



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT 425 OF 2008**

**TELKOM KENYA LTD.....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RULING**

1. By its application dated 22/09/2008, filed under Certificate of Urgency and brought under Sections 3, 3A and 63(e) of the Civil Procedure Act, Cap 21 and Order 39 Rules 2 and 3 and Order 50 rules 1 and 2 of the Civil Procedure Rules, the applicant seeks **ORDERS THAT:-**

*(a) This application be certified urgent, service of the application and the pleading be dispensed with in the first instance, and the same be heard exparte.*

*(b) The Respondent be compelled by a temporary mandatory injunction to grant the Applicant consent to enter on any public land under its control including road-opening-permits, to execute necessary works on the Applicant's telecommunications installations, over, under or along wayleaves and wayleave spaces on road reserves, pending the, inter parties, hearing and determination of this motion.*

*(c) The Respondent, its servants, employees or agents be restrained by a temporary injunction from anyway whatsoever interfering with or impeding the Applicant entry on public land under its control to execute necessary works on the Applicant's telecommunications installations, over, under or along wayleaves and wayleave spaces on road reserves pending the, inter partes, hearing and determination of this motion.*

*(d) The Respondent be compelled by a temporary mandatory injunction to grant the Applicant consent to enter on any public land under its control, including road-opening permits, to execute necessary works on the Applicant's telecommunications installations, over, under or along wayleaves and wayleaves spaces on road reserves, pending the hearing and final determination of this suit.*

*(e) The Respondent, its servants, employees or agents be restrained by a permanent temporary injunction from anyway whatsoever interfering with or impeding the Applicants entry on any public land under its control to execute necessary works on the Applicant's telecommunications installations, over, under or along wayleaves and wayleave spaces on road reserves pending the hearing and final determination to this suit.*

*(f) The costs of, and incidental to, this application be provided for.*

2. The application is supported by (14) grounds which are set out on the face of the application: ?

*(i) The Applicant is the successor to the telecommunications business undertaken by the former Kenya the Kenya Posts and Telecommunications Corporation, (“the KPTC”), (sic) and is a duly licenced telecommunications operator by the Communications Commission of Kenya (“the CCK”) under the provisions of the Kenya Communications Act, 1998, (“the KCA”).*

*(ii) The KPTC had acquired wayleaves and wayleave spaces on private and public land throughout the country, to establish or construct its installations and/or facilities for provision of telecommunications services under the provisions of the Kenya Posts and Telecommunications Corporation Act, Cap 411, (“the Repealed Act”). These wayleaves and wayleave spaces on road reserves are, inter alia, some of the assets of the KPTC that were transferred and vested in the Applicant.*

*(iii) No fees or charges could be levied on the KPTC for the acquisition and use of such wayleaves and wayleave spaces on road reserves under the provisions of the Repealed Act. The KPTC did not require the consent of the person in control of the land for it to carry out necessary works on its telecommunications installations.*

*(iv) The KCA has introduced a new statutory scheme in respect of access to public land under control of a local authority by a telecommunications operator for purposes of carrying out necessary works. Entry on any such land is subject to consent of the local authority under terms and conditions agreed between the operator and the local authority, and in the absence of such an agreement, on terms and conditions set by the CCK or Appeals Tribunal established under the KCA.*

*(v) In flagrant breach of the new statutory scheme under the KCA, the Respondent unilaterally levied Wayleaves Licences Application Fees and Annual Rent of Wayleave Space on Road Reserve vide Gazettee Notice No. 8494 of 14/12/2001.*

*(vi) The Respondent demanded from and claimed payment of the levied Wayleaves Licences Application Fees and Annual Rent of Wayleave Space on Road Reserve fees which the Applicant disputed and the Respondent brought suit HCCC No. 1066 of 2006, City Council of Nairobi v Telkom Kenya Ltd. to enforce payment.*

*(vii) Since bringing its said pending suit, H.C.C.C. No. 1066 of 2006, the Respondent has persisted and persists in refusal to grant the Applicant consent to enter upon land under its control, and road-opening-permits to the Applicant, to carry out necessary works on its telecommunications installations over, under or along wayleaves and wayleave spaces on road reserves, with the intention of coercing the Applicant to settle the disputed claim.*

*(viii) The Applicant’s telecommunications business is in grave jeopardy as it has been denied the consent, and road-opening-permits by the Respondent to enter on public land under its control to, inter alia, establish, construct, repair, improve or alter its telecommunications installations over, under or along wayleaves and wayleave spaces on road reserves.*

*(ix) The Applicant has suffered and continues to suffer loss and damage consequent upon the Respondent’s aforesaid wrongful acts.*

*(x) The Applicant has been disabled by the Respondent’s wrongful acts to execute the works for the Contract for the Supply, Installation and Commissioning of Government Common Core Network, (“the GCCN Contract”).*

*(xi) The Respondent has acted in total disregard of the law.*

*(xii) The Respondent’s conduct is wrong, injurious and oppressive to the Applicant.*

**(xiii) The nature and facts of this case establish special circumstances for the grant of interlocutory mandatory injunction.**

**(xiv) There is need to maintain the status quo which is the position prevailing before the Respondent wrongfully refused to grant consent, and road-opening-permits to the Applicant to enter on public land under its control to execute necessary works on telecommunications installations, over, under or along wayleaves and wayleave spaces on road reserves.**

3. The applicant filed the application contemporaneously with a plaint dated 22/09/2008 by which it alleged that the defendant was in breach of the Kenya Communications Act (KCA) by imposing terms and conditions that would take away the applicants authority conferred upon it by the KCA to enter on public land under the control of the defendant to execute necessary works on the plaintiff's telecommunications installations over, under or along wayleaves and wayleave spaces on road reserves vide publication of Gazettee Notice No.8494 of 14/12/2001. The applicant alleged that the defendant purported to issue the said Legal Notice by virtue of section 148 of the Local Government Act to unilaterally levy wayleaves Licences Application Fees and Annual Rent of wayleave space on Road Reserve, used by the applicant. That pursuant to the said Legal Notice **"and with the intention of coercing the applicant to pay the illegal or invalid, and disputed Wayleaves Application Fees and Annual Rent aforesaid, the defendant served upon the applicant a Seven (7) Day's Enforcement Notice issued under the Physical Planning Act, Cap 286 of the Laws of Kenya, and the defendant's Bye-laws seeking to compel the applicant to remove all its telephone booths along Moi Avenue and Wabera Street, notwithstanding that the said telephone booths constituted a part of the subject matter in HCCC No.1066 of 2006.**

4. The Plaintiff thus prays for judgment against the defendant for:-

**(a) A declaration that the Wayleaves Licences Application Fees and Annual Rent of Wayleave Space on Road Reserve published in Gazette Notice No.8494 of 14/12/2001 are illegal, invalid, void and a nullity;**

**(b) A declaration that the Plaintiff is statutorily entitled to get the Defendant's consent to enter on public land under the Defendant's control for purposes of exercising any or all the powers, and performing any or all the activities prescribed under section 85(2) of the Kenya Communications Act, 1998, subject to terms and conditions imposed in compliance with section 86 thereof;**

**(c) A declaration that the provisions of section 148 of the Local Government Act, Cap. 265, cannot be applied to levy fees and/or charges on the Plaintiff's statutory entitlement to enter on any public land under the Defendant's control to exercise any or all the powers, and perform any or all the activities, prescribed under section 85(2) of the Kenya Communications Act, 1998;**

**(d) A mandatory injunction compelling the Defendant to grant consent to the Plaintiff to enter on any land under its control, and road-opening-permits, to execute necessary works on the Plaintiff's telecommunications installation over, under or along wayleaves and wayleave spaces on road reserves for provision of telecommunications services;**

**(e) An injunction restraining the Defendant, its servants, employees or agents in anyway whatsoever interfering with or impeding the Plaintiffs access to its telecommunications installations, over, under or along Wayleaves and road reserves to execute necessary works;**

**(f) Damages, together with interest thereon at Court Rates; and**

**(g) Costs, of and incidental to this suit, together with interest thereon at Court rates.**

Sections 85 and 86 of the KCA

**85.1. Subject to subsection (3), a telecommunication operator may, with the consent in writing of the**

*owner or occupier of any land, and subject to such terms and conditions as may be agreed upon between the operator and the owner or occupier, place or maintain under, over, along across, in or upon such land, any telecommunication apparatus or such radio-communication apparatus, installed or used in accordance with a radio-communication licence.*

*(2) Upon an agreement under subsection (1), it shall be lawful for the telecommunication operator or its representatives, at all times and on reasonable notice, to enter upon the land and to –*

*(a) put up any posts, which may be required for support of any telecommunication lines;*

*(b) fasten or attach to any tree growing, on that land a bracket or other support for the line;*

*(c) cut down any tree or branch which is likely to injure, impede or interfere with any telecommunication lines; or*

*(d) perform any activities necessary for the purpose of establishing, constructing, repairing, improving, examining, altering or removing any telecommunication apparatus or radio-communication apparatus, or for performing any other activities in accordance with the provisions of this Act.*

*(3) Notwithstanding any agreement under subsection (1) a telecommunication operator shall not, except with the consent of the owner or occupier of the land –*

*(a) acquire any right other than that of user of such land under, over, along, across, in or upon which any telecommunication apparatus or radio communication apparatus is placed and only for such purposes as the parties have agreed.*

*(b) exercise those powers in respect of any land vested in or under the control of a local authority, except in accordance with a procedure set out in section 86.*

*(4) A telecommunication operator shall ensure that as little damage as possible is caused to the land and to the environment by reason of the exercise of the powers conferred by this section and shall pay fair and adequate compensation to the owner or occupier of the land for any damage or loss sustained by reason thereof.*

*(5) Any dispute arising between an operator and the owner or occupier of any land with respect to the provisions of this section may be referred to the Tribunal for adjudication within thirty days of the dispute.*

*86. (1) Where a telecommunication operator licensed by the Commission intends to enter any land under the control of a local authority or other public body, the telecommunication operator shall seek the consent of the local authority or public body stating the nature and extent of the acts to be done.*

*(2) The local authority or other public body may, upon request under subsection (1), permit the telecommunication operator to exercise any or all of the powers under section 85(2), subject to such conditions, including the payment of any fee for the use of the property, the time or mode of execution of any works, or for any other related activity undertaken by the telecommunication operator under the section as may be agreed between the telecommunication operator and the authority.*

*(3) An operator dissatisfied with the terms or conditions imposed by the local authority under subsection (1), may apply to the Commission for the review of such terms or conditions.*

*(4) A person aggrieved by the decision of the Commission under subsection (3) may appeal to the Tribunal within thirty days of such decision.*

5. To the above application and suit in general, the defendant, through Mr. Abwao Erick Odhiambo

Advocate, filed a Notice of Preliminary Objection seeking to have the applicant's entire suit struck out and/or dismissed on the ground that the suit as filed is misconceived, a non-starter in law and hopelessly defective, and that it was filed in blatant violation and/or contravention of Order LIII Rules 1 and 2 of the Civil Procedure Rules. It is the defendant's Preliminary Objection that is the subject of this ruling.

6. At the hearing of the Preliminary Objection, Mr. Abwao reiterated the grounds upon which he had raised the Preliminary Objection and said that that an order of injunction cannot issue against the defendant herein and that any relief sought by the applicant against the defendant should have been by way of Judicial Review application under Order 53 of the Civil Procedure Rules. Mr. Abwao relied on the case of **Ali and 3 Others –vs- City Council of Nairobi – Nrb. HCCC No. 820 of 2003**, a case in which the plaintiff's filed a civil suit, together with an application seeking an injunction to prevent the City Council from interfering with the development and construction of multiple dwelling houses on a parcel of land. The defendant argued that non-compliance by the applicants with Sections 33 and 35 of the Physical Planning Act (Cap 286) which require a developer to undertake certain developments, meant that the High Court had no jurisdiction to entertain the application. The court held that

*(i) where one is dissatisfied with the decision of a local authority declining permission to undertake developments on a specified parcel of land, he is entitled to appeal against the said decision pursuant to the Physical Planning Act (cap 286).*

*(ii) The City Council of Nairobi is a local authority and just like the government, no injunction can lie against it and its officers. The proper remedy in such course (sic) would be with an application by way of judicial review.*

7. Secondly, Mr. Abwao contended that Section 5 of the Wayleaves Act Cap 292 provides that any owner of land who intends to object to any works can only do so with the sanction of the Minister. The section reads thus:-

*“5. (1) If any owner, lessee or occupier of any private land through, over or under which it is intended that any sewer, drain or pipeline shall be carried objects to the intended work and serves notice in writing of his objection at the office of the District Commissioner of the district in which the land is situated at any time within that month, the intended work, in so far as it affects the land of the person serving the notice of objection shall not be commenced without the sanction of the Minister.*

*(2) The Minister may appoint such person or persons as he may think fit to make inquiry on the spot into the propriety of the intended work, and into the objections thereto, and to report to the Minister on the matters with respect to which the inquiry was directed, and, on receiving the report of such person or persons, may make an order disallowing or allowing, with such modifications (if any) as he may deem necessary, the intended work.”*

8. In conclusion, Mr. Abwao contended that on the strength of the case of **Niazsons (K) Ltd. vs China Road and Bridge Corporation (K) [2003] 2 EA 502**, the court should find merit in the Preliminary Objection and dismiss the applicant's entire suit with costs to the Defendant. The Niazon's case dealt with what constitutes a Preliminary Objection on points of law. In his judgment, Bosire JA referred to the case of **Mukisa Biscuit Co. –vs- West End Distributors [1969] EA 696** and said as was stated in the **Mukisa** case that a preliminary point raises purely points of law. He also referred to the observations of Newbold P at page 701 of the **Mukisa** case to the effect that:-

*“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues.”*

Mr. Abwao submitted that his Preliminary Objection falls within the above definition and that the same

should be allowed.

9. Mr. Chiuri Ngugi who appeared together with Mr. Patrick Rugo opposed the Preliminary Objection, citing the provisions of Order 2 Rule 7 of the Civil Procedure Rules which states:

***“7. No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought hereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.***

Mr. Chiuri also cited the case of **Gathuna –vs- African Orthodox Church of Kenya (1982) KLR 356** saying that the reliefs being sought by the applicant in this case are declaratory in nature, and not orders under Order 53 of the Civil Procedure Rules and that as such, this court has the jurisdiction to hear and determine the dispute before court in the form in which it is. In the **Gathuna** case, the appellant who was a Bishop in the African Orthodox Church of Kenya was defrocked and deposed to the position of a layman by the Holy Synod of the Apostolic and Patriarchate Throne of Greek Orthodox Patriarchate Metropolitan of Alexandria. The church then moved to court for an injunction to restrain the plaintiff from carrying himself as a Bishop of the church and from interfering with the affairs of the church. The application was allowed. A Preliminary Objection that the court had no jurisdiction to entertain matters involving ecclesiastical law and that a judgment of the Holy Synod was not a foreign judgment and therefore could not be enforced in Kenya was overruled. The court held that the Kenya Courts had jurisdiction and that the judgment of the Synod was enforceable in Kenya as a foreign judgment. On appeal against that decision, the court noted at page 363 of the judgment as follows at lines 2-35.

***“The High Court has unlimited original civil jurisdiction under Section 60 of The Constitution of Kenya, which must be exercised in conformity with the Constitution and subject thereto, all other written laws and the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1897 and the procedure and practice observed in courts of justice in England on that date according to Section 3 of the Judicature Act.***

***A suit for a declaratory judgment or order is unobjectionable under Order II rule 7 of the Civil Procedure Rules. Provided the dispute is a justifiable one for example where the issue concerns a right to property, a right of contract or any other legal right and it would not be unconstitutional to grant the relief sought. See Simpson J in Matalinga v Attorney General [1972]EA 518 (K).***

***Lord Dunedin summarized the rules for the exercise of this discretion in the action of declarator in Scotland and for Order XXV rule 5 in England, which is in almost identical terms as the Kenya Order II rule 7, in this way:***

***“The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.”***

***Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd (1921) 2 AC 438, 448. All this is a valuable guide for such actions in Kenya. This suit between the Church and the defendant clearly reveals a dispute which is a justifiable one. The issues concern rights to property, among others, and it would not be unconstitutional to grant the relief sought. The questions are real and not theoretical ones, both parties have a real interest in them (and the answers to them) and the defendant has a true interest in opposing the declaration sought.***

10. In the case of **Riachand Khimji & Co. –vs- Attorney General [1972] EA 536**, the Inspector of Explosives purported to confiscate the appellants explosions under section 26(1) (a) of **The Explosives Act (Cap 115)** and after the appellant’s two appeals, one to the Chief Inspector of explosives and the other to the Minister were rejected, the appellant sued the AG for a declaration that the confiscation was unlawful, and appealed from the dismissal of the suit which suit the judge summarily dismissed and gave his reasons later. On the issue of jurisdiction of the High Court, LAW, Ag V-P said at page 540.

*“I agree with the judge below that the fact that the Minister’s decision is stated to be final does not preclude the High Court from exercising its supervisory jurisdiction in relation to that decision. The High Court has power to quash a decision of a statutory tribunal for want or excess of jurisdiction, breach of the rules of natural justice, error of law on the face of the record, fraud or collusion. In the case of a decision by a statutory tribunal or person exercising judicial or quasi-judicial powers, as was the case here, the High Court is usually moved on an application for an order of mandamus, prohibition or certiorari, as the case may be. In this case however, the Minister’s “final” decision was challenged in a suit claiming, inter alia, a declaration that the confiscation of the “pop caps” the subject of this appeal, was wrongful, unlawful and done without powers. I can see no objection to a suit for a declaration being instituted in preference to an application for the issue of an order in the nature of a prerogative writ, especially when (as in this case) the plaintiff is seeking additional relief by way of a claim for the return of the confiscated goods or alternatively damages. This appears to be the position in England (Pyx Granite Co. –vs- Ministry of Housing (1960) A.C. 260) and in my view is also the position in Kenya. The remedies by way of certiorari or declarations as Lord Goddard said in the Pyx Granite case are not mutually exclusive. That is not disputed by counsel for the respondent Attorney General.”*

11. On the basis of the above authority, Mr. Chiuri contended that the applicant is perfectly in order to have instituted his claim against the Defendant by way of suit, although he could also have done so under Order 53 of the Civil Procedure Rules; and that the **Ali & 3 Others case** (above) may have been decided without the benefit of the **Raichand case**. The question that arises is whether this case should be decided on the basis of the **Ali & 3 Others case** or on the basis of the **Raichand case**. Mr. Abwao has argued that this case must fail at this stage because of the provisions of section 148 of the Local Government Act, Cap 265 of the Laws of Kenya which empowers the Defendant to impose fees and charges. The section provides as follows:-

*“148 (1) A local authority may –*

*(a) Charge fees for any licence or permit issued under this Act or any other written law or in respect of any person or matter premises or trade, whom or which the local authority is empowered to control or license;*

*(b) Impose fees or charge for any service or facility provided or goods or documents supplied by the local authority or any of its officers in pursuance of or in connection with the discharge of any duty or power of the local authority or otherwise.*

*(2) All fees -----*

*(3) Save where the contrary is expressly or by necessary implication in any written law provided, a local authority may authorize the remission in whole or in part of any fees due to it or charges imposed by it under this Act or any other written law.”*

12. After carefully considering the issues in hand, it is clear that these issues concern rights to property as between the plaintiff and the defendant. It is also clear to me, as was held in the **Russian Commercial and Industrial Bank case** (above) that it would not be unconstitutional to grant any of the reliefs sought by the applicants herein. The applicants are concerned about the prospects of not being able to carry forward their mandate under the KCA because of the imposition of high charges by the defendant and also by the defendant’s denial of consent to allow the applicants to carry out that mandate. These are real issues of concern; with each of the parties having a high stake in them, and that is why the defendant wants both the application and the suit struck out at this point.

13. The **Raichand case** makes it clear that an aggrieved party in circumstances similar to those of the instant case can choose to come to court either by way of plaint or by way of Judicial Review provided that the applicant shows that in addition to the declaratory orders sought the applicant has sought other reliefs such as damages. In the instant case, the applicant has sought declaratory reliefs, an injunction and also damages together with interest thereon at court rates. For this reason, I would agree with LAW, Ag v

P's view in the case of **Raichand**. I am also of the view that there would be nothing unconstitutional if eventually the orders sought by the applicant are granted. My concern now is that both parties should be heard on the merits of the application. Whether the applicant succeeds on that application or not is an issue to be considered when all the submissions have been made by both parties on the merits of the application. There are issues that need to be substantively addressed such as the Legal Notice by which the applicant was required to pay licence and other fees to the defendant. There are also the provisions of the KCA that need to be addressed in detail during arguments at the inter partes hearing of the application.

14. I have considered Mr. Abwao's submissions regarding the provisions of the Wayleaves Act but in my view these provisions are not relevant for this ruling. Suffice it to say here that the objection raised by Mr. Abwao against the applicant's application and the entire suit does not meet the definition of a Preliminary Objection as set out in the **Mukisa Biscuit case**.

15. In the result, I decline to uphold the Preliminary Objection. The same is accordingly dismissed with costs to the plaintiff/applicant.

It is so ordered.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of October 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:

M/s Chiuri Rogo (present) For the Plaintiff

Mr. Abwao (present) For the Defendant