on the Defendant's network, which prejudice cannot be ameliorated by an award of damages. The balance of convenience lies in favour of granting the orders sought.



6. The Defendant raised a preliminary objection dated 6th June 2023 on the grounds that the Plaintiffs suit and application offend the doctrine of res sub judice in violation of Section 6 of the [Civil Procedure Act](#). The Plaintiff is guilty of forum shopping. The Plaintiffs suit is in abuse of the Court process. The Plaintiffs suit is vexatious.
7. This court has considered the applications and submissions therein. The issues for determination before court for determination are;
 - a. Whether the defendant's application dated 6th June 2023 seeking to strike out the Plaintiff's suit or in the alternative stay this matter pending the hearing and determination Nairobi HCCC No. E096 of 2022 and Nairobi ELC No. E157 of 2023 is merited.
 - b. Whether the Plaintiff's application dated 19th May 2023 seeking a temporary injunction restraining the defendant from limiting the Plaintiff's access to L.R No. MN/1/3590 Nyali Telephone Exchange where the Plaintiff has erected a base transceiver station is merited.
8. It is the Plaintiff's case that it entered into a lease agreement with the defendant on 20th December 2018 for the lease of part of L.R No. MN/1/3590 Nyali Telephone Exchange where it has erected a base transceiver station. The Plaintiff maintains that under the lease the defendant as the lessor, in consideration for rent had granted the Plaintiff unrestricted access to the suit property. The Plaintiff maintained despite being in full compliance with the terms and conditions of the lease, the respondent has breached the lease agreement by using police officers to deny its employees access. Further to that the Plaintiff claims that the defendant has illegally accessed the suit property and tampered with its infrastructure which has since caused disruptions in critical mobile communications to the Plaintiff's clients such as Safaricom Limited, Wananchi Group and Jamii Telecommunication Limited. The Plaintiff prays inter alia for a permanent injunction compelling the defendant to grant the Plaintiff access to L.R No. MN/1/3590 Nyali Telephone Exchange for the purpose of installing, using, operating, maintaining, repairing, renewing or carrying out any action consistent with the terms of the lease dated 20th December 2018.
9. In their application dated 6th June 2023, the defendant maintained that this suit is sub judice to two other suits filed by the Plaintiff i.e. Nairobi HCCC No. E096 of 2022 ATC Kenya Operations Limited vs Telkom Kenya Limited and Nairobi ELC No. E157 of 2023 ATC Kenya Operations Limited vs Telkom Kenya Limited. The Plaintiff has urged the court to either strike out this suit as a consequence of better still stay it pending the determination of the two suits filed in Nairobi.
10. Section 6 of the [Civil Procedure Act](#) provides for the principle of Sub judice it provides,

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 proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”
11. The Plaintiff has filed Nairobi ELC No. E157 of 2023 ATC Kenya Operations Limited vs Telkom Kenya Limited vide a plaint dated 9th May 2023. In the said plaint, the Plaintiff herein avers that they have entered into 196 lease agreements with the defendant herein for their various base transceivers stations throughout the country. The Plaintiff has itemized the lease between themselves and the



defendant dated 20th December 2018 for LR No. MN/1/3590 Nyali Telephone Exchange is one of the leases that have been breached by the defendant. The Plaintiff has further urged the court to issue a permanent injunction against the defendant from interfering with their right of occupation of the various leased premises throughout the country.

12. It is clear that the parties herein are similar to those in ELC No. E157 of 2023 and they are litigating over the same subject matter, the leases entered between the two parties. The only difference is that the Plaintiff has in this instance suit, selected to litigate on the lease between themselves and the Plaintiff dated 20th December 2018 over LR No. MN/1/3590 Nyali Telephone Exchange; while in Nairobi ELC No. E157 of 2023 they have litigated on 13 lease agreements between themselves and the defendant, including the lease dated 20th December 2018 over the suit premises herein. The relief that the Plaintiff has sought in the instance suit is similar to that sought in Nairobi ELC No. E157 of 2023, as they seek to restrain the defendant from denying them access of the suit premises.
13. The court takes judicial notice of the ruling delivered in Nairobi ELC No. E157 of 2023 dated 13th July 2023 where the court ordered a stay of the proceedings in the said matter pending the hearing and determination of Nairobi HCC No. E096 of 2022 *ATC Kenya Operations Limited v Telkom Kenya Ltd*. In the said ruling, the court found that Nairobi Commercial High Court No. EO96 of 2022, where the Plaintiff herein instituted a suit against the defendant herein was a commercial litigation in nature over master site licence agreements, master tower agreements and site sharing agreements between the parties, who had respective obligations in respect of infrastructure erected on several sites. The court was of the view that the leases between the parties, cannot be read alone as they would amount to misconstruing the tower agreements between the parties. The court found that the dispute was more than just denial of access to the suit properties subject to the various leases upon which the infrastructure stood upon.
14. I do agree with the court's ruling Nairobi ELC No. E157 of 2023 dated 13th July 2023, the parties herein dispute goes beyond the lease they seek to litigate upon. There exists licence agreements between the parties, which were entered into much earlier than the lease agreement and in my view seem to be intertwined with the recent accessibility issue. The outcome of the case in Nairobi ELC No. E157 of 2023 will affect the decision in this suit in the event the Plaintiff's case is upheld.
15. This court is satisfied that the claim herein can be litigated in Nairobi ELC No. E157 of 2023 and there is no justification in having the two cases being heard parallel to each other. This will not only be a slur to the sub judice rule but further violate the overriding objective of the *Civil Procedure Act* of efficient use of the available judicial and administrative resources. Since the court in Nairobi ELC No. E157 of 2023 has stayed the matter pending the determination in Nairobi Commercial High Court No. EO96 of 2022. Consequently, I find that the defendant's preliminary objection dated 6th June 2023 is merited and I strike out the applications and this suit with costs for being sub judice.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

