



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 12 of 2010

COUNTRYSIDE BROADCASTING CO. LIMITEDPLAINTIFF

VERSUS

**GO COMMUNICATION LIMITED1ST DEFENDANT
COMMUNICATION COMMISSION OF KENYA2ND DEFENDANT**

RULING

1. The plaintiff's /applicant filed a suit against the defendants claiming for a permanent injunction to restrain the defendants from withdrawing or in any way dealing with FM Frequencies; FM 97.1 MHZ, Nairobi, FM 106.5 MHZ, Nakuru, FM 106.3 MHZ, Nyeri and FM99.1 MHZ, Meru in a manner or in a way that is detrimental and adverse to the interests of the plaintiff. In the alternative, the plaintiff seeks for an order for payment of a sum of Ksh.110,094,317.25 being the total investment by the plaintiff and any other future losses that the plaintiff may incur.

2. Simultaneously with the filing of the suit, the applicant filed an amended Chamber Summons seeking for an interim order of injunction to restrain the defendants from dealing or interfering with those frequencies. The plaintiff also filed a notice of motion seeking for an order of mandatory injunction to compel the 1st defendant to switch back the frequencies FM 97.1 MHZ Nairobi and FM 106.5 MHZ Nakuru. These two applications were heard together. According to the supporting affidavits, sworn by **Martin Munene Njenga** in support of the application. The three affidavits were sworn on 14th January 2010, 22nd January 2010 and a supplementary affidavit sworn on 23rd February 2010 respectively all gave an account of how the plaintiff operated the FM stations using 1st defendants' frequencies.

3. It is contended by the plaintiff that it entered into an oral partnership agreement with the 1st defendant in which an entity known as **Smart Media Institute Limited** operated an FM radio station in the name of **Bahasa FM**. The 1st defendant contributed the frequencies to the partnership whereas the plaintiff contributed the broadcasting equipments which costed millions of shillings. The premises for the station, money and all other necessary equipments for setting up a broadcasting business were provided by the plaintiff. **Bahasa FM** radio station went on in the air in September 2007 and operated under Smart Media Institute until February 2009 when the plaintiff took over the business.

4. After the plaintiff took over the business, it undertook vigorous campaigns to popularize the FM radio station under the name of Countryside Broadcasting. The plaintiff hired a helicopter which flew for over 500 kilometers marketing the brand **Countryside FM**. The plaintiff has also been engaged by various companies and others to provide advertisement services and promotion of their goods through the radio station. However sometimes in December 2009, one **Henry Otiende** who is also a director of the 1st defendant informed the plaintiff that he had sold the frequencies. He also warned the plaintiff that he would withdraw the frequencies from the **Countryside FM** and the plaintiff is apprehensive that unless the order of injunction is granted to restrain the 1st defendant, it will interfere with the frequencies and the plaintiffs' business and investment will suffer irreparable harm. The plaintiff further contended that they have invested in specialized equipments, and incurred colossal debts in setting up and operating the business. They have been contracted to carry out advertisements by several clients. Moreover if the 1st defendant who is the licensee fails to remit the license fees to the 2nd defendant the license is likely to be revoked.

5. After this suit was filed, the frequencies were switched off, that is; **FM 97.1 MHZ Nairobi and FM 106.5 MHZ Nakuru**. Thus the plaintiff filed a notice of motion dated 22nd January 2010 seeking for the mandatory orders to restore the frequencies. The plaintiff insists that there was an agreement with the 1st defendant for the use of their frequencies for which the plaintiff paid a consideration of Ksh.4 million into the account of **Henry Otiende** the Principal Director of the 1st defendant. This payment was made on 26th July 2007 and immediately thereafter Bahasa FM began broadcasting. In consideration thereto the 1st defendant was supposed to ensure compliance with all the regulations under the law.

6. This application was opposed by both defendants, the 1st respondent relied on replying affidavit of **Henry Otiende** sworn on 20th January 2010 and a further a replying affidavit sworn on 23rd February 2010. According to the 1st defendant it is the registered licensee of radio broadcasting frequencies:-

1. **97.3 MHz for your Transmitter station in Nairobi**
2. **107.6 MHz for your Transmitter station in Mombasa**
3. **106.5 MHz for your Transmitter station in Nakuru**
4. **107.0 MHz for your Transmitter station in Malindi**
5. **105.8MHz for your Transmitter station in Kapenguria**

This is as per the letter dated 18th February 2005 written by the Communication Commissions of Kenya.

7. The 1st defendant denied having entered into any agreement with the plaintiff in respect of the use of the frequencies. It is contended that the plaintiff entered into an illegal agreement with a third party known as **Smart Media Institute** and proceeded to use the 1st defendant frequencies without authority. The 1st defendant contends that it solely operated the radio station under the name **Bahasha FM** and in January 2009, the 1st defendant decided to suspend the operations of **Bahasha FM** so as to re- invent itself and plan a major re-launch. That is when the plaintiff illegally started using the frequencies without the consent of the 1st and the 2nd defendant under the name of Countryside FM. The 1st defendant is operating their radio station under the name Go FM using the frequencies.

8. It was submitted that the plaintiff has no right over the frequencies and the 1st defendant has no authority to assign, trade in, or transfer the frequencies to the plaintiff without the written consent of the 2nd defendant. It is further alleged that the plaintiff has been acting illegally by using the 1st defendant's frequencies without obtaining the consent of the 2nd defendant who regulates broadcasting and issues the licenses. It was therefore argued that the plaintiff cannot claim to benefit from their own illegality and obtain an order of injunction. In any event they have not demonstrated a prima facie case with a probability of success.

As regards the payment of Ksh.4 million from Country Side suppliers Limited which was paid to **Henry Otiende** he contends that the sum was paid to help to procure communication equipment from his contacts within the communication industry which he did. He denied the

money was remitted to him pursuant to an oral agreement as consideration for the use of the 1st defendant's frequencies. The money was paid to him in his personal capacity and not on behalf of the 1st defendant.

9. The 2nd defendant also opposed this application; reliance was placed on the replying affidavit by **John Omo** on behalf of the 2nd defendant who is the statutory regulator and issuer of the licenses for broadcasting services. He gave an account of how the 1st defendant applied for a broadcasting permit and was assigned 10 broadcasting frequencies. The assignment of the frequencies to the 1st defendant did not confer any rights which can be traded in, or transferred without the written authority by the 2nd defendant. According to the 2nd defendant all the transactions disclosed on oath especially by the supporting affidavit of the plaintiff in respect of the broadcasting frequencies assigned to the 1st defendant are illegal as they breach the provisions of the Act and the Regulations made there under. The oral partnership agreement alluded to by the plaintiff is illegal, null and void. The parties also filed written submissions in further support of their respective positions. They have also cited several decided authorities some of which I will make reference to in the course of the analysis of the matters raised for and against the two applications.

10. The two applications seek for both temporary and mandatory injunctions respectively. The principles upon which such orders can be made are all settled. As regards the interlocutory temporary order of injunction, the plaintiff has to establish prima facie case with a probability of success. Secondly, irreparable harm which cannot be compensated for in damages would arise and if in doubt, the court would determine the matter on a balance of convenience. (See the oft' cited case of; **Giella vs. Cassman Brown & Company Limited 1973 EA 358.**) The principles to guide the court on whether to grant an order of mandatory injunction are similar and they have been settled in a long line of decided authorities by the Court of Appeal, One such leading case is that of; **Kenya Breweries Ltd & Another vs. Washington Okeyo C.A. Civil Appeal No.322 (Nairobi)** (unreported) at page 3 of that decision, their Lordships quoted with approval the Text Book Vol.24 of Halsbury's Laws of England 4th Edition paragraph 948 which reads as follows:-

“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. However, if the case is

clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff . . . A mandatory injunction will be granted on an interlocutory application.

Also in *Locabail International Finance Ltd. V. Agroexport and others* [1986] 1 ALL ER 901 at page. 901 it was stated:-

“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 court thought that the matter ought to be decided at once or 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. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

Those principles of law enunciated by this decision have received full approval by the courts within our jurisdiction. See the cases of *Belle Maison Limited vs. Yaya Towers Limited* H.C.C.C. 2225 of 1992, per Bosire, J (as he then was) and *The Ripples Limited vs. Kamau Mucuha* H.C.C.C. No. 4522 1992 per Mwera J.”

11. Back to the point whether the plaintiff has established a prima facie case with a probability of success, the plaintiff's claim is that he entered into an oral partnership agreement with the 1st defendant to run a radio station using the 1st defendant's frequencies. The plaintiff's claim as stated in the first supporting affidavit was that the 1st defendant's contribution to the partnership was the frequencies while the plaintiff contributed the money, equipments, premises and other necessary requirements for setting up a radio station. In a later affidavit, the plaintiff claims that a company known as **Country Side Suppliers Limited** paid a sum of Ksh.4 million to **Henry Otiende** in consideration of the frequencies. This payment was made to **Henry Otiende** and not the 1st defendant. Secondly, it is made by Country Side Suppliers Limited and not the plaintiff.

12. Apart from the above, the 1st defendant has categorically denied that the money was paid for the frequencies but for communication equipment which the said **Henry Otiende** claims to have supplied. There is a further complexity regarding this oral partnership which is said was an illegal contract. The frequencies were assigned to the 1st defendant and according to the provisions of **The Kenya Communication Regulations, 2001 Regulation 21.**

“Frequencies assigned to be used by a licensee and the rights therein granted by such authorization shall not be transferred, without the written consent of the Commission”

13. It was submitted by counsel for the 1st and 2nd defendants that the alleged oral partnership agreement if any constitutes an illegal contract which cannot be enforced by a Court of law. The plaintiff’s claim is solely founded on the so called oral partnership agreement with the 1st defendant for the use of the frequencies. If that is the claim, under the provisions of **Section 36 of the Kenya Information and Communication Act, 1998** it provides that the use of frequencies assigned to a licensee without the written consent of the Minister is a violation of the Act. It was further argued that the plaintiff cannot sustain an action which is founded on an illegality. Reference was made to Court of Appeal decision in the case of; **Standard Chartered Bank Limited v Intercom Services Limited & 4 Others [2004] eKLR** where their Lordships discussed at length the question of illegality or breach of Statutes and cited with approval the principles of law on this subject as restated by **Devlin J in Eidler v Averbach [1950] IKB 359 page 371** thus:

“Counsel then cited North Western Salt Company Ltd v Electrolytic Alkali Company Ltd (1914 AC 461). That case, I think, authorizes four propositions; first that where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; Secondly, that, where as here, the contract is not ex facie illegal evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may enforce the contract, whether the facts were pleaded or not.”

14. Also in the case of **Patel vs. Singh 1987 KLR** the Court of Appeal explained the effect of an illegality of a contract in three folds.

“(a) If at the time of making the contract there is an intent to perform it in an unlawful way, the contract although it remains alive, is unenforceable at the suit of the party having that intent and where the intent is common, it is not enforceable at all.

- (b) The illegality may prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act. He may not recover even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal.
- (c) An illegality may also have the effect of making the contract void ab initio and that arises if the making of the contract is expressly or implicitly prohibited by statute or otherwise contrary to public policy”.

15. I also need to mention that apart from the so called oral partnership agreement over the radio frequencies being illegal, its very existence is also denied by the defendants. If the so called oral partnership agreement offends the provisions of the Statute, can a Court issue an injunction? It is clear the Court cannot perpetuate an illegality although that is perhaps a matter for trial, at this stage even the principle of public policy as expressed by the Latin Maxim of; **Ex turpi causa non oritur action** which means no Court will lend its aid to a man who found his cause of action upon an illegal act would disentitle the plaintiff to the orders sought. The facts of this case as they are; do not meet the threshold of granting a temporary order of injunction let alone a mandatory one

16. For the reasons that the plaintiff’s claim has no foundation in law, because it contravenes the provisions of the Statute and goes against the public policy, no prima facie case is established. Since the principles of granting an order of injunction are sequential, there is no need of proceeding to evaluate the second and third elements on whether the plaintiff will suffer irreparable loss. For those reasons the plaintiff’s applications cannot be granted. They are dismissed with costs to the 1st and 2nd respondents.

RULING READ AND SIGNED ON 11TH JUNE 2010 AT NAIROBI.

**M.K. KOOME
JUDGE**