



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Case 526 of 2010

LEOPARD COMMUNICATIONS LTD. ....PLAINTIFF

VERSUS

CELTEL KENYA LIMITED ..... DEFENDANT

RULING

The application before Court is brought by a Chamber Summons dated 29<sup>th</sup> May, 2010, and is taken out under **Rule 2** of the **Arbitration Rules, 1997**; **Section 7** of the **Arbitration Act, 1995**; **Order XXXIX Rules 1** and **9** of the **Civil Procedure Rules**; **Sections 3A** and **63** of the **Civil Procedure Act**; and all other enabling provisions of the law.

The main prayer which the Applicant seeks is that a mandatory injunction be issued ordering the Respondent to forthwith reconnect and restore on the Respondent's network short codes numbered 5604, 5605, 5627 and 5911 until the date of publication of an award by the sole arbitrator in the pending arbitral proceedings as an interim measure of protection provided for in **Section 7** of the **Arbitration Act, 1995**. The Applicant also prays that the costs of this application be provided to the Claimant.

The application is supported by the annexed affidavit of DIPEN NAVANI, a Director of the Claimant, and is based on the grounds that there is already an arbitration in respect of the agreement made between the Claimant and the Respondent for the use of the Respondent's network by the provision of value added services, in which arbitration the Claimant contends that the Respondent has breached the said agreement by its wrongful disconnection of the Claimant from the Respondent's network. It is the Claimant's case that unless its network short codes are reconnected, its business will be rendered inoperative and it will be unable to conduct its business at all and this will ultimately lead to the total collapse of the Applicant's business. If that happens, the arbitration itself will be rendered nugatory.

Opposing the application, the Respondent filed a replying affidavit sworn by IVY NGANA, a legal officer in the Respondent Company, on 7<sup>th</sup> June, 2010. In that affidavit, the Deponent deposes that the contract between the parties was terminated by a letter dated 4<sup>th</sup> December, 2009.

During the oral canvassing of the application, Mr. R. Nagpal appeared for the Applicant while Ms. Majanja appeared for the Respondent. Mr. Nagpal argued that the principles governing interlocutory mandatory injunctions are similar to those governing the grant of prohibitory injunctions. He referred to **KENYA BREWERIES LTD. v. OKEYO [2002], EA** and submitted that in the case before this Court, there are special circumstances to warrant the grant of a mandatory injunction. He submitted that the Applicant has undertaken on oath to pay whatever is due to the Respondent, and that the replying affidavit contained absolutely nothing showing why this injunction should not issue. He further submitted

that the Respondent will not be prejudiced by reconnecting the Applicant but if the Applicant is not reconnected, the Applicant will be driven out of business and will get totally destroyed. He then relied on **JAMBO BISCUITS (K) LTD. v. BARCLAYS BANK OF KENYA LTD. & ORS [2003] 2 EA 443** and submitted that the Applicant was entitled to a mandatory injunction, otherwise it would be destroyed. Finally, he submitted that damages were not an adequate remedy in this matter and that if the injunction is not granted, then the arbitration will come to naught as the Applicant will be out of business.

Mr. Majanja for the Respondent relied on the grounds of opposition filed on 7<sup>th</sup> June, 2010 by which the Respondent contends that the Applicant has not met the conditions for the grant of a mandatory injunction; that the contract, the subject matter of the suit, had been terminated and is now the subject of an arbitration; and that damages were an adequate remedy in the circumstances. He submitted that once a contract is terminated, wrongly or otherwise, the rights of a party lie in damages and cited **KILIMANJARO CONSTRUCTION v. EA POWER & LIGHTING CO. LTD.** as an authority for the proposition that on a breach of contract, damages are an effective remedy.

Finally, Mr. Majanja argued that there were no special circumstances that would entitle the Applicant to the orders sought, and that even if the orders sought were granted, there would be nothing to prevent the Respondent from terminating the contract again. He also submitted that granting the mandatory injunction would be tantamount to putting the parties where they were before termination which would defeat the entire purpose of arbitration. He likened this to forcing the Respondent back to the marital bed to continue with a relationship it does not wish to proceed with. He said that damages, special or otherwise, can be calculated and there was nothing to suggest that the Respondent could not pay.

In reply, Mr. Nagpal argued that if the Applicant can't operate the business, that will be akin to a death penalty. He referred to Clauses 9 and 10 of the agreement and submitted that contracts have termination Clauses, but that the Applicant's contention is that the termination Clause in this matter was wrongfully invoked. He urged the Court to grant the orders as prayed otherwise **Section 7** of the **Arbitration Act** will be rendered useless if the view prevails that damages are an adequate remedy.

On that note, and after considering the rival arguments by Counsel, I note that **Section 7 (1)** of the **Arbitration Act** states that –

***“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during the arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”***

Bearing that **Section** in mind, it is significant that this matter is already before an arbitral tribunal, and that all the Applicant seeks is an interim measure of protection pending the arbitral process. Therefore the issue that stands to be determined is whether or not the Applicant is entitled to the order sought.

Although the principles governing interlocutory mandatory injunctions are similar to those governing the grant of prohibitory injunctions, the test as to whether to grant a mandatory injunction or not is authoritatively stated in Volume 24 of Halsbury's Laws of England (4<sup>th</sup> Edition) at paragraph 848 wherein it is stated thus –

***“a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted ...”***

Also in **LOCABAIL INTERNATIONAL FINANCE LTD. v. AGROEXPORT & ORS [1986] 1 All ER 901** it was stated that –

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff ...”***

These principles have been embraced with full approval by the Courts within our jurisdiction – see for instance **BELLE MAISON LTD. v. YAYA TOWERS LTD. [1992] LLR 1702 (HCK)** and **RIPPLES LTD. v. MUCUHA HCCC No. 4522 of 1992.**

In **GIELLA v. CASSMAN BROWN & CO.**, it was held that to be entitled to an interlocutory order of injunction, an Applicant must show a *prima facie* case with a probability of success; that an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury and when the Court is in doubt, it will decide the application on the balance of convenience.

Applying these principles to this case, it is to be observed that there is already an arbitration pending before an arbitral tribunal. That matter is therefore *sub judice* before another forum, and this Court cannot comment authoritatively on the merits or otherwise of what lies before that tribunal. For that reason, I find myself in doubt as to whether the Applicant has established a *prima facie* case with a probability of success. However, I have no doubt that the Applicant will suffer irreparable loss and injury if the injunction sought is not granted. Failure to grant it would in all likelihood result in the complete destruction of the business and goodwill of the Applicant.

The Applicant alleges in its statement of case before the arbitral Tribunal that the disconnection by the Respondent was unconscionable, unfair, unwarranted and wholly unjustified. Consequently, the Applicant claims from the Respondent, *inter alia*, **“an order that the Respondent do forthwith reconnect/restore the Claimant’s connection to the Respondent’s network.”**

It is not lost on this Court that the Applicant finds itself in a very precarious position. If the order sought from this Court is not granted, that is as good as a death warrant in respect of the Applicant’s business. In which case even if the arbitral process were to grant an order that the Respondent do forthwith reconnect/restore the claimant’s connection to the Respondent’s network as prayed by the Applicant, the Applicant will probably have already been driven out business altogether. Such an outcome would therefore render the arbitral process nugatory. For that reason, I am persuaded that the balance of convenience in this matter lies in the maintenance of status quo ante as at the time before the reference of the matter to arbitration. A decision to the contrary will probably result in destruction of the business and goodwill of the Applicant long before the arbitral process is over.

In the circumstances, I grant prayer 3 of the application by Chamber Summons dated 29<sup>th</sup> May, 2010 as prayed, and direct that the Applicant will meet any costs incidental to the restoration of the network services.

Costs will be in the cause.

It is so ordered.

**Dated and delivered at Nairobi** this 23<sup>rd</sup> day of June, 2010.

**L. NJAGI**  
**JUDGE**