



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

Civil Case 504 of 2007

BROSE INTERNET ACCESS LIMITED.....PLAINTIFF

VERSUS

TELKOM KENYA LIMITED.....DEFENDANTS

R U L I N G

Before me is an application by way of Chamber Summons brought under Order XXXIX Rule 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act in which the plaintiff seeks orders that an injunction do issue to restrain the Defendant, its agents and/or servants from disconnecting the telephone lines in use by the plaintiff at the plaintiff's premises registered in the individual names of the plaintiff's directors and/or disrupting the plaintiff's business in any way pending the hearing and determination of this suit. The application is based on the grounds as stated in the body of the Chamber Summons and also supported by an affidavit sworn by Pamella Onyambu, a director of the plaintiff company on 28th June 2007 and further affidavit sworn on 16th July 2007.

The application is opposed by the defendant company which has filed two replying affidavits. One sworn by Paul Ngunjiri Miti on 9th July 2007 and the other by Wycliffe Ochieng Onyango the same day.

The facts which gave rise to this litigation briefly may be stated.

The defendant is the sole provider of fixed landline telephone lines and the plaintiff is currently using a number of lines from the Defendant company which telephone lines were legitimately acquired by the plaintiff and its directors and some of the lines are registered in the name of the company and also in individual names. The plaintiff always promptly pays its bills for the post paid lines in its use and periodically buys from the Defendant's agents for the pre-paid lines in its use. On 19th June 2007 the defendant's agents and/or servants visited the plaintiff's offices on the 4th Floor Norwich Union House and started to dismantle the telephone gadgets used by the plaintiff to make business telephone calls claiming that the plaintiff was using ADSL data lines No 313879 and JA74176 which do not belong to the same owner thus violating Telkom Kenya requirements for provision of data services and threatened to disconnect the telephone lines being used by the plaintiff and carry away the equipment being used by the plaintiff. This prompted the plaintiff to file this suit. Simultaneously with the suit the plaintiff brought this Chamber Summons seeking injunctive orders as stated above.

Mr. Saende appearing for the applicant submitted that the plaintiff is carrying on legitimate business of an ISP provider and an internet café having been duly licensed by the Communications Commission of Kenya the regulator of the Communications Industry. All the telephone lines being used by the plaintiff were legitimately acquired and for which the plaintiff duly and promptly pays for any charges that are due

and is upto date in payment for any of postpaid telephone lines.

Mr. Saende further submitted that there is nothing illegal in the plaintiff using telephone lines legitimately acquired and registered in the individual names of the plaintiff's directors and that the defendant has no lawful cause to disconnect the telephone lines in use by the plaintiff.

Mr. Murugara Counsel appearing for the respondent in opposing the application relied on the replying affidavits sworn by Paul Ngunjiri and Wycliffe Ochieng respectively submitted that the defendant had discovered the plaintiff was using the defendant's facility to make international calls. Mr. Murugara conceded that the plaintiff is licenced to carry out ISP services. He also submitted that there is no dispute that the plaintiff has authority to render the services it is authorized to render but the only issue is that the plaintiff has been using the defendant's lines to offer international calls services without any agreement between the plaintiff and the defendant authorizing the plaintiff to make international calls using the defendant's lines.

He further submitted that the contract between the plaintiff and the defendant is for the use of local calls and not for international calls and therefore the defendant had a right to stop them.

I have considered the plaintiff's application in light of the affidavit on record and the arguments by both Counsel for the plaintiff and the defendant.

I bear in mind that an injunction is a great equitable remedy for the protection of those legal rights of parties to litigation which have been or are threatened by violation. The necessary conditions for the grant of an interlocutory injunction are well established. They were laid down by the East African Court of Appeal in the celebrated case of *GIELLA V. CASSMAN BROWN & CO LTD* [1973] EA 358.

First the applicant must make out a prima facie case with a probability of success at the trial. Secondly an injunction will not normally issue if the injury feared may adequately be compensated in damages; and thirdly, if the court is in doubt, it should decide the application on a balance of convenience.

In the instant case there is no dispute that the plaintiff is licensed to carry out ISP services. There is also no dispute that the plaintiff has authority to render the services it is authorized to render. But the only issue raised is the use of the defendant's lines to offer international call services without any agreement between the plaintiff and the defendant to render such services to which counsel for the plaintiff says there is nothing illegal in so doing as there is no legal requirement requiring the plaintiff to have an agreement with the defendant to render such services.

Looking at the matter from the above perspective I am persuaded that this is a suitable case to issue the orders to maintain the status quo as the plaintiff has satisfied the principles as enunciated in the case of **Giella V. Cassman Brown & Co Ltd 1973 EA 358.**

In order to elude the position further from my point of view I would respectively borrow the following words from the speech of **Lord Diplock V Ethicon Ltd 1975 AC 396 at pp. 406 and 408** with which I see no reason to differ:

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.”

As stated above the plaintiff is licensed to carry out ISP services business and if the business is interrupted, damages would not be adequate compensation in the event the suit is resolved in its favour.

All in all I am satisfied that the plaintiff has met the conditions of granting an injunction and therefore allow the application in terms of prayer 3 of the Chamber Summons dated 28th June 2007.

Costs will be costs in the suit.

Dated and delivered at Nairobi this 16th day of May 2008.

J. L. A. OSIEMO

JUDGE