REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 486 OF 2017

RADIO AFRICA GROUP……..... PLAINTIFF

VERSUS

KENYA PREMIER LEAGUE LIMITED…. DEFENDANT

RULING

1. At the conclusion of the oral arguments by the parties on the Plaintiff's application for an interlocutory injunction, I was satisfied that the application was not merited. I immediately made an *ex tempore* decision dismissing the same but reserved my reasons and order as to costs. I was not able to immediately give my reasons then.

2. The following are now my reasons for the decision.

3. The Plaintiff's application was launched under urgency on 5 December 2017. By the application, the Plaintiff sought to restrain the Defendant from opening or evaluating bids, making any award of the tender or taking any further action in respect of the invitation to tender which the Defendant had caused to be published in two local print-media on 16 November 2017. The tender was in respect of licensing of the right to produce and broadcast audio-visual programs for any soccer matches of the Sportpesa Premium League / FKF Kenyan Premier League for the three seasons between 2018 and 2020 inclusive.

4. The Plaintiff also sought injunctive orders to restrain the Defendant from negotiating or entering into an agreement/contract with any other party in respect of any exclusive or non-exclusive licence of the media rights relating to the Kenyan domestic men's professional football competition known as the Sportpesa Premier League/FKF Kenyan Premier League including without limitation, the rights to produce and broadcast audio-visual programs for any and all football matches of the Sportpesa Premium League/ FKF Kenyan Premier League for the five seasons between 2018-2022, inclusive.

5. The application was supported by the odd seven grounds stated on the face thereof as well as by the founding affidavit of Patrick Quarcoo, the Plaintiff's Chief Executive Officer.

6. The Defendant filed two opposing affidavits on 8 December 2017. The first of the two affidavits was sworn by Francis Philip Okoth, the Defendant's acting Chief Executive Officer while Daniel Kenneth Aduda swore the second.

7. As may be gleaned from both the Plaint and the founding affidavit, the Plaintiff's case is that its relationship with the Defendant commenced in or about April 2017 after a South African media entity terminated the production and broadcasting rights it had with the Defendant. The termination was effected

mid-stream the 2017 Soccer League Season. At the request of the Defendant's agents, the Plaintiff agreed to step in and produce/broadcast matches for the remainder of the 2017 season. Accordingly, an agreement was executed by the Plaintiff and the Defendant to survive the remainder of the 2017 season.

8. According to the Plaintiff, the Plaintiff only agreed to such arrangement on condition that it included a right by the Plaintiff to make an offer in respect of the exclusive media production and broadcasting rights for the five seasons beginning 2018 through 2022.

9.The Plaintiff is however not before the court on the basis of any representation made by the Defendant or the authorized agent. The Plaintiff is before the court against the backdrop of the belief that it has a duly executed and enforceable contract with the Defendant which grants it exclusive media rights to produce and broadcast audio-visual programs in respect of all men's football matches of the Kenyan Premier League for the seasons between 2018 and 2022 (inclusive) ("the media rights").

10. The contention by the Plaintiff is that it received from the Defendant's authorized agent Silva & Co Limited (" the authorized agent") an invitation to offer for the acquisition of the media rights. On 17 July 2017 the Plaintiff contends that it presented to the Defendant an offer for the media rights. The Plaintiff further contends that the offer was accepted when the Defendant's vice-chairman, on 31 July 2017,endorsed thereon as follows: "*Received the original hereof and the offer is accepted*". Subsequently, the Plaintiff contends, the Defendant's authorized agent forwarded the draft Global Licensing Term Sheet in accordance with the offer which had been purportedly accepted by the Defendant.

11. The Plaintiff then accuses the Defendant of breach of contract. It is alleged that the Defendant has failed to sign a Global Licensing Term Sheet. It is alleged that the Defendant is seeking to derogate from the contract. It is also alleged that the Defendant has sought to renege on the acceptance. Critically and of relevance now, it is alleged that the Defendant has invited bids from third parties for purposes of engaging any successful third party to undertake that which the Defendant has exclusively granted to the Plaintiff.

12. The Defendant's short answer to the Plaintiff's allegations is simple. The Defendant asserts that it has no binding contract with the Plaintiff as it has never accepted any offer from or by the Plaintiff.

13. According to the Defendant, the Defendant never met or resolved as an entity to accept the Plaintiff's offer and this position was communicated to the Plaintiff on 25 September 2017. The Defendant further contends that correspondences between the parties from 17 July 2017 clearly show that there has never been any binding contract between the parties.

14. In the end as the Plaintiff asserts that it has a prima facie case with a chance of success, the Defendant insists that no prima facie case has been established.

15. At the oral arguments before me on 18 December 2017, the parties counsel, Mr. Godfrey Imende for the Plaintiff and Mr. Elijah Mwangi for the Defendant, consubstantially went over their respective heads of arguments filed prior to the hearing date.

16. Mr. Imende insisted that the Plaintiff had established a prima facie case with a probability of success as there was evidence that the Plaintiff's offer of 17 July 2017 had been accepted by the Defendant on 31 July 2017 and a binding contract created. Mr. Imende copiously referred to a letter dated 20 July 2017 which was drawn by the Defendant's authorized agent and which letter had the handwritten remarks "*Received the original hereof and the offer is accepted(signed) Ambrose Rachier. 31 July 2017"*. Mr. Imende submitted that when considered objectively the endorsement and correspondence revealed that there was a binding contract between the Plaintiff and the Defendant.

17. Additionally and while making reference to the cases of **Royal British Bank *v* Turquand [1843-60] All ER 435 Morjoria *v* Kenya Batteries (1981) Ltd [2002] EA 479** and **Kimani Kabucho Karuga *v* Sundowner Lodge Ltd [2011]*e*KLR,** Mr. Imende submitted that it mattered little that the Defendant now alleged that the contract had not been accepted formally and in accordance with the internal rules and

regulations of the Defendant. In this regard, Mr. Imende reiterated the well known principle of the law that persons dealing with corporate entities must be insulated from any internal shortcomings by the company. Mr. Imende insisted that the signature by the vice-chairman of the Defendant meant that a binding contract had been formed and bound the Defendant to the contract.

18. It was also Mr. Imende's contention that the Plaintiff stood to suffer irreparably if no injunction was granted.

19. In response, the Defendant's counsel submitted that the Plaintiff could not possibly point to any acceptance of the Plaintiff's offer by the Defendant. Rather counsel stated that the email communication pointed to knowledge on the part of the Plaintiff that the acceptance as of 1 August 2017 was yet to come. In these respects Mr. Mwangi accused the Plaintiff of failing to disclose material facts to the court when the Plaintiff moved the court ex parte on 5 December 2017.

20. To push forward its arguments the Defendant pointed to the fact that the Plaintiff was aware that any acceptance of its offer by the Defendant required the Defendant's committee's approval and ratification which was lacking. According to Mr. Mwangi, the Plaintiff was therefore estopped from insisting that it did not matter that certain internal formalities had not been complied with and observed.

21. Then referring to various authorities, including **Polycarp Ochola *v* Homa Line Company Ltd [1982] e KLR** as well as **Bhagwandas Goverdhandas Kodia *v* Girdharilal Parshottamdas [1966] AIR 543,** the Defendant's counsel submitted that both the offer and acceptance needed to be unequivocal and not presumed from the parties' state of mind.

22. In my judgment, the core question upon which the Plaintiff's application turns to be determined is whether the Plaintiff has shown any prima facie basis that it has a binding contract with the Defendant.

23. As the application is for an intermediary injunction the guiding principles are those laid out in the case of **Giella *v* Cassman Brown & Co. Ltd [1973] EA 358** and reiterated in **Mrao Ltd *v* First American Bank of Kenya Ltd & 2 others [2004] 2 EA 46.** The applicant for an interlocutory injunction is to establish before me a prima facie case with a probability of success and that he is likely to suffer irreparably if the injunction is not granted. Where the court is in doubt then, the balance of convenience principle is to be invoked by ascertaining where the greater hardship would lie if the injunction was to be granted or denied. The court is however to refrain from holding a mini-trial even as it balances the parties respective claims and defences : see **Nguruman Ltd *v* Jan Nielsen Bonde & 2 others CACA No. 72 of 2012.** I will and must consequently not make any definitive findings of fact or law: see **Bonde *v* Steyn [2013] 2 EA 8.**

24. The starting point is the alleged acceptance by the Defendant of the Plaintiff's offer of 17 July 2017.

25. It is not in dispute that the Defendant contracted the authorized agent to source and secure a licensee for the production and broadcast of football matches managed by the Defendant. It is also not in dispute that during the tenure of the agency agreement the authorized agent secured the Plaintiff to make an offer to the Defendant for such media rights. An offer was duly made on 17 July 2017 by the Plaintiff who forwarded the same to the Defendant's authorized agent. The latter subsequently forwarded the offer to the Defendant on 20 July 2017. The Defendant did receive the offer on 26 July 2017 as the endorsement on the offer which appears as annex "PQ-3" in the founding affidavit indicates.

26. Controversy emerges when the Plaintiff states that the offer was accepted by the Defendant on 31 July 2017 hence creating a binding contract whilst the Defendant denies any acceptance. Accordingly, the Defendant does not only deny acceptance but also denies that there was a final contract capable of acceptance and execution by both parties. While admitting and acknowledging having received the offer, the Defendant states that negotiations on some of the terms were still running, a contention however denied by the Plaintiff.

27. It is a generally and widely acceptable principle that the coincidence of offer and acceptance will in a

vast majority of cases represent the mechanism of contract formation. It is however also not lost that whether there is indeed a binding contract between the parties depends not on a subjective state of mind but upon a consideration of what has been communicated between the parties by words or conduct and whether it leads objectively to a conclusion that the parties intended to create legal relations and had agreed upon all terms which they regarded as essential: see **RTS Flexible Systems Ltd –v- Molkerei Alois Muller GmbH & Co. KG (UK Production) [2010] UKSC 14.** It is all about an objective appraisal of the circumstances, words and conduct of each party and each case.

28. In short, the signing of documents may only add to show fact of acceptance and establishment of legal obligations, but even where no signature is present a contract may still be deemed to have been created with a binding legal effect. This of course is unless the law expressly by statute requires otherwise as in the case of sale of land or guarantees.

29. In the present case, the Plaintiff forwarded to the Defendant an offer. The Plaintiff sought that the offer be executed by the Defendant. Specifically the Plaintiff sought that the offer be countersigned to signal acceptance. The Plaintiff was also explicit that it was aware that the Defendant would need to obtain the Defendant's committee's approval and ratification. Neither seems to have been attained. There is no evidence that the offer itself was countersigned and also that the Defendant obtained its committee's approval and ratification. The Plaintiff however points to an endorsement by the Defendant's vice-chairperson to state that there is prima facie evidence that the offer by the Plaintiff was accepted.

30. The endorsement which reads thus "*Received the original hereof and the offer is accepted*" was effected on 31 July 2017 on the forwarding letter by the Defendant's authorized agents dated 20 July 2017. It was not on the offer itself. The offer had earlier been received by the Defendant's Chief Executive Officer on 26 July 2017. It is unclear whether the endorsement was referring to the original of the letter or the offer. It is also unclear whether the acceptance by the vice-chairperson was to signal his personal acceptance of the offer as drawn given that the letter of 20 July 2017 had been placed to the attention of three individuals, namely the chairman, the vice-chairman and the Chief Executive Officer of the Defendant. It may only be left to speculation as to whether the vice-chairman was also authorized to accept the offer on behalf of the Defendant. For now, it will suffice to state that the endorsement without a clear indication of its purport, in my judgment, appears to have been irresponsible and maybe a sign of a dysfunctional organization. There is in these respects no indication that the chairman or the Chief Executive Officer also accepted the same offer.

31. According to the Plaintiff, the endorsement was enough to help create a contract. Even as the Defendant protested that the Defendant had never formally resolved to accept the offer, the Plaintiff insisted that the rule in *Turquand's case* applied.

32. Royal British Bank *v* Turquand [1856] 6 E & B 327 stands for the proposition that a person dealing with a company is entitled to assume, in the absence of circumstances putting him on inquiry, that there has been due compliance with all matters of internal management and procedure required by the parties. The rule is however not absolute and unqualified. The presumption of regularity will not apply if circumstances dictate otherwise or point to irregularity or forgery.

33. The parties in the instant case were clear on the requirement or what the Defendant had to do to ensure that the transaction was fully sealed. The Plaintiff though was entitled to assume that the process had been followed to the letter and then obtain the benefit of the rule in *Turquand's case*. However as will become clearer shortly, the Plaintiff did not take that route. The Plaintiff initially sought to have a more formal acceptance.

34. To ascertain however whether the parties could have bound themselves to a legal contract it may be worth-the-while to consider the correspondence exchanged subsequent to the 31 July 2017 as well as the parties conduct. This may ultimately lead to an objective determination on the status of the offer.

35. Post 31 July 2017, the Plaintiff engaged both the Defendant as well as the Defendant's authorized agent through various correspondence. The emails appear, in my view, to reveal that the Plaintiff sought a

more formal execution of and acceptance of the offer. An email of 1st August 2017 was particularly telling. It appears to suggest that the Plaintiff was clear that the Defendant had not accepted the offer. The Plaintiff had particularly, in uppercase typing, stated that there was no confirmation of the acceptance. This, in my view, was an indication of the Plaintiff insisting that the Defendant formally accepts the offer rather than make a presumption that all was well and that the endorsement of 31 July 2017 had sailed through as an acceptance.

36. In my view, at this preliminary stage, it may not be stated that the correspondence establish, even on a prima facie basis, a binding legal agreement between the parties.

37. The additional email correspondence, copies of which were availed by the Plaintiff, would also not point to a situation of acceptance of the offer. As of 21 August 2017 the Defendant was still reviewing the offer.

38. The totality of the affidavit evidence before me would not lead me to conclude that the Plaintiff has established a prima facie case that there exists a legally binding agreement between the Defendant and the Plaintiff.

39. I would ordinarily stop there but two more points, in my view, deserve my attention and consideration.

40. The Defendant accused the Plaintiff of lack of full and frank disclosure when the Plaintiff approached the court on 5 December 2017 for an *ex parte* order. The Defendant urged the court to ensure that the Plaintiff obtains no advantage from these proceedings for failing to be candid to the expected standards. In particular the Defendant pointed to the Plaintiff's failure to disclose and avail all the email correspondence post 31 July 2017.

41. The scope of the duty of disclosure of a party applying ex parte for injunctive relief may be summarized in simple terms as follows. An applicant must show good faith and disclose his case fully and fairly. He must investigate the nature of the cause of action asserted and facts relied upon before applying and identify any likely defenses. He must then disclose all facts which reasonably could or would not be taken into account by the judge in deciding the application. It is no excuse for the applicant to say that he was not aware of the importance of the matters or facts he has omitted to disclose especially if the facts not disclosed would form a line of defence: see **Bahadurali Ebrahim Shamji *v* Al Noor Jamal & 2 Others CACA No. 210 of 1997, Esther Muthoni Passaris *v* Charles Kanyuga & 2 Others [2015] eKLR** and **R *v* Kensington Income Tax Commissioners *Ex P* Princess Edmond De Polignac [1917] 1 KB 486.**

42. The rule as to full and fair disclosure has been used to discharge ex parte injunctions. It has also been used discretionally to deny even deserving parties any orders after *inter parties* hearing. It is however an instrument of justice, hence must not be used to cause injustice. The court must on the facts of each case decide whether an appropriate sanction would be to fetch the strict tenets of the rule upon the applicant even at the *inter partes* hearing.

43. In my view, in the instant case there was failure on the part of the Plaintiff to disclose material evidence. The Plaintiff sought to rely on an endorsement effected on 31 July 2017, yet hours later was communicating that there was no formal acceptance. The Plaintiff failed to disclose several of the correspondence exchanged after 31 July 2017. There was an unnecessary lack of candor on the part of the Plaintiff which would drive it from this court's seat of equity.

44. There is then the factor of delay.

45. The age old rule when a party seeks the court's discretion as well as moves a court for any equitable relief is that there is need for expedition. Expedition is essential as equity does not assist the indolent at all.

46. In the present case, the Plaintiff was made aware on 25 September 2017 that the Defendant had not accepted any offer from the Plaintiff. The Defendant even urged the Plaintiff to make another offer. This was in response to a letter of 15 September 2017 where the Plaintiff had sought to assert the position that there was a contract between the two parties. The Defendant also stated in the letter that it was shopping for another broadcaster. This ought and should have been the pointer to the Plaintiff. However, the Plaintiff did not do anything towards asserting its rights. The Plaintiff did not prompt the court but waited some two months later just before the Defendant closed bids for the tenders it had invited. There was no explanation and my attempts to eke out the explanation were not successful. I do not view it that the conduct of the Plaintiff in this respect was particularly impressive and befitting a litigant in equity.

47. The Plaintiff failed to establish a prima facie case for the existence and breach of contract. I need not therefore consider the principle of irreparable loss.

48. For all the foregoing reasons, I still find that I had appropriately dismissed the Plaintiffs application dated 5 December 2017. It still stands dismissed. I have seen no reason why I should deny the successful party costs of the application. The Plaintiff will pay the Defendant's costs of the application.

Dated, signed and delivered at Nairobi this 22nd day of December, 2017.

J.L.ONGUTO

JUDGE