



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

Misc Civ Appli 955 of 2006

**KENYA NATIONAL FEDERATION OF CO-OPERATIVES LIMITED (KNFC)
.....APPLICANT**

VERSUS

ECONET WIRELESS KENYA LIMITED

ECONET WIRELESS INTERNATIONALS LIMITED

CORPORATE AFRICA LIMITED

**COMMUNICATIONS COMMISSION OF KENYA
RESPONDENTS**

RULING

The applicant initiated this action by filing a notice of motion which is entitled *ex parte*. That notice of motion is brought under

the Inherent jurisdiction of the High Court, Section 3 A of the Civil Procedure Act and order L of the Civil procedure Rules. It is also based on Section 98 (A) (b) and section 99 of the Kenya Communication Act No. 2 of 1998. The applicant by that application seeks amongst other the following order:

The Honorable court be pleased to waive and/or exempt the applicant from the provisions of Sections 98 of the Kenya Communications Act, Act No. 2 of 1998 to the effect that the applicant has leave to file legal proceedings in terms of the hereto annexed draft plaint without first having to file and serve 30 days formal written notice to the communications Commission of Kenya, due to the urgency of the subject matter hereof”.

When the matter came up for hearing *inter partes* the fourth respondent argued its preliminary objections. The said objections is in the following terms.

1 This Honorable court has got no jurisdiction either under the provisions cited or at all to grant the reliefs sought in the said application.

2 In any event, there are no competent proceedings before this Honourable court upon which any relief may be granted.

In support of the first limb of the objection counsel for the fourth respondent stated that section 98 of the Kenya Communication Act requires a written 30 days notice to be given to the Director General of the

fourth respondent. He stated that the notice requires that the applicant gives particulars of the claim being made against the 4th respondent. He stated that that same section also had time limitation of six months from the date of the cause of action. That the applicant by the present action seeks to waive the requirements of section 98 and yet the Act does not give power to the court to grant such waiver. He stated further that the inherent jurisdiction does not assist the applicant because it only applies to a suit that is properly instituted and only to circumstances where there are no other provisions of the law. He referred to section 3 [1] of the Judicature Act and stated that it provided the Jurisdiction to be exercised by the High court and the Court of Appeal.

Counsel stated that the provisions of Section 98 of the Kenya Communication Act is a written law and the court was obliged to conform to it. Counsel also submitted that Section 60 of The Constitution could not assist the applicant on this matter because that section although giving the High Court unlimited jurisdiction also stated that the High court jurisdiction was conferred by The Constitution or any other law. That being the case he stated that Section 98 of the Communication of Kenya Act should guide this court in matters relating with the 4th respondent.

Counsel relied on the case *Narok County Council V Trans Mara County Council [2000]1 EA 161 CAK 1 LRC 98*, where the Court of Appeal disapproved the superiors court finding that it could overlook the provisions of an Act of Parliament because of the unlimited jurisdiction conferred to the High Court by Section 60 of The Constitution.

The Court of Appeal stated the following in that case:-

“60 [1] of The Constitution which defines the jurisdiction including its limitation, of the High court: “and such other jurisdiction and powers as may be conferred on it by this constitution or any other law”, and which in turn means that the extent of the jurisdiction of the high court may not only be that which is conferred or limited by the Constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit”.

Counsel also relied on a case from Zambia namely *Zambia National Holdings Ltd and Another – v – Attorney General of Zambia [1994] I LRC 98*. This case dealt with article 94 [1] of the Zambian Constitution which counsel said is similar to our section 60 of The Constitution. He relied on the following portion: -

“The jurisdiction of the High Court on the other hand is not so limited; it is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law..... “the question of the jurisdiction of the High court is of course irrelevant. Although Article 94 of the constitution gives the High Court unlimited jurisdiction that court is bound by the laws which govern the exercise of such jurisdiction”.

Counsel also relied on the case *Maqbal Ahmed – v – Onkar Pratab [1935] 62 IA 80, PC* where the privy council rejected an argument that by the exercise of inherent jurisdiction the court could override the provisions of the Limitation Act. In support, of the 2nd limb of the preliminary objection counsel submitted that proceedings brought by the plaintiff initiated by a notice of motion was not the correct mode of initiating proceedings he said that this was not the prescribed means of initiating Civil Proceedings and therefore he argued that the application is incompetent.

The advocate for the 1st and 2nd respondents supported the preliminary objection and similarly stated that section 98 (A) and (b) provided that a written notice had to be given to the 4th respondent. He stated that the plaintiff could not seek a waiver from a mandatory statutory provisions. He said that it is clear from the act that the requirement for the notice was not qualified. In support of 2nd limb of the preliminary objection counsel for 1st and 2nd respondents said that one cannot originate proceedings either by a notice of motion or chamber summons. He said that section 2 of the Civil Procedure Act clearly defines what a suit is. The act provides how proceedings should be initiated and he said that it was by a plaint or originating summons.

At the end of the submissions by the aforesaid counsels counsel for the applicant request the court to give him time to study the authorities that had been relied upon by his opponents. The court granted him time and the matter was adjourned to the following day 19th September 2006 at 2.30 pm. However when that day came and by 3.00 pm the advocate for the applicant not being present in court the court gave a date for ruling of the preliminary objection.

I have considered the submissions made before me and I find I am in agreement with counsels for the respondents in regard to the provisions of section 98 of the Kenya Communication Act. That section clearly requires that notice of proceedings be given to the Director General of the 4th respondent and the notice should be for at least one month and in writing. The applicant seeks from this court waiver from that specific provision. I am in agreement with the respondent that section 60 of the Constitution requires that the High Court be guided in the exercise of its jurisdiction by the constitution and by any other written law. That being the case this court stand guided by section 98 of the Kenya communication Act. The applicant cannot obtain waiver of that section since the act does not provide for such waiver. I am also in agreement that the inherent jurisdiction cannot salvage the situation for the applicant because that jurisdiction is only exercisable where there are no other provisions of the law. Indeed it is exercisable by the court when it needs to make orders as may be necessary for the end of justice. When one considers the definition of justice it essentially means the fair and proper administration of laws. The Kenya Communication Act is one such laws and this court is mandated to administer that law. I find therefore that the 1st limb of the respondents' objections is well taken and I do therefore find in favour of the respondent. In respect of the 2nd limb of the preliminary objection I do find that I am in agreement with the respondent in respect of how one should initiate proceedings in this court. A suit under Section 2 of the Civil Procedure Act is defined as:

“Suit means all civil proceedings commenced in any manner prescribed.”

Order VII and Order XXXVI of the civil procedure rules clearly show that civil proceedings are commenced either by a plaint or by originating summons. In case the applicant might want to take solace in the definition of pleadings under section 2 of the Civil Procedure Act which it defines pleadings is as follows:

“Pleadings” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.

The applicant would then be met by a decision of the Court of Appeal in **CIVIL APPEAL NO. 61 OF 1999 BETWEEN BOARD OF GOVERNORS, NAIROBI SCHOOL AND JACKSON IRERI GETA**. The court of appeal had the following to say in respect of such an argument.

“However, before we conclude this judgment, we consider it pertinent to consider the issue which the appellant raised, namely, whether a chamber summons is a pleading within the meaning of the term as used in the civil procedure act and rules made there under. “Pleadings” is defined in section 2 of the Civil Procedure Act as follows:-

“ .includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant:”

Mr Amolo for the appellant urged the view that the general practice of the High Court and the working of the afore quoted definition suggests that the term “pleadings” may be extended to cover a chamber summons and other proceedings commenced otherwise than by plaint, petition or originating summons. He cannot be right. The definition, above, is couched in such a way as to accord with Order IV rule 1, which prescribes the manner of commencing suits, which rule provides that:

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be

prescribed.”

Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and rules made there under. The use of the term “summons” in the definition of the term “pleading’ must be read to mean ‘Originating summons’ as that is “a mannerprescribed” for instituting suits”.

The applicant therefore faced with the 2nd limb of the respondents objection finds itself without a leg to stand on. I do therefore also find in favour of the respondents in respect of the 2nd limb of the objection. The end result is that the respondent having succeeded in its preliminary objection the court does hereby dismiss this action with costs being awarded to the 1st, 2nd and 4th respondents.

It is pertinent to state in this ruling that counsel for the applicant did come to court although late on 19th September 2006 and attempted to get the attention of the court to hear him in response of the preliminary objection raised by the respondent. Since the applicants counsel had failed to attend court at the time allocated and since the court was at that time engaged in the hearing of another matter the court declined to hear the applicants counsel.

MARY KASANGO

JUDGE

Dated and delivered this 22nd of September 2006.

MARY KASANGO

JUDGE