REPUBLIC OF KENYA

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

MISCELLANEOUS CIVIL APPLICATION NO.1570 of 2004

REPUBLIC …….. APPLICANT

VERSUS

COMMUNICATIONS COMMISISON OF KENYA……RESPONDENT

ECONET WIRELESS KENYA LTD..…….1ST INTERESTED PARTY

KENYA NATIONAL FEDERATION OF COOPERATIVES LTD ….2ND INTERESTED PARTY

RULING

I have before me an Application made under the inherent powers of this Court by which the 1st interested Party, Econet Wireless Kenya Limited, seeks: 1. THAT the ex-parte Leave granted to Kenya Telecommunications Investments Group Ltd. (hereinafter referred to as ("KTIG") on 17th November, 2004 to apply for orders of Certiorari and Mandamus as set out in the Chamber Summons Application dated 15th November, 2004 and filed herein on 16th November, 2004 be set aside and or discharged.

2. THAT consequently, the said Chamber Summons dated 15th November, 2004 together with all the consequential proceedings filed herein by KTIG in pursuance of such Leave be dismissed with costs. 3. THAT KTIG be ordered to pay the costs of this Application and the entire Judicial Review Proceedings so far. The Application was premised inter-alia on the grounds that:

(a). When this Court granted Leave to KTIG on 17th November, 2004, the Court ordered that the substantive Motion be filed within 21 days from the date thereof and thereafter serve the same upon the Respondents and any interested party within 8 days failing which Leave so granted would automatically lapse.

(b). THAT the 21 days for filing of the substantive Motion lapsed on 8th December, 2004. Thereafter and in compliance with the Order aforesaid, KTIG was supposed to serve the substantive Motion upon the 1st interested party within 8 days, namely on or before 16th December, 2004.

(c). THAT even though the 1st interested party is so named in these proceedings and is thus a party contemplated in the Order aforesaid, no pleading, substantive Motion and or document whatsoever has been served by KTIG upon the 1st interested party to date.

(d). THAT accordingly KTIG has failed to comply with the order aforesaid and as a consequence whereof the Leave granted to KTIG on 17th November, 2004 has automatically lapsed.

(e). THAT in consequence, all the proceedings taken and or documents and pleadings filed by KTIG

pursuant to the aforesaid Leave ought to be dismissed with costs to the 1st interested party.

The Application was further supported by the Affidavit of one Zachary Wazara, a Director of the 1st interested party. The said Affidavit does not add anything new a part from the expounding and elaborating on the grounds in support of the Motion aforesaid. The matter was mentioned before me on 23rd February, 2005 so that I may give directions as to the hearing of the Application. On the said date I directed that the instant "Application be served on the ex-parte Applicant, the Respondent and the 2nd interested party. Once served, the said parties should file and serve their papers in response if any within the next seven (7) days from the date hereof. Thereafter the Motion could be set down for hearing." The Motion was subsequently set down for hearing on 3rd May, 2005 and was duly served on the parties herein. When the Application was called out for hearing, Mr. Regeru assisted by Miss Oriri Learned Counsels appeared for the 1st interested party Applicant, whereas Mr. Amoko, Learned Counsel appeared for the Respondent. Mr. Kaluma Learned Counsel appeared for the Exparte Applicant.

Before the hearing of the Applicant could commence Mr. Kaluma made an Application to adjourn the hearing of the Application on the grounds that since the Application before Court merely required that the ex-parte Applicant adduces evidence of service of the substantive Motion on the 1st interested party within 8 days of filing in terms of the Order granting Leave there was need for the ex-parte Applicant to file a replying Affidavit together with an affidavit of Service to show when, where and how the 1st interested party was served. He sought time to be able to prepare and file the said documents. He stated that he had been unable to do so earlier as according to him the process server had suddenly left their employment and was not until a few days ago that he had been traced.

The Application for adjournment was for obvious reasons strongly opposed by both Mr. Regeru and Mr. Amoko. The objection was based on the fact that on the 23rd February, 2005 when the matter was mentioned before me for directions, I ordered that the ex-parte Applicant and indeed all other parties to the Application be served with the Application, and who in turn should within seven (7) days file and serve if at all their Affidavits in response. Based on the said Order the ex-parte Applicant ought to have served its papers in response almost two (2) months ago. Mr. Regeru further submitted that if the ex-parte Applicant had difficulties complying with the aforesaid Order he ought to have sought an extension of time, and swore an Affidavit explaining the difficulties experienced by him in complying with the Order. In the course of the arguments, it however transpired that the Replying Affidavit with a copy of Affidavit of service annexed, thereto had infact been filed in Court early in the morning on that day.

So that what Mr. Kaluma was telling the Court to justify the Application for adjournment was not true. In view of the foregoing and the Replying Affidavit having been filed in breach of a Court Order and as the Court felt that the Counsel for the ex-parte Applicant was not being candid in his Application for adjournment, the Court on the Application of Counsel for the 1st interested party, supported by Counsel for the Respondent promptly struck out the offending Replying Affidavit. The Application for Adjournment was in those circumstances denied and the Motion by the 1st interested party thereafter proceeded to hearing.

In his submissions in support of the Application, Mr. Regeru Learned Counsel submitted that the ex-parte Applicant was meant to file the substantive Motion within 21 days and serve the same on the Respondent and any interested Party within 8 days of filing, failing which Leave so granted would automatically lapse. The 1st interested party was named as such in the ex-parte Application in terms of the order aforesaid. The 1st interested party ought to have been served latest by the 16th December, 2004. To date however the 1st interested party has never been served with the substantive Motion. He referred the Court to paragraph 5 of the supporting Affidavit which makes reference to a letter from the company secretary of the 1st interested party dated 5th January, 2005 confirming that the 1st interested party had not been served with the substantive Notice of Motion.

Mr. Regeru concluded his submissions by stating that the net effect of the exparte Applicant's actions was that there was non-compliance with a specific Court Order and therefore prayers sought in the Notice of Motion ought to be granted. On is part Mr. Amoko Learned Counsel in support of the Motion by the 1st interested party submitted that the Order of the Court was specific and peremptory. The consequences

that would stem from want of compliance with the Order were explicitly set out in the Order. He further submitted that disobedience of a peremptory court Order would qualify as intentional and contumelious.

For this statement of the Law Counsel referred the Court to HYTECH INFROMATION SYSTEMS LTD VS COVENTRY CITY COUNCIL (1997) 1 W.L. R. 666. Mr. Amoko echoed the words of Lord Doplock in TOLLEY VS MORRIS (1979) 1 W. L. R. 592 when he said "Where there has been such contumelious disobedience not only the Plaintiff original action but also any subsequent action brought by him based on the same cause of action will be struck out." Failure by the ex-parte Applicant to comply with the Court order was inexcusable. In the premises, the Application by the 1st interested party ought to succeed, Mr. Amoko concluded his submissions.

In his response Mr. Kaluma submitted that he relied on the Replying Affidavit that had been filed in Court that morning. That the said Affidavit confirms that service of the substantive Motion was effected on all the parties herein in compliance with the Court Order. Indeed the 1st interested party was served on 21st December, 2004 through its Officer, Kairu Mbuthia. In the premises, he further submitted, the Application is mischievous and ought to be dismissed. Finally Mr. Kaluma submitted that even if there was non compliance with the Court Order then the Leave granted automatically lapsed and there was no need to file the instant Application.

In a brief reply, Mr. Regeru submitted that it was contemptuous of the ex-parte Applicant to make reference to a Replying Affidavit that had been expunged from the Court record. That it was in the Replying Affidavit of one Justus Wanga, that a purported Affidavit of Service was annexed. Since the said Replying Affidavit was expunged from the record, it went out with the annexure. Consequently no reference ought to be made to the said annexure as proof of service.

I have carefully considered and evaluated the submissions by Counsel in support and in opposition of the Application by the 1st interested party. It is crystal clear to me that the order of this Court granting Leave was very specific and unambiguous. The pertinent paragraph was couched in the following terms "That Leave hereby granted shall automatically lapse if the Applicant does not comply with the aforesaid conditions." The conditions were that the ex-parte Applicant files the substantive Notice of Motion within 21 days from the date when the Leave was granted. Upon such filing the said Application, should be served on the Respondents and any interested party within eight (8) days.

It is important to note that in the ex-parte Chamber Summons for Leave, the 1st interested party was named as such in the said Application. So that from the word go, the ex-parte Applicant knew that the 1st interested was a necessary party to the proceedings who ought to have been served with the substantive Motion within 8 days of filing. The ex-parte Applicant duly filed the substantive Motion within time on 26th November, 2004. In terms of the Court Order the Respond and interested parties ought therefore to have been served with the Notice of Motion latest by 3rd December,, 2004.

The first interested has deponed to the fact that to date, almost 6 months later, it has not been served with the said Application. The depositions by the 1st interested party have so far not been challenged. They are uncontroverted and uncontested. The ex-parte Applicant in a bid to meet the 1st interested party's challenge relied on the Replying Affidavit sworn on 28th April, 2005 and the Annextures thereto. As already stated the said Affidavit had been expunged from the records. In those circumstances, the ex-parte Applicant ought not to have placed any reliance at all on it or made any reference to it.

This Court will make no reference to the said offending Replying Affidavit which any event does not exist, having been struck out. As it is now the Court can only go by the word of the 1st interested party that to date it has not been served with the Notice of Motion contrary to the clear and unambiguous terms of the Court Order issued on the 17th November, 2004. There is ample evidence to back this claim. There is a specific letter from the company secretary of the 1st interested party dated 8th January, 2005 to the effect that "……this is to confirm that Econet Wireless Kenya Limited has not been served with the Notice of Motion in Misc. Application No. 1570 of 2004……."

This assertion remains unchallenged. Taken together with what is deponed to in the Affidavit in support

of the Application, I am persuaded that the 1st interested party has not been served with the substantive Notice of Motion in contravention of the Court Order. As submitted by Mr. Amoko, the Order was specific and peremptory. The consequences of non-compliance were explicitly stated therein. In the case of HYTECH INFORMATION SYSTEMS LTD VS COVENTRY CITY COUNCIL (1997) 1 E.L. R. 1666 it was held quoting Lord Diplock in TOLLEY VS MORRIS (1979) 1 W.L.R. 592, 603 that: "Disobedience to a peremptory Order is generally to be treated as contumelious conduct……" The Court made further reference to the case of JANOR VS MORRIS (1981) 1 W. L. R. 1389 wherein it was stated "…….Where there has been such contumelious disobedience not only the Plaintiff's original action but also any subsequent action brought by him based on the same cause of action will be struck out…..

The basis of the principle is that orders of the Court must be obeyed and that a litigant who deliberately and without proper excuse disobeys such an Order is not allowed to proceed. The rationale of such penalty being it is contemptuous to flout the Order of the Court……"

Applying the aforesaid principles to the circumstances of this case, I am in no doubt at all that the ex-parte Applicant has deliberately and without just cause failed to comply with a peremptory Court Order. The consequences that would ensue from want of compliance with the order where explicitly set out in the order; to wit, Leave so granted would automatically lapse. Since there was non-compliance with the Order by the ex-parte Applicant and in terms of the order, Leave so granted automatically lapsed. Any subsequent pleadings filed pursuant to the Leave so granted were in the premises incompetent and liable to be struck out. I would for the foregoing reasons grant prayers 1, 2 and 3 of the Notice of Motion dated 22nd February. 2005.

Finally I may add and as was stated by Ward LJ in Hytex Ltd (Supra) "Had Counsel appeared before the Judge with sufficient humility, making respectful submissions that it was considered that the Order had been complied with, throwing himself or herself on the mercy of the court and offering to comply with the Order if that view was wrong, then I would imagine that the quality of mercy would not have been utterly dead in a Judge's bosom. In this case that was not the course followed by the defendant" (exparte Applicant in our case)

These observations apply with equal force with the circumstances that obtained in the course of the hearing of the instant Application. The ex-parte Applicant did not seem to appreciate the seriousness of the matter and had even the temerity to refer the Court to an Affidavit knowing very well that the same had been struck out. There was also lack of candour on his part.

Dated at Nairobi this 27th day of May 2005.

M. S. A. MAKHANDIA

JUDGE