



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS**

**CIVIL CASE NO 516 OF 2013**

**C-HEAR (KENYA) LIMITED .....PLAINTIFF/APPLICANT**

**Versus**

**LIQUID TELECOMMUNICATIONS**

**KENYA LIMITED..... DEFENDANT/RESPONDENT**

**RULING**

**Application for injunction**

[1] The application dated 21<sup>st</sup> November, 2013 seeks for an injunction against the Defendant, its officers, servants and agents to restrain them from disconnecting the internet services it provides to the Applicant/plaintiff. It also seeks for a mandatory injunction to require the defendant to continue providing internet services as agreed. Mr Sahenye argued the application on 13.2.2014. they also filed submissions in support of their application. Mr Sahenye urged that there are two agreements and the agreement in position is the one of July 2010. Dealership agreement is about selling service to customer. The July 2010 agreement is oral but is supported by correspondences between the parties. Their claim is not a money claim; rather it is a claim for damages for breach of contract, loss of business and other incidentals. He referred the court to prayers (a) and (b) for injunctions. He stated that the Money claim is just an addition and they claim Kshs.17, 000,000/-. They also paid some money to the defendants but they claimed that the cheque bounced without showing any proof of the bounced cheques. Looking at it from another angle, the defendant's claim is still small than the plaintiff's. Sahenye was of the view that the case of Giella v. Casman Brown recognized that even monetary claims would still be secured by injunction. Since they obtained an injunction there has not been any complaints and services are smooth. Quantum of damages is triable issue in this case. They will suffer irreparable damage as so many businesses of their customers will be affected as well as their employees unless an injunction is issued.

[2] He did not stop there; he saw convenience tilting in their favour. Issues of services to be rendered are to be resolved at the trial. He beseeched the court to give them an injunction, and that they would abide by any conditions issued by the court. He, however, admitted that the Applicant paid the entire amount owing the day preceding the hearing of the application herein.

[3] The applicant filed submissions and supplementary submissions. In the written submissions, the Applicant stated that their said application is premised on the grounds that:

- a. The Defendant has been in breach of agreement and without any or any lawful cause or justification threatened to disconnect the internet service provided by the Defendant to the Plaintiff.
- b. There is real and immediate threat of the Plaintiff's internet service being disconnected by the Defendant.
- c. The Plaintiff is likely to suffer irreparable damage incapable of being compensated by damages.
- d. The Plaintiff is likely to suffer greater inconvenience than the Defendant if the injunction sought is not granted.
- e. There is every probable chance of success in this suit.

[4] The Application is supported by the Affidavit of PARESH TANNA sworn on the 21<sup>st</sup> day of November, 2013 and a further Affidavit by the said Paresh Tanna sworn on the 16<sup>th</sup> December 2013. In a nutshell the Applicant is a retail internet service provider (also known as and hereinafter referred to as "VISP" or "Virtual Internet Service Provider") who is engaged in the business of resale on retail basis of internet service (also known and hereinafter referred to as "internet products" or "internet resources") purchased from a wholesale internet service provider (also known as and hereinafter referred to as "ISP" or "Internet Service Provider"). The Defendant/Respondent (hereinafter referred to as "the Respondent") is an Internet Service Provider ("ISP") who is engaged in the business inter alia of sale of internet products on whole basis to Virtual Internet Service Providers ("VISPS"). By an Agreement verbally entered into between the Applicant of the one part and the Respondent of the other part on or about the 1<sup>st</sup> July 2010 (herein after referred to as "the said Agreement") the Respondent agreed to sell on wholesale basis and at a discount to the Applicant and the Applicant agreed to buy the Respondent's internet products for resale by the Applicant to the Applicant's own customers on retail basis and at a price that may be determined from time to time by the Applicant at the Applicant's sole discretion.

[5] The sale price of the said wholesale internet service to the Applicant was governed by a sales package known as "Box Package" which was successively replaced by new and modified sales packages known as "Box Plus", "Wholesale Box Plus" and Virtual Private Routed Network" (VPRN"). The said agreement replaced an earlier Dealer Agreement dated the 3<sup>rd</sup> May 2010 whereby the Applicant sold the Respondent's internet service on behalf of the Respondent on commission basis as an appointed dealer of the Respondent. The Dealership Agreement dated the 3<sup>rd</sup> May 2010 is defunct and is hereinafter referred to as "the defunct Agreement". The substance and purport of each of the said two Agreements referred to above were as different as chalk and cheese. Under the defunct Agreement the Applicant sold internet service on behalf of the Respondent, as an appointed dealer of the Respondent, whereas under the said Agreement the Applicant sold the internet service as purchased from the Respondent in its own right as a retailer. The terms of the defunct Agreement could not apply and had no applicability whatsoever to the said Agreement which is currently subsisting and binding on the parties. They equated the Respondent's attempt of dragging the terms of the defunct Agreement in order to suit its purpose a drowning man clutching at a straw. The defunct Agreement was a Dealership Agreement and it could not, and was never, referred to as a "reseller agreement". There was no agreement whatsoever by the parties whereby the terms of the defunct Agreement were to be imported into the said Agreement. Consequently paragraphs 6,7,8 and 9 of the Replying Affidavit sworn by Shahab Meshki on the 3<sup>rd</sup> December, 2013, hereinafter, "the said Affidavit" are entirely false, irrelevant and inapplicable to the matters in issue before this court. The said paragraphs should be struck out as being misleading, oppressive and irrelevant in terms of Order 19 Rule 6 of the Civil Procedure Rules 2010.

[6] The said Agreement was made between the Applicant's Managing Director namely Mr. Paresh Tanna acting on behalf of the Applicant, Ben Odour and Atul Chaturvedi duly authorised representatives of the Respondent. By the said Agreement, it was agreed between the parties as under:

- a. The said Agreement would replace and supersede the defunct Agreement.

- b. The Applicant would no longer act as Respondent's dealer but as retail seller in its own right.
- c. The internet service would be purchased by the Applicant from the Respondent on wholesale basis for resale to the Applicant's own customers on retail basis.
- d. The Applicant would host its own server and router which would interlink with the Respondent's system.
- e. The Applicant would provide first line support to its customers and would maintain its own network system.
- f. The Respondent would provide second and third line support by reason of the Respondent being the owner of the infrastructure.
- g. The Applicant's servers would be located at the Respondent's data centre.

The said Agreement did not provide for disconnection of service for any non-payment or otherwise. Under the said Agreement, the Respondent was under express and/or implied obligation to provide to the Applicant adequate, satisfactory and suitable internet service which was fit for the purpose for which the Applicant purchased the same from the Respondent.

[7] In breach of the said Agreement and in breach of the Respondent's aforesaid express and/or implied obligation the Respondent provided to the applicant internet service which was wholly unsuitable and unsatisfactory for the Plaintiff's purpose in that the said internet service was unreliable and of poor quality with unacceptably low internet speeds, the bandwidth capacity was exceedingly short, there were frequent and prolonged downtimes, repeated outages and repeated fluctuations. To clearly understand the gravity of the situation we invite the court to look at the:-

- a. Report dated the 14<sup>th</sup> November, 2013 prepared by the Applicant's Escalation Engineer, Tom Maradona Shikuki (Marked "PT1')
- b. Emails relating to network instability (In a bunch marked "PT2")
- c. Emails relating to switches and port issues (In a bunch marked "PT3") all attached to the supporting Affidavit of Paresh Tunna sworn on 21<sup>st</sup> November, 2013 hereinafter "the Applicants said Affidavit".

[8] In further breach of the Respondent's said express or implied obligations the Respondent caused or allowed to be caused deliberate sabotage of Applicant's internet system. The Respondent also caused or allowed to be caused frequent disruptions of service through non-payment of rental to owners of buildings where the Respondent's equipment were fitted. In further breach of the said Agreement and obligations thereunder, the Respondent failed to pay any or any adequate heed or attention to the applicant's complaints with regard to matters set out hereinabove and refused and/or neglected to take any or any adequate rectifying measures and persisted in supplying to the Applicant unreliable and wholly inadequate internet service of poor quality which was unfit for its purpose. The Respondent's purported claim of "some instances" of "isolated" downtimes at paragraph 10 of the said Affidavit is a gross understatement and/or misstatement. This court's attention is drawn to the following which demonstrate the gravity and magnitude of the problem, which said problem, the Respondent has treated cursorily in an attempt at glossing over the matter;

- a. Paragraphs 9, 10, 11, 12 and 13 of the applicant's said Affidavit.
- b. Exhibits PT 1, PT 2, PT 3 and PT 4 annexed to the Applicant's said Affidavit.
- c. Email correspondence relating to network instability (pages 20-50 of the Plaintiff's List of Documents dated the 21<sup>st</sup> November, 2013).
- d. Email correspondence relating to Switches and Ports Issues (Pages 51 – 82 of the Plaintiff's List of Documents dated the 21<sup>st</sup> November 2013).

[9] By reason of the matters set out above, the Applicant's customers prematurely terminated their contracts with Applicant and in consequence whereof the Applicant suffered loss and damage in the sum of Kshs.17,822,736.25 for which the Applicant holds the Respondent wholly liable. The said loss and damage comprises loss of income by reason of premature termination of customer's contracts amounting to Kshs.13,416,640.00 and amount spent towards attempts made

by Applicant at mitigating loss arising from the Respondent's breach namely Kshs.4,406,096.25 as can be seen from the annexure marked "PT4" attached to Applicant's said Affidavit.

[10] The Applicant submitted further that, notwithstanding the Respondents clear knowledge of the circumstances referred to an paragraph 8, 9, 10, 11 and 12 of the applicant's said Affidavit the Respondent has continued to levy its regular monthly charges and has continued to demand the same from the applicant, which the applicant's loss and damage as set out at paragraph 1q2 of the applicant's said Affidavit. The Respondent has at Paragraph 15 of the said Affidavit admitted carrying out disconnection of the Applicants service but has not explained on what authority (whether contractual or otherwise) the said disconnection was carried out. The said disconnection was unlawful, without any authority and in breach of the Respondent's contractual obligations. The Respondent had no legal right or authority to disconnect the Applicant's services for purported non-payment or otherwise. Additionally, in carrying out the illegal disconnection for the purported non-payment, the Respondent wholly ignored the Applicant's colossal claim against the Respondent in the sum of Kshs.17,822,736.25 as particularised at paragraph 12 of the Applicants said Affidavit. The Respondent's allegation at paragraph 19 of the said Affidavit with regard to the applicant's claim against the Respondent as being "baseless" and not reflecting "true picture of the dealings between the parties" remains wholly unexplained, vague and nothing more than a bare statement unsupported by any concrete evidence. The same should, therefore, be rejected and struck out as being oppressive, frivolous and irrelevant in the extreme.

[11] The Applicant went on; the Respondent knows or ought to know that the Applicant was not entitled to levy regular monthly charges for a wholly unreliable, poor and unsatisfactory service as provided by the Respondent. The Respondent further knows or ought to know that there was no question of satisfying the Respondent's purported bills when the Applicant had a much larger counterclaim against the Respondent as demonstrated at paragraph 12 of the Applicants said Affidavit. In any even the Respondent's statement of account as shown at pages 102 to 122 of the annexure marked "SM1" to the said Affidavit is falsified and fraudulently presented as can be seen from the following entries in the exhibit marked "SM1" to the said Affidavit:-

- a. At page 120 entries number 3 and 4; for 8<sup>th</sup> January, 2013 the running balance was Kshs.2,030,000/-. On 8<sup>th</sup> May, 2013 we paid Kshs.367,155/- yet this is not reflected in the statement.
- b. At page 115 of the said exhibit the entry for 1<sup>st</sup> October 2012 the running balance was Kshs.3,750,073.49. On 22<sup>nd</sup> October, 2012 the Applicant paid Kshs. 979,999.85 but the amount was not deducted from the running total.
- c. At page 116 of the said exhibit the running totals are incorrectly stated as Kshs 15,000.01 instead of the correct figure of Kshs.1,294,999.86 being an over payment.
- d. At page 119 of the exhibit the entry for 1<sup>st</sup> October, 2012 the running balance is Kshs. 816,069.78. On 22<sup>nd</sup> October, 2012 the Applicant paid Kshs. 279,000.35 but the amount was not deducted from the running total.
- e. At page 120 the amount shown as outstanding is incorrectly stated as kshs.2,230,000/- instead of the correct amount of Kshs.1,382,845 .65.
- f. At page 121 of the exhibit the entry for 1<sup>st</sup> October, 2012 the running balance is US\$5,795.94. On 22<sup>nd</sup> October, 2012 the Applicant paid US\$1,426.94 but the amount was not deducted from the running total.
- g. At Page 121 of the exhibit the entry for 10<sup>th</sup> January 2013 the running balance is US\$27,096.44. On 29<sup>th</sup> January 2013 the Applicant paid US\$ 10,465.12 but the amount was not deducted from the running total.
- h. At Page 122 of the exhibit the entry for 1<sup>st</sup> June, 2013 the running balance is US\$41,566.09. On 6<sup>th</sup> June 2013 the Applicant paid US\$6,078.44 but the amount was not deducted from the running total.
- i. At Page 122 of the exhibit the entry for 1<sup>st</sup> August 2013 the running balance is US\$35,679.09. On 5<sup>th</sup> August 2013 the Applicant paid USD\$10,485/- but the amount was not deducted from the running total.

- j. At page 122 the amount shown as outstanding is US\$35,679.09 is incorrectly shown when the actual figure is US\$7,223.05, this is clearly seen from the copies of the excel sheet printouts with the correctly added amounts marked "PT3" attached to the Applicants further Affidavit sworn on 16<sup>th</sup> December, 2013.

[12] The Applicant stated that as demonstrated above, the Respondent has been deliberately falsifying the Applicant's amounts in the Respondent's books in order to inflate the amount of its claim against the Applicants. In addition, the Respondent has been charging the Applicant for deceased customers, unknown and non-existing customers, making duplications of charges, failing to issue Credit Notes, charging full cost of bandwidth notwithstanding its short supply, making fraudulent transactions in Applicant's name, making false entries and creating deliberate inconsistencies in the accounting system and failing to provide monthly statements of account on regular basis.

[13] Further, the Respondent has also overcharged the Applicant and has presented exaggerated amounts which are disputed because they have charged the Applicant twice both wholesale and retail instead of wholesale only, as can be seen from annexure "PT4" attached to the Applicants further Affidavit. The truth of the matter is that the Applicant does not owe the Respondent any amount of money but it is the Respondent who owes the Applicant as claimed in the plaint herein. On or about the 26<sup>th</sup> September, 2013 the Respondent in a domineering, high-handed and authoritarian style and without any contractual or other authority wholly disconnected its internet service to the Applicant under the pretext of non-payment of its dues, notwithstanding the Applicant's enormous loss through poor and inadequate service falsification of accounts as aforesaid and lack of monthly statements of account disclosing periodic payments made by the Applicant. A crisis situation arose within the Applicant's organization whereby the Applicant's remaining customers (about 194 in number) threatened to terminate their internet service agreements with the Applicant. The Respondent continued to maintain its oppressive, authoritarian, overbearing and belligerent attitude, and it was not until considerable pleas, entreaties and imploration that the Respondent reconnected its service to the Applicant on condition that the Applicant would enter into a Settlement Agreement, a copy whereof is annexed hereto and marked "PT5" to the Applicants said affidavit.

[13] The said Settlement Agreement is wholly self-serving, partial, biased and heavily leaning in the Defendant's favour and therefore wholly unacceptable to the Applicant. The settlement negotiations were commenced and conducted on a "without prejudice" basis as is evident from pages 38 to 52 of the exhibit annexed to the said Affidavit. The said negotiations were virtually forced upon the Applicant by reason of oppressive, authoritarian, over bearing and belligerent attitude of the Respondent. The Applicant is apprehensive that if the Applicant refuses to execute the said Settlement Agreement, the proverbial "Sword of Damocles" which is hanging over its head will fall and the Applicant's service will once again be disconnected by the Respondent.

[14] The Applicant said something about the Respondent's allegation that the Applicant's cheques were dishonoured as contained at paragraph 14 of the said Affidavit by the Respondent; the Respondent knows the true facts but has not presented the correct picture of the same to this Honourable Court. The true facts are as set out hereunder:

- a. Cheque No. 001508 was never dishonoured. It was duly honoured on presentation as evident from the attached duly Photostatted copy of the Applicant's bank statement dated the 1<sup>st</sup> July, 2013 (marked "PT 1") and attached to Applicants further Affidavit. The Respondent had raised this issue earlier upon enquiring from the Applicants bank which confirmed having honoured the cheque, and the Respondent bank confirming having received the said amount and crediting the Respondent's account, the issue was settled and laid to rest.
- b. Cheques No 001535 and 001536 were presented by the Respondent prematurely and in breach of express agreement between the parties that the same would not be deposited until the 10<sup>th</sup> August 2013.

- c. For Cheque No. 001270 in an email dated 18<sup>th</sup> December, 2012 to the Respondent the applicant's Managing Director told the Respondent to hold on to the cheque until 28<sup>th</sup> December, 2012. However, one of the Applicants Director, Mrs. Jayshree Tanna's purse containing the cheque book was snatched and stolen. Consequently, the Applicant was forced to cancel all the cheques containing in the stolen cheque book and upon the Managing Directors return from Christmas holiday on the 11st January, 2013 he issued a replacement bankers draft of the same amount and the issue was settled as can be seen from "PT 2 a and b" which are copies of the relevant email and bankers draft attached to the further affidavit.

[16] The Applicant's isolated request or requests for more time to satisfy the Respondent's bills has no bearing whatsoever on the matters in issue herein nor on the Applicant's financial ability to meet its obligations. These kinds of requests are quite common in the commercial sector and the Respondent ought to be aware of such a practice. Further and/or in the alternative and without prejudice to the above, the Applicant's alleged financial hardship was occasioned through colossal loss sustained by the Applicant by reason of wholly poor and inadequate service resulting in huge exodus of customers to the Applicant's competitors. This has been clearly demonstrated in the foregoing paragraphs.

[17] The Respondent is indebted to the Applicant in a much larger sum, i.e. Kshs. 17,822,736.25. Consequently the purported basis for the Respondent to justify its unlawful act of disconnection is of no consequence at all and should be rejected. The Respondent cannot claim a licence to breach the said Agreement on the purported basis that there are purportedly many other internet service providers in the market. Such an argument is in the extreme and should be rejected. There are huge attendant costs of installation and migration and the Respondent should understand that the parties chose with whom to enter into contracts with and once entered the parties are bound by the terms of the contract notwithstanding the availability of other ISP's in the market. The Respondent, is merely advancing excuses in order to wriggle out of the said Agreement which to date remains fully binding on the parties. The Applicant's losses are far greater than the Respondent's purported (unspecified) losses. Consequently the Application is likely to suffer greater inconvenience than the Respondent if permanent injunction is not granted.

[18] The Respondent's assets and liabilities are unknown. The Applicant will not be able to recover the colossal debt owed by the Respondent should the Respondent be declared bankrupt. The Respondent's arguments are frivolous and of no serious consequence and should therefore be rejected.

[19] It is because of the foregoing that the Applicant seeks a prohibitory injunction restraining the Respondent from disconnecting the Applicant's service and a mandatory injunction ordering the Respondent to provide to the Applicant proper and adequate internet service in terms of the Applicant's requirements. It would be in the interest of justice that these orders are granted to the Applicant.

[20] It was urged further that, apart from loss of the said sum of Kshs.17,822,736.25, the Applicant has suffered considerable loss and damage through loss of customers, goodwill and reputation for which the Applicant holds the Respondent wholly responsible. The Applicant stands to lose considerably if the Respondent once again carries out its threat of disconnection. The threat of disconnection of internet service by the Respondent (who, by virtue of position as the wholesale internet service provider, is enjoying a stronger bargaining power) is real and imminent. The threat of disconnection hangs over the Applicant's head like the proverbial "Sword of Damocles" and the Applicant does not know when it's said overbearing and authoritarian supplier might decide to disconnect the said service once again.

[21] The Applicant implores that it is in the interest of justice that an injunction be granted restraining the Respondent from disconnecting its internet service to the Applicant. The Applicant has every probable chance of success in the suit filed herein. Unless the orders sought are granted the Applicant is likely to suffer irreparable loss and damage through loss of clients, goodwill and

reputation which are incapable of being compensated by damages. The Applicant entered into the said agreement with the Respondent due to the Respondent's wide network coverage of its fibre infrastructure in the majority of buildings in Nairobi, and throughout the country and in the entries East African Region. The other ISPs' do not have such a wide coverage. Consequently, the Applicant's clients at places where the other ISPs' do not have coverage would be left without a remedy was the Respondent services disconnected. So, the Respondent's argument that there are other ISPs' in the market does not hold water.

[22] Further the Applicant's clients have greatly invested in the Respondents infrastructure through the Applicant and there will be huge attendant losses should they be forced to uproot such infrastructure and install new infrastructures with new ISPs'. In addition the Applicant has employed a number of employees in whom the Applicant has greatly invested in terms on training and their families and dependants are bound to suffer. The Applicant has also invested heavily in its network infrastructure, branding its company name, product promotion and advertisements.

[23] The Applicant avers also that there are many businesses connected on the Applicant and its client's current infrastructure which are bound to suffer tremendously through collapse of business, loss of livelihoods and loss of investments not to mention the avalanches of potential lawsuits that may face the applicant through claims for breach of service agreements, inter alia. Clearly therefore, these are irreparable losses that cannot be compensated by damages. The Applicant has established overwhelmingly strong case with much greater probability of success. Additionally the loss of goodwill, reputation and reliable customers cannot be compensated or adequately compensated by damages, and in any even the balance of convenience heavily tilts in favour of the Applicant who faces a high risk of not being able to recover damages and aforesaid colossal debt from the Respondent.

#### **APPLICANT FURTHER SUBMISSIONS**

[24] The Respondent deliberately keeps denying the existence of an oral agreement entered between the parties on the 1<sup>st</sup> July 2010 in a bid to mislead the court, wriggle out of the contract and justify its claim for wrongful charges. It keeps insisting on the existence of the defunct agreement dated 3<sup>rd</sup> May 2010 when the said defunct dealership agreement dated the 3<sup>rd</sup> May 2010 did not stipulate the following terms and conditions which were evident in the oral agreement entered between the parties on or about the 1<sup>st</sup> July 2010 and in successive upgraded packages mutually agreed upon thereafter as highlighted below:-

- a. A Box Product Package and its discount of 20%
- b. A Box Product Package pricing flexibility whereby the Applicant would determine its sales pricing strategy based on completion in the market and charge its clients for internet services provided based on its sole discretion and independent of the respondent's recommended retail pricing.
- c. A Box plus Package and its discount of 25%.
- d. That any losses incurred for non-payment from the Applicant's clients would be absorbed by the Applicant and not the Respondent.
- e. The VPRN Package, its capacity and number of port requirements. It's pricing structure, its setup, internet system configurations and of contention ratios.
- f. That the hosting of the Applicant's server and router, its deployment, maintenance, hosting charges, its costs would be borne by the Applicant.
- g. The Applicant's purchase of bulk internet capacity for redistribution.
- h. The Applicant's prospecting for new client's requiring fibre pull and delivering such solutions at flexible pricing.
- i. That the Respondent would allow the Applicant to migrate Box, Box Plus and any other clients to the Applicants VPRN system free of charge.
- j. That the Applicant would purchase, allocate and deploy independent internet protocol addresses (IP's) and bear its annual costs.
- k. That the Respondent would ask the Applicant to obtain internet redistribution licence from the

Communications Commission of Kenya (CCK) and have the Applicant pay its annual charges on revenue generated.

1. That the Respondent would purchase the Applicant's clients at a consideration.

[25] The defunct dealership agreement dated the 3<sup>rd</sup> May, 2010 was primarily overridden by Box Package on or about the 1<sup>st</sup> July 2010, and thereafter a Box Plus Package and eventually the VISP package which subsists to-date as is clearly evident from the copies of email correspondence and the VISP proposal attached and marked as "PT 1" to the Supplementary Affidavit. There was an agreement between the Applicant and the Respondent's agents namely Samuel Wakoro and George Githome during meeting discussions held at the Respondent's offices on 30<sup>th</sup> July 2013 that cheques number 001535 and 001536 were not to be deposited until the 10<sup>th</sup> August, 2013 but the Respondent deposited them on or about 5<sup>th</sup> of August 2013, which at the same time sabotaging the Applicant's Internet System. Contracting parties cannot be expected to document each and every conversation when based on trust and in good faith. Further we live in a crime prone town and incident of the Applicant's Director's purse having been snatched is not an excuse to explain a way out for the non-payment of cheque number 001270 for Kshs.300,000/- that was paid subsequently by a replacement banker's cheque. The same is no longer an issue.

[26] The amounts stated on the Respondent's statement of Accounts and its running totals are at variance with the applicant's reconciliation and do not comply with the basic international principles and practice of double entry book keeping which requires both a credit and a debit entry for every transaction unlike the system of single entry as adopted by the Respondent.

[27] The Respondent is making wild allegations of bouncing cheques, without indicating the cheque numbers, and or availing copies of the said cheques. They have persisted with such failure, despite requests by the applicant to verify with its company records. To-date cheques for Kshs. 979,999.85, USD 6,078.44, Kshs. 279,999.35 and USD 1,426.94 remains unaccounted for. The Respondent should not be allowed to make bare allegations without proof. The applicant, having issued cheques for the same, and the Respondent having admitted receipt thereof, the burden of proof shifts to the Respondent to show that the cheques were not honoured.

[27] The credit-notes issued by the Respondent do not relate to the disputed invoices amounting to Kshs. 4,066,043.12. Further the charge of USD 5,162.00 stated on the statement of account at page 19 of the exhibit is unknown to the applicant as no additional services were rendered by the Respondent and no invoice relating to the alleged service, if any has been issued. Referring to the Respondent's alleged claim of Kshs.4,060,000/- and USD58,009.09 the Respondent has deliberately failed to account for Kshs.4,066,043.12 and USD5,162.00 being charges for the disputed invoices which amounts are clearly not payable to the Respondent. The Respondent has not availed and attached the invoices and statement of account to show how it has arrived at the said figure.

[28] The Respondent cannot bill the Applicant for a non-existing service. Further the Respondent cannot issue back dated invoices subjecting the Applicant to loss of VAT refund claims and it is only fair that the Respondent compensates for the said loss. The Applicant's disputes arose over the Respondent sabotaging its client connection and Internet System. The Respondent failed to resolve the matter and instead turned it into a financial dispute. Further and in breach of its contractual obligations the Respondent has since August 2013—to-date disallowed the Applicant from connecting new clients to replace those who terminated as a result of the Respondent's deliberate and persistent disconnections, system sabotage, client connection sabotage, yet the Respondent continues to bill the Applicant in full while being aware that the Applicant's internet system is not being fully utilised.

[29] According to the Applicant, it is abundantly evident that the Respondent is deploying all tricks to paralyse the Applicant without any basis by claiming outstanding amounts that are not due, and poaching on the Applicant's clients as a calculated scheme to wipe out all competition.

## **RESPONDENT'S SUBMISSIONS**

[30] The Respondent gave a summary of the plaintiff's claim to be that of interlocutory and mandatory injunctions the basis of which is internet services provided by the Respondent/Defendant (the Respondent). The Respondent contends that the Applicant has not met the test for the grant of the prayers sought. The applicant's claim looked at in totality, is a money claim which if sustained can be compensated by way of damages. The money claim is in any event not sustainable and appears to have been fabricated in order to create a basis for the prayers sought herein.

[31] The Respondent argues further that the application is an abuse of the court process and it should fail on the ground expounded below.

[32] The Respondent disputes the alleged oral agreement of 1<sup>st</sup> July 2010. In any event, whether or not an oral agreement existed is not relevant for purposes of the application. The type of applicable package is also not relevant for the purpose of the application herein, that is, whether the services were provided under a Box Package, Box Plus or Wholesale Plus or VPRN. What is relevant and not disputed by both parties is that internet services were provided to the Applicant at all material times. That should be the starting point. The Applicant's argument (page 5 of the submissions and paragraph 14 of the affidavit of Parish Tanna sworn on 16<sup>th</sup> December 2013) that the alleged oral agreement did not provide for disconnection of services for non-payment does not lie. Even if there was an oral agreement (which is denied), the Respondent would be entitled under the law of contract to disconnect the internet services for breach of contract due to the non-payment of the services. There is no authority required as contended by the Applicant. It would be absurd to hold otherwise.

[33] The Respondent contended further that it is expected in the internet services industry to have low speed and down times in some instances. There were indeed isolated instances of down times but the Applicant was duly compensated by way of credit notes for any losses. The Applicant received credit notes worth Kshs. 9,032,173.84 for the period in question. This has not been denied by the Applicant. The e-mails and correspondence produced as Exhibit PT1, PT2 and PT3 setting out the alleged unsuitable and unsatisfactory services do not therefore portray the correct position. The Respondent believes the documents have been produced to muddle the facts and create an impression that the respondent did not provide satisfactory services which is not the case.

[34] The alleged loss of Kshs. 17,822,735.25 is denied. If the applicant suffered the loss, such loss should not be attributed to the Respondent. In any event, the alleged loss goes to show that the applicant's claim is actually a money claim and therefore capable of compensation by way of damages. We will deal with these issues in detail as follows:

a) It is against commercial principles for a party to fail to settle invoices due to apparent financial troubles then fabricate a larger counterclaim in order to avoid paying for the services.

b) The fabrication is made clear by correspondence between the parties and particularly the email dated 19<sup>th</sup> September, 2013 from the Applicant through its advocate who indicated that if the internet services are disconnected the Applicant would take the Respondent '**to court and seek huge damages for loss**' (emphasis added). The email is at page 39 of the exhibit 'SM1' annexed to the affidavit of Shahab Meshki sworn on 3<sup>rd</sup> December, 2013.

c) It is note-worthy that following the email of 19<sup>th</sup> September, 2013 referred to above, the Applicant made demand in the sum of Kshs. 20,009,815/- (see the letter dated 3<sup>rd</sup> September 2013 annexed to the said exhibit 'SM1') which sum is quite different from the sum of Kshs. 17,822,736.25 now being claimed by the Applicant.

d) The alleged discrepancies in accounts have been explained in the Respondent's further affidavit filed herein. In a nutshell, the Applicant misunderstood how the balances are arrived at in the Respondent's statements of account annexed at pages 1 to 19 of the Respondent's further affidavit. The applicant failed to deduct the bounced cheques in order to arrive at the amounts due. The amounts of Kshs. 2,030,000/- and US\$. 35,679.09 were therefore due and payable as at 5<sup>th</sup> August, 2013.

e) The Applicant has since not paid for internet services from August, 2013 to date and the amount now outstanding is Kshs. 4,060,000/- and US\$58,009.09. It is clear that the Applicant's claim is baseless and amounts to an abuse of the court process. If the applicant has objections to parts of the accounts up to 5<sup>th</sup> August 2013 why have they not paid subsequently? This indeed goes to show that the Applicant is using the court process to avoid paying for the services. The court should not allow the Applicant to trade at the Respondent's expense. The non-payment also goes to buttress the Respondent's contention that the Applicant is facing financial troubles and there is a risk that the Respondent may not recover the amounts owing from the Applicant.

[35] According to the Respondent, as a result of the non-payment by the applicant the parties entered into negotiations on the payment of the outstanding amounts by the applicant. The applicant was ready to sign the settlement agreement as it is evident in the e-mail dated 30<sup>th</sup> September 2013 (pages 44 of the exhibit 'SM1' annexed to the affidavit of Shahab Meshki sworn on 3<sup>rd</sup> December, 2013). It is therefore not true that the negotiations were oppressive, authoritarian and self-serving as far as the Respondent is concerned.

[36] The Applicant has not met the test for the grant of the injunction as set out in the case of **GIELLA V. CASSMAN BROWN [1973] EA 358** (No. 2. of the Respondent's list of authorities) in that:

- a. No prima facie case with a probability of success has been established.
- b. The Applicant's alleged claim can be compensated by way of damages.
- c. The convenience tilts in favour of the Respondent.

[37] What is a prima facie case? According to **MRAO LTD. V. TRUST AMERICAN BANK [2003] KLR 125** (No. 3 of the Respondent's list of authorities), a prima case in a civil application "Include but is not confined to a 'genuine and arguable case". It is exercising itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. The Applicant's claim is based on allegations of unsatisfactory internet services from the Respondent. The Respondent has shown that any instances of down times and errors in billing were duly compensated by credit notes worth over Kshs.9 million. The alleged loss of goodwill arising from the alleged loss of customers does not therefore arise. It is clear that the Applicant's case centres on a dispute as to accounts. It has been held in many decided cases that a dispute on accounts is no ground for a grant of an injunction. See for instance;

- a. **RLCO Steel Fabricators v. Commercial Bank of Africa – HCCC No. 223 of 2004 (Unreported)** NO. 7 of Respondent's Supplementary List of Authorities) at pages 17, 18 and 20.
- b. **Patel v. Ngiru – CA No. 18 of 1977 (Unreported)** at pages 6 to 7. (Number 2 on the Respondent Supplementary List of Authorities)

The Applicant has therefore no case with any probability of success. The Court of Appeal held in the case of **KENYA COMMERCIAL FINANCE CO. LTD V. AFRAHA EDUCATION SOCIETY [2001] EA 85** that the three limbs of the test are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third can be addressed. This should therefore be the end of the matter as no prima facie case has been established but we will look at the other two limbs in the event there is any doubt.

[38] Is the liquidated claim herein capable of compensation by way of damages? The applicant's case looked in totality is a money claim that is baseless and thus not sustainable. The Applicant should not be heard on the one hand that it has suffered a liquidated loss and on the other say it will suffer irreparable loss. The attached case of **MACPLAN ENGINEERING SERVICES LTD. V. PETER GROUDHLEHNER [2013] ECLR** puts the position very clearly thus:

**‘The plaintiff has claimed monetary damages from the defendant. So what irreparable loss can it possibly suffer in the even its application for a temporary injunction was refused?... In the circumstances, the temporary injunction sought should not have been granted at all! (Pages 2 – 3).**

See also the Court of Appeal's decision in the attached case of **MUREITHI V. CITY COUNCIL OF NAIROBI [1976 – 1985] EA 331** in which it was held that **“... if damages in the measure recoverable would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the applicant's claim appeared to be at that stage”**

The Court of Appeal also analysed this limb of the test in the case of **PATEL V. NGIRU** (No. 2 of the Respondent's supplementary list of authorities) at page 7 in which it stated **“ On the face of it, damages would be sufficient compensation should the power of sale be found to have been improperly exercised”**. In the same vein, it is clear that the Applicant's case herein is capable of compensation by way of damages.

[39] The Respondent posits that the claim of loss of goodwill and reputation falls on its face in that:

- a. The loss is pegged on the liquidated claim of Kshs. 17,822,736.25 for the alleged unsatisfactory services for the past period. The Respondent has shown that the claim is baseless.
- b. The Applicant has not explained how it will suffer any loss of goodwill and reputation if the internet services are disconnected.
- c. The claim for loss of goodwill and reputation for the past period is therefore a claim that can be assessed by this court and if found payable, paid by the Respondent.
- d. There are many internet service providers in the market. The Applicant is at liberty to obtain the internet services from other providers.
- e. The Applicant should not have its cake and eat it. The applicant should not on the one hand say that Respondent has a wide and satisfactory network coverage than other service providers (page 15 of the submissions) and on the other hand;
  - i. Enjoy the services and not pay.
  - ii. Allege that they received unsatisfactory services.
- f. The alleged losses to the Applicant's client and employees as well as the alleged infrastructure have been included in the submissions for the first time (page 15) and should be disregarded. A party should not give evidence by way of submissions.
- g. In any event, the applicant ought to have avoided a situation where it falls behind in payments to avoid the alleged repercussions. The Applicant is thus the author of any misfortune it may face.

[39] Where does the balance of convenience tilt? The Respondent is apprehensive that it will not receive the outstanding amounts which continue to accrue from the Applicant in view of the financial hardship facing the defendants as evidenced by:

- a. The e-mails at pages 123 to 125 of the exhibit 'SM1' annexed to the affidavit of Shahab Meshki sworn on 3<sup>rd</sup> December 2013 in which the Applicant's director asked for more time to settle invoices in view of financial hardships.
- b. The dishonoured cheques produced at pages 34 to 37 of the said exhibit. See also paragraph 4 of

- the Respondent's further affidavit filed herein.
- c. The admission of financial hardship at paragraph 25 of the Applicant's further affidavit and page 13 of the applicant's submissions.

[40] The Applicant has rightly stated that the Respondent is a well-established company with wide network coverage of fibre infrastructure in Kenya and in East Africa Region (page 15 of its submissions). It then takes a complete turn around and says that the Respondent's assets and liabilities are unknown and that it would suffer irreparable loss if the Respondent is declared bankrupt (page 14). This is dishonest of the Applicant and goes to show how far the applicant has gone to breathe life into an otherwise unsustainable claim.

[41] It is vital for the court to protect the Respondent's interests. As the record would show, the Applicant has not offered an undertaking as to damages. The court held in the case of **GATI V. BARCLAYS BANK OF KENYA LTD. [2001] KLR 526 AT 531** (number 5 on the Respondent's List of Authorities) that an undertaking as to damages is one of the requirements for granting an injunction and where one has been given, an injunction should not issue. See also the case of **MAYERS V. AKIRA RANCH [1972] EA347** (number 3 on the Respondent's Supplementary List of Authorities) in which the court held at page 349 that an undertaking as to damages is a pre-requisite for the grant of an injunction. The same principle is also found in **Steven Gee QC, 'Commercial injunction'** at page 285 (No. 4 of the Supplementary list).

### **Mandatory injunctions**

[42] The Applicant has made a prayer for an interlocutory mandatory injunction at prayer 3 of the application herein. The principles for the grant of such an injunction are set out in inter alia the cases of **LOCALBAIL INTERNATIONAL FINANCE LTD V. AGRO EXPORT 1WLR 657** and **MALINDI AIR SERVICES & ANOTHER V. HALIMA ABDINOOR HASSAN – CA APPLICATION NO. 202 OF 1998 (unreported)** (No. 6 and 7 of the Respondent's list of authorities) that the Applicant's case should be clear and incontrovertible.

[43] As stated above, the Applicant's case is not only unclear and controvertible, but it is also unsustainable. Look at the **Conduct of the Applicant**: One of the equitable principles the court looks at in application for injunction is the conduct of a party who seeks equitable remedies. The Applicant has come to court with unclean hands and is not entitled to the orders sought. This is demonstrated by inter alia the e-mails (pages 60 to 98) the applicant sent to the Respondent's top officers and third parties including the Respondent's regulator, the Communications Commission of Kenya, alleging untrue and misleading information which had nothing to do with provision of internet services. The Respondent believes that was meant to put pressure on the Respondent not to insist on the settlement of outstanding amounts. The courts have considered this principle in many cases including the Mrao case (supra) at holding 5 in which the Court of Appeal observed that the appellant had come to court of equity without showing at most faith and was thus not entitled to an injunction. See also **MALINDI AIR SERVICES** case (post) at page 9, the **GATI V. BARCLAYS BANK OF KENYA CASE (IBID)**, holding and **SPY'S PRINCIPLES OF EQUITABLE REMEDIES** (No. 8 of the Respondent's list of authorities).

[44] The Respondent concluded that it is just and fair that the application be dismissed with costs. In the unlikely event that the court grants the injunction to the Applicant the grant should be:

- a. Conditioned on the furnishing of an undertaking as to damages backed by appropriate security including a bank guarantee or an insurance bond. Authority for this is **Commercial Injunctions (supra) at page 288**
- b. Auditioned on the furnishings of an undertaking as to damages and the Applicant or deposit sums now outstanding Kshs. 4,060,000/- and US\$58,009.09 in an appropriate security and joint interest earning account.
- c. The Applicant to settle the subsequent billings and the billings going forward failing which the

respondent to be at liberty to disconnect the internet services.

## **COURT'S RENDITION**

### **Accusations upon accusations**

[45] This is a case for temporary and mandatory injunctions. And I have carried out a detailed analysis of the submissions of the parties. What I have found out is; the entire submissions are characterized by accusations and contra accusations by and between the parties. Each party has blamed the other for the problems it is facing. The Applicant accuses the Respondent of high-handedness, oppression and blackmail. It makes further accusations; that the Respondent deliberately coined a Settlement Agreement which was wholly self-serving, partial, biased and heavily leaning in the Respondent's favour and therefore wholly unacceptable to the Applicant. It admits, however, that the settlement negotiations were commenced and conducted on a "without prejudice" basis as is evident from pages 38 to 52 of the exhibit annexed to the supporting Affidavit. Nonetheless, it is the contention of the Applicant that the said negotiations were virtually forced upon the Applicant by reason of oppressive, authoritarian, over bearing and belligerent attitude of the Respondent. The Applicant is apprehensive that if it refuses to execute the said Settlement Agreement, the Respondent will draw blood upon the Applicant; it has used the proverbial "Sword of Damocles" to describe the oppressive attitude and character of the Respondent in the way it has handled the contract herein. It has levelled further claims that the Respondent has not only interrupted the supply of internet services, but has supplied low quality services even in the occasions it has provided services. All these insidious acts were intended to pressure the Applicant to sign the settlement agreement.

[46] The Respondent, on the other hand, has described the Applicant as unreliable, dishonest and evasive person, not ready to pay its just debts. The Respondent has dramatized this character of the Applicant by stating that the Applicant issued bad cheques which on presentation were dishonoured. The Respondent is apprehensive that the Applicant's financial difficulties pose yet another danger; the Applicant may not be able to pay the debts it owes the Respondent. In addition, the Respondent submitted, the Applicant refused to sign for settlement of the outstanding amounts. Instead, the Applicant engaged in intimidation by writing e-mails (appearing at pages 60 to 98) to the Respondent's top officers and third parties including the Respondent's regulator, the Communications Commission of Kenya, alleging untrue and misleading information which had nothing to do with provision of internet services. The Respondent believes that was meant to put pressure on the Respondent not to insist on the settlement of outstanding amounts. The Applicants have been billed as agreed but they have failed or deliberately refused to pay them despite having sold the services to its customers, so the Respondent argued. In totality, the conduct of the Applicant translates into bad faith which then means, the Applicant did not come to court with clean hands. For those reasons, it is not entitled to the reliefs sought, for they are equitable in nature.

[47] After careful consideration of the material before me, there is every indication and substantially so, that these accusations bear some truth; in essence, both parties are equally at fault. If that be so, the case falls within the doctrine of *in pari delicto* whereat the court will not ordinarily involve itself in resolving one side's claim over the other; the law leaves them where it finds them, in accordance with the maxim, *in pari delicto potior est conditio defendentis et possidentis*. Or, where appropriate, the court should take the view that whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. Judicial decisions on this subject are legion and I do not wish to multiply them.

In the circumstances, I will not pretend to or even consider whether the principles applicable in the grant of temporary injunctions in the case of **GIELLA v CASSMAN BROWN** have been satisfied or not.

[48] The rule is; leave them where we find them or whoever possesses whatever is in dispute may

continue to do so in the absence of a superior claim. The Applicant is still receiving supply of internet services from the Respondent, thanks to the interim relief herein. And the Respondent is still receiving payment from the Appellant for those services; again courtesy of the interim relief herein. The best judgment of the court is that the Applicant should continue to receive the internet services from the defendant provided that it continues to pay all current bills as shall be rendered by the Respondent until the suit is determined. Essentially, that means; in the event of default to pay on its due date, any current bill rendered by the Respondent for the services consumed during the period of the bill, this relief shall lapse and the Respondent will be entitled to take appropriate action allowed by the contract of supply between them including disconnection of supply. It is so ordered.

[49] Before I close, I reckon that the claims by both parties revolve around settlement of accounts and it should be a prudent way of disposing of this suit for the parties to consider narrowing down the issues and set down the cause for trial as a matter of priority.

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of March, 2014**

**F. GIKONYO**

**JUDGE**