



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND NO. 910 OF 2012

JAMII TELECOMMUNICATION LTD.....PLAINTIFF

VERSUS

KENYA URBAN ROADS AUTHORITY

MATTAN CONTRACTORS LIMITEDDEFENDANT

RULING:

The applicant herein **Jamii Telecommunications Ltd** has brought this Notice of Motion dated 29th November, 2012 against the Defendants herein **Kenya Urban Roads Authority & Mattan Contractors Ltd** under **Order 40 Rule 1,2,&10 and Order 50 Rule 1, of the Civil Procedure Rules, Section 1A,1B, and 3A of Civil Procedure Act, Section 25,26,27 and 56 of the Kenya Road Act and Articles 40(2) and 47 of the Constitution of Kenya 2010** , and all other enabling provisions of the law.

The applicant sought for these orders:-

- i. That the Court do issue Temporary Injunction restraining the Defendants by its agents, Contractors, and/or employees from interfering with , obstructing and/or damaging the Plaintiff's infrastructure Utilities Laid upon and along several Roads Upper Hill area within Nairobi whether by excavating, digging or any other means pending the hearing and determination of this suit.
- ii. That the Court to issue Mandatory Orders compelling the Defendants to issue the requisite statutory notice as required under section 27 of the Kenya Roads Act 2007, and to avail to the Plaintiff/Applicant the program of work as agreed at the stakeholders meeting of 2nd October, 2012, to allow the Plaintiff/Applicant reasonable time to undertake measures for mitigation of loss, inconvenience and disruption to the Plaintiff/Applicant's client pending the hearing and determination of the suit.
- iii. In the alternative, the court to issue Orders for the preservation of the Plaintiff's cables and property situated on the road reserve pending the hearing and determination of this suit.
- iv. That in view of the urgency of this matter, and in the interest of justice, the Court to waive the requirements of section 67 of the Kenya Roads Act, 2007.
- v. The Defendants/Respondents be ordered to pay the cost of this application.

The application was supported by the grounds on the face of the application and on the Supporting Affidavit of **John Njuguna Kamau** and further Supporting Affidavit of **Morrison Mwangi** . Among the

grounds for the application are that; the applicant is a data network operator providing information network services to key industries in the country. That the applicant was issued with wayleave dated 27th November, 2008 by the city Council of Nairobi to lay terrestrial Fibre Optic Infrastructure Cables along various roads within Nairobi and the applicant used considerable cost to lay down such Infrastructure Utilities after paying necessary payments to City Council of Nairobi and continuous to observe the provisions of the wayleave. However, the Defendants/Respondents by its agents, employees and/or contractors without due notice to the Plaintiff undertaken extensive construction works within Upper Hill area and in the process have caused extensive damage and loss to the Plaintiff's infrastructure utilities. That the said interference of the Plaintiffs infrastructure utilities by the Defendants/Respondents are illegal and infringes on its right to protection of property. Applicant therefore, prayed for restraining Order and maintenance of Status Quo pending the full hearing of the matter.

The application was opposed by both the Defendants. The 1st Defendant through Engineer **David Ndirangu Mutuohoro** who deponed a Replying Affidavit denied the allegations made by the Plaintiff/Applicant herein. The Deponent herein deposed that, prior to commencement of the constructions work, the 1st Defendant called several meetings of all service providers, Plaintiff included and informed them of the proposed project and the service providers were informed of the need to relocate the services. He further deposed that, the on –going project is set to cost the exchequer **Kshs.2 Billion** and is scheduled for completion in June, 2014 and any delays occasioned by these proceedings would have a negative and punitive effect to the tax-payers . He further averred that, the sought Injunction would be inequitable and prayed for the dismissal of the application. The Replying Affidavit contained some annextures thereto.

The 2nd Defendant also opposed the application and one **Najib Rashid** swore a Replying Affidavit in opposition to the Notice of Motion. The Deponent herein deposed that, he is a stranger to the Plaintiff's allegations and denied that any of their servants, or agents acted carelessly negligently and hence caused damage to the Plaintiff's infrastructure. He further admitted that 2nd Defendant embarked on extensive Road Construction Work in Upper Hill area of Nairobi on or about 18th August, 2012.

He also denied that, section 27(3) of the Kenya Roads Act applies herein and that, Plaintiff had constructive **notice** since its representative attended the stakeholder's consultative meetings. He further deponed that, the Plaintiff herein was uncooperative disinterested and condescending throughout the stakeholders meetings and during work execution and he is not entitled to receive the program of works for the road construction works, as it is a contractual document between the 1st and 2nd Defendants herein. The 2nd Defendant prayed for dismissal of the Plaintiff's application.

The parties herein canvassed the Notice of Motion through Written Submissions. The Court has now considered the pleadings in totality and the Written Submissions and the Law. The Court makes the following findings:-

The Applicant herein is seeking for injunctive Orders. He has to satisfy the three main principles for grant of Injunctive relief as was held in the case of **Giella Vs Cassman Brown Ltd (1973) EA 358**. These thresholds Principles for injunction are:-

- i. The applicant must establish he has a Prima facie case with probability of success.
- ii. The applicant must establish that he will suffer irreparable loss or injury which cannot be compensated by damages.
- iii. When the Court is in doubt, to decide the application on a balance of probabilities.

From the available evidence, there is no doubt that the applicant herein, obtained Public Rights of Way (Way leave) from the City Council of Nairobi. It obtained the same on 27th November, 2008 as evidenced by JNK1. There were conditions that, the applicant was to meet for the grant of the way leave. The applicant had to pay some amount of money to City Council of Nairobi and this was done as evidenced by JNK2. The grant of the way leave herein to the applicant was therefore lawful. The way leave grant was for laying optic fibre cables along various roads within Upper Hill area as shown in

annexure JNK1. Section 27(1) of the Road Act Cap 2 of 2007) defines infrastructure utilities as :

“ To include fibre borne utilities including fibre optic cables”

There is also no doubt that the Plaintiff/Applicant is a Data Network Operator licenced to provide Communication and Information Network solution to a large number of clients.

It is therefore, evident that when the applicant was granted the way leave, it laid out the stated cables at a considerable cost this was demonstrated by the Applicant in paragraphs No. 7 & 8, of the Supporting Affidavit of **John Njuguna Kamau**.

There is also no doubt that the 1st Defendant embarked on extensive works in Upper Hill areas of Nairobi and contracted the 2nd Defendant to do the works. This aspect is admitted by the 1st and 2nd Defendants in their Replying Affidavits.

The applicant has alleged that in the process of carrying out construction works, the 2nd Defendant has recklessly destroyed the Plaintiff's infrastructure utilities causing widespread interruption of the essential communication services to the consuming public. These destroyed cables are evidenced by JMK3.

The applicant alleged that the Defendants herein did not give them the due notice that is envisaged by section 27 of the Kenya Roads Act and therefore the Defendants have contravened the Law and that has caused the Plaintiff great loss. Section 27 (2) of the Road Act reads as follows:-

“where infrastructure utility is located within a Road reserve, the provider and operator of such infrastructure utility shall upon written request by the responsible authority relocates such infrastructure utility to a location or alignment”.

The Defendants on their part submitted that they gave constructive notice through their several meetings with the stakeholders. However section 27(2) is couched in Mandatory terms and the responsible authority ought to have given written request. With due respect, I differ with the 1st Defendants submissions that section 27(2) was not couched on Mandatory terms. The 1st Defendant herein being the authority responsible did not request the applicant herein to relocate such infrastructure utilities. The Defendants also submitted that the various consultative meetings with the stakeholders or service providers, Plaintiff included amounted to constructive notice. However, Section 27(3) of the Kenya Roads Act is very clear that the authority ought to have given reasonable notice.

Section 27(3) of the said Act reads as follows:-

“where an authority intends to exercise any power under section (2) it shall give reasonable notice of its intention to do so to the person having control of such infrastructure utility and such person shall cause to be removed such infrastructure within sixty days.

The 1st Defendant was required by the Law to make a written request for removal of utilities and the applicant was allowed 60 days to remove the said utilities. There is no evidence that the 1st Defendant did any of what is required by section 27 of the Kenya Roads Act 2007. Again with due respect, the Court disagree with the Defendants submissions and Replying Affidavits that the various meetings with service providers (applicant) included amounted to the required Notice.

The applicant has demonstrated that he had a right of way (way leaves) and has also demonstrated that the Defendants breached the provisions of section 27 of the Kenya Roads Act.

The Court finds that applicant has demonstrated that he has a prima facie case with high probability of success. I will rely on the authority cited by the Plaintiff; the case of **Muigai Vs Housing Finance Co. Of Kenya Ltd and Another (2002) KLR Vol.2 Pg 332**, where Ringera Justice (as he was then held that:-

‘.....I must bear in mind that I should not make definitive findings of fact or law at this stage and particularly so where affidavit evidence is contradictory. The case that the Plaintiff has to prove at the trial is that he was not served with a valid Statutory notice....so all in all , I think the Plaintiff has shown a prima – facie case that he was not served with a valid Statutory Notice contrary to the provisions of Section 74 of Registered Land Act”.

The applicant has alleged and submitted that it used considerable cost to lay down the infrastructure utilities. The said infrastructure utilities having been destroyed have disrupted services to a large consuming clients and public who depend on the Network for Information and Data Transfer.The applicant has therefore, incurred loss and injury which cannot be compensated by way of damages.

On the balance of convenience, the Court finds that the applicant has been inconvenienced due to the fact that the Respondent failed to follow the law. The Court therefore, finds that the balance of convenience tilts in favour of the applicant herein. The court has taken into consideration the submissions by the 1st Defendant that, in this matter, the Court should not only be guided by the three Principles in considering whether injunctive relief is warranted. 1st Defendant submitted that, the Court should also consider the Public Interest. There is no doubt that 1st Defendant is drawing money from the exchequer in construction of these roads. The money being used is tax-payers money. However, whether the Defendants are using tax-payers money or not, they are bound by the law and whatever they do should be within the confine of the country’s law to weed out impunity. The Defendants herein contravened the provisions of section 27 of the Kenya Roads Act and cannot hide under the cover of Public interest.

Having now carefully analysed the pleadings before me and the Written Submissions, the Court finds that the applicant has demonstrated that it has a **Prima facie Case** with high probability of Success. It has also demonstrated that, it stands to suffer irreparable loss which cannot be compensated by damages. For the above reasons, I find that the applicant is entitled to the **injunctive Orders**.

Applicant brought the application under certificate of urgency. Applicant has submitted why it failed to comply with section 67 of the Kenya Roads Act.

The Applicant has not sought to restrain the Defendants from carrying on with the Road construction works but from further destruction of the applicant’s infrastructural utilities.

The Applicant has also not sought to be supplied or provided with the contract document between the 1st and 2nd Defendants but **only** to be supplied with the program of works to enable it take measures to mitigate the loss. The Court consequently, allows the applicant’s application in terms of prayer No.3, 4 and 6.

Costs in the Cause.

It is so ordered.

Dated, Signed and delivered at Nairobi this 19TH of July, 2013.

L .N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant/Applicant

Anne: Court Clerk

L .N. GACHERU

JUDGE