



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 229 OF 2010

**CELTEL KENYA LTD.....1ST
PLAINTIFF/RESPONDENT**

VERSUS

**TODD MICHAEL DICK.....1ST
DEFENDANT/APPLICANT**

**SAMUEL MUTAHI GATHOGO T/A VALLEY AUCTIONEERS.....2ND
DEFENDANT/APPLICANT**

RULING

Before the court are two applications by way of Chamber Summons dated 27th September, 2010 and 25th November, 2010.

The first application filed by the 2nd Defendant seeks prayers that the Plaint dated 27th April, 2010 and filed in the court on 28th April, 2010 be struck out and the 2nd Defendant be given his costs for defending the suit and for his application. The application is premised under Order VI Rule 13 (1) (b) and (d) of the Civil Procedure Rules (repealed). This provision is now under Order 2 Rule 15 of Civil Procedure Rules 2010. As per the provisions of Order 54 Rule (2) of the Civil Procedure Rules, the application is properly before the court.

The application is supported on grounds set forth on the face thereof and on supporting affidavit sworn by Samuel Mutahi Githongo on 27th September, 2010.

The 2nd application filed by the 1st Defendant also seeks the similar prayers of striking out the Plaint and costs. It seeks further order of granting of interest at court rates on the costs awarded.

The 2nd application is supported on the grounds set forth on the face thereof and on the supporting affidavit sworn by Dismas Ooko Wamboki, the Advocate for the 1st Defendant, sworn on 25th November, 2010. The application is premised under Order VI Rule 13 (1) (b) and (d) as well as Sec. 1A, 1B and 3A of Civil Procedure Rules.

The Plaintiff has opposed these applications and has filed a replying affidavit sworn by one Ivy Ng'ang'a, a Legal Affairs Manager of the Plaintiff company, on 31st January, 2011.

Because the applications seeks prayers to strike out the Plaintiff, it shall be appropriate to look at the pleadings filed before the court.

The main issue in the Plaintiff is the proclamation of attachment issued by the 2nd Defendant under the authority of the 1st Defendant against the assets belonging to the Plaintiff. The assets of the Plaintiff were proclaimed because of the orders issued by the Industrial Court in its Cause No. 252 of 2010 which cause was between the 1st Defendant and Mobile Telecommunication Company (MTC). International Holding, Baharian SPC. The issue between the parties was the employment dispute and the Plaintiff has not been a party to the said dispute. Yet as per the Plaintiff, the proclamation was issued by 2nd Defendant on the assets of the Plaintiff. The Plaintiff thus claims for damages (general and exemplary) for unlawful attachment of assets and trespass to the Plaintiff's premises. The Plaintiff also filed an application dated 27th April, 2010 for temporary injunction restraining the two Defendants from attaching or proclaiming, disposing of, advertising, publishing, charging etc, the assets owned by the Plaintiff or interfering with its mobile cellular operation license until full hearing of the case. The application was opposed by both the Defendants and a preliminary objection was raised as to the competence of application before the court.

In the meantime, the 1st Defendant filed his Statement of Defence on 24th May, 2010 and the 2nd Defendant filed its Statement of Defence under protest on 20th September, 2010.

Hon. Dulu J. heard the said application and delivered his ruling on 3rd August, 2010 and dismissed the application by holding that the application has been filed in the wrong forum and is, therefore, incompetent.

It is also true that he observed that his decision is limited to the said application as it is the application which is for his consideration, though the matter started by way of a Plaintiff.

However, he did make the following observations on pages 18 – 19 and 20 of the Ruling

“It is true that the plaintiff herein is not an employee of the 1st defendant. However, all the prayers sought arise from a decision of the Industrial Court. That decision on attachment or proclamation of assets and the underlying proceedings are not before me either on appeal, for review or execution. In my view, this application which arises from a decision of the Industrial Court is in the wrong forum because I do not have the decision of the Industrial Court with me for adjudication, nor can I supervise or alter the decision of the Industrial Court or issue orders in addition to what the Industrial Court has issued as requested in this application which was filed under the Civil Procedure Act. In my view, this application should have been made in the Industrial Court which was and is seized of the actual case from which all the complaints emanate for consideration and decision before considering going to any other court. On this I rely on the provisions of section 12 (3), (4) (5) (6), (7) and (8) of the Labour Institutions Act, which provide as follows:-

12. (3) The Industrial Court may consolidate claims for the purpose of hearing witnesses as appropriate.

(4) In discharge of its functions under this Act, the Industrial Court shall have the powers to grant injunctive relief, prohibition, declaratory order, award of damages, specific performance or reinstatement of an employee.

(5) In deciding on a matter, the Industrial Court may make any other order it deems necessary which will promote the purpose and objects of this Act.

(6) Any decision or order of the Industrial Court shall have the same force and effect as a judgment of the High Court and a certificate signed by the Registrar of the Industrial Court shall be conclusive evidence of the existence of such decision or order.

(7) The Industrial Court may make an order for payment of costs, according to the requirements of the law and fairness and in so doing, the Industrial Court may take into account the fact that a party acted frivolously, vexatiously or with deliberate delay during conciliation proceedings and in bringing or defending a proceeding.

In my view, the powers of the Industrial Court above, other than being powers similar to those of the High Court, cover all the prayers sought in the present application, wherein the Industrial Court can grant the orders sought to give specific directions on the same. The fact that there is no specific procedure or rules provided under the Labour Institutions Act akin to the Civil Procedure Rules, should be no bar to an applicant. The applicant merely needs to cite the specific sections of the law that confers on the Industrial Court powers to adjudicate on their complaint and put the complaints and reliefs in clear language for the Industrial Court to consider

The said Ruling has not been appealed against or been sought for review.

In the supporting affidavit of the 1st application, the said ruling is annexed as annexure SMG1. In the Defence filed under protest, the 2nd Defendant has raised an issue of Jurisdiction of this court.

Similar is the stand of the 1st Defendant in the second application. It is also brought to the notice that the said Ruling of Hon. Dulu J. was on the Preliminary Objection filed and thus the application was held to be incompetent without going into the merits of the application.

The 1st Defendant has also stated that the Respondent before the Industrial Court case has deposited the ordered claim as security and that the Plaintiff has not applied to be joined in as a party before the Industrial Court.

In opposition, the Plaintiff/Respondent still maintains that it is only the High Court which can hear and determine the following issues, namely:-

(a) Whether the proclamation by the auctioneer was manifestly illegal and a nullity in law.

(b) Whether the auctioneer carried out due diligence to establish ownership of the assets that were proclaimed.

(c) Whether the court should revoke or suspend the auctioneer's license on the basis of the illegal attachment.

(d) Whether the Defendants are liable for damages for wrongful attachment and trespass onto the Plaintiff's properties.

(e) Whether the 1st Defendant had a lawful right to interfere with the Plaintiff's Cellular Operator License issued by the Communication Commission of Kenya.

(f) Whether the Plaintiff's business reputation was damaged on account of an illegal attachment.

(g) What is the quantum of damages to be awarded to the Plaintiff for libel.

(h) Whether it is conscionable for the auctioneer to claim the sum of Kshs.23,000,000/= based on an illegal attachment.

It has also raised several issues to show that the attachment was illegal and hence the claims made in the Plaintiff.

I do note that what is asked by the Plaintiff is the damages suffered due to alleged unlawful proclamation of attachment of its assets. Moreover, it has also sought for permanent injunction restraining the Defendants from proceeding in any way the alleged unlawful proclamation. There is a Ruling however, by a High Court Judge, that the application for interim injunction which is based on and arises from the order of the Industrial Court is filed before a wrong forum. That finding has not been challenged and thus is binding so far as the parties in this case are concerned.

It is also clear that the prayers for damages in prayer no. (a) and (b) arises from the orders of the Industrial Court.

I specifically reiterate the following observations of Hon. Dulu J. made in the said Ruling (page 15 thereof)

“In my view, this application should have been made in the Industrial Court, which was and is seized of the actual case from which all the complaints emanate for consideration and decision before considering going to any other court.”

I also note the specific provision of Sec. 12 of Labour Institutions Act, which gives the Industrial Court powers to award damages and declaratory orders. Sec. 12 (5) moreover, gives the discretion to the Industrial Court to make any other order it deems necessary which will promote the purposes and objects of the Act.

It is to be understood from the said Ruling that the application which was filed under the Plaintiff emanated from the matter seized by the Industrial Court, can I then state that the Plaintiff is different in any way. Plaintiff is clearly and concisely arises from what has been determined by the Industrial Court. If the application to file an objection proceeding from the attachment of assets as a result of order of the Industrial Court is found to be incompetent and the Plaintiff has conceded to that eventuality, how then the Plaintiff averring the same facts can be otherwise?

In my view, my hands are tied by the unchallenged Ruling of Hon. Dulu J. and I thus shall proceed to allow the two applications as prayed, except that I shall not grant any order on interest as prayed in the 2nd application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 18th day of **May, 2011**

K. H. RAWAL

JUDGE

18.05.2011