



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT NAIROBI.**

**Civil Case 249 of 2005 (1)**

**COMMUNICATIONS CARRIER LTD.....1<sup>ST</sup> PLAINTIFF**

**COMMCARRIER SATELITE SERVICES LTD.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TELKOM KENYA LIMITED.....DEFENDANT**

**R U L I N G**

The suit herein was instituted by way of a Plaint which was filed on 11<sup>th</sup> May 2005. Simultaneously with the plaint, the Plaintiffs filed an application pursuant to the provisions of Order 39 rule 2 of the Civil Procedure Rules, and Section 7 of the Arbitration Act, 1995.

By the application, the Plaintiffs sought an injunction to restrain the Defendant from terminating or interfering with the telecommunication satellite services which are provided by the Plaintiffs, pending the determination of this suit, by arbitration.

It is the Plaintiffs' case that on 24<sup>th</sup> June 2002, the 1<sup>st</sup> Plaintiff tendered for supply, delivery and commissioning of a VSAT HUB, for the Defendant. VSAT is defined the Agreement dated 20<sup>th</sup> December 2002, as VERY SMALL APERTURE TERMINALS.

And, when canvassing the application, Mr. Simani, advocate for the Plaintiffs, explained to the court that the HUB was essentially a huge "satellite dish".

The 1<sup>st</sup> Plaintiff says that it entered into an agreement with the defendant, pursuant to which the said 1<sup>st</sup> Plaintiff was to put up the HUB, and finance its installation as well as commissioning. Thereafter, the 1<sup>st</sup> Plaintiff was expected to recover its expenses by reselling the services which the Defendant was to offer through the HUB. The process of recovering the expenses was anticipated to last a period of three years, during which time the 1<sup>st</sup> Plaintiff would charge a premium, for the services. The idea was to have the Plaintiff earn a commission, over and above the actual cost of the services offered. By earning the said commission, the 1<sup>st</sup> Plaintiff would recover its expenses.

As far as the Plaintiffs were concerned, the Agreement between the parties herein was executed on 20<sup>th</sup> December 2002. And, it was contended that pursuant to the said Agreement, the Defendant was to provide a complete and fully staffed HUB. In other words, although the HUB itself had been built by the 1<sup>st</sup> Plaintiff, it belonged to the Defendant, who in turn made it available to the Plaintiffs, fully staffed. The Plaintiffs were expected to run the HUB, and through that process, pay itself.

At some point in time, a dispute arose as between the parties, in relation to the invoices which the Defendant was raising vis-à-vis the agreed tariffs.

The Plaintiffs' explanation was that the HUB was the first of its kind, in Kenya. Accordingly, both parties to the Agreement dated 20<sup>th</sup> December 2002 were said to have been experimenting, as neither of them was very sure about the rates which ought to have been charged by the defendant, for the use of the HUB; and by the Plaintiffs, for the re-sale of the services to the consumers thereof.

After a period of trial, the Defendant seems to have become convinced that the Agreement was skewed in favour of the Plaintiffs. It therefore sought to re-negotiate the Agreement, and to that end, sent a sample Reseller's Agreement, to the Plaintiffs. But, the Plaintiffs contend that they never signed the Reseller's Agreement.

In the meantime, the Plaintiffs had continued to run the HUB. In effect, the Plaintiffs contracted with consumers of the services, and made available the required services, at an agreed fee. The said agreed fee was a premium, which enabled the Plaintiffs to earn more the sum which they were invoiced by the Defendant.

But, the Defendant is then said to have felt cheated, by the Plaintiffs, and so they sought to vary the charges which had been agreed upon between the parties herein. And, when the Plaintiffs declined to pay the revised rates, the Defendant is said to have threatened to terminate the Agreement between it and the Plaintiffs.

It is for that reason that the Plaintiffs instituted these proceedings, with a view to ensuring that the Defendant did not terminate the Agreement unlawfully. It is contended that if the Agreement was terminated by the Defendant, the Plaintiffs and their consumers would suffer irreparable loss and damage. Therefore, the Plaintiffs ask that an injunction should issue from this court, to restrain the Defendant from terminating the Agreement, pending resolution of the dispute, through the process of arbitration.

It is the Plaintiffs' case that there is a provision in the Agreement, that if there was a dispute between the parties, the same would be resolved through arbitration. Yet the Defendant is said to be keen to terminate the Agreement without any reference to arbitration, hence the plea by the Plaintiffs, for an interim injunction.

The issues which are said to be in dispute are two, as I understand it. First, the Plaintiffs contend that the Defendant is raising invoices which do not accord to the Agreement. As a result, the Defendant was now claiming that the Plaintiffs owed it much more than was due under the contract. For that reason, the Plaintiffs would like the dispute over the invoices resolved through arbitration.

Secondly, the Defendant is accused of erroneously insisting that the intended termination was justifiable, for the reason that the 2<sup>nd</sup> Plaintiff did not have the requisite licences from the Communications Commission of Kenya. As far as the Plaintiffs were concerned, they did not need to have any licences, as they did not own the VSATS. The said VSATS were owned by the Defendant, and therefore, as far as the Plaintiffs were concerned, it was the said defendant who was obliged to be licensed.

In the light of the foregoing, the Plaintiffs contend that an injunction should issue to restrain the Defendant from terminating the Agreement, or interfering with it, pending resolution through arbitration.

In response to the application, the Defendant asserts that it was never an agreed term of the Agreement between it and the 1<sup>st</sup> Plaintiff that, the latter would have the exclusive right to provide the VSAT services by its nominee. Indeed, the Defendant emphasises that the proposal by the 1<sup>st</sup> Plaintiff for such a nominee was expressly rejected.

The said proposal is embodied in the 1<sup>st</sup> Defendant's letter dated 24<sup>th</sup> June 2002. By that letter, the 1<sup>st</sup> Plaintiff offered to the Defendant deferred payments, on condition that its nominee would be appointed a reseller of all the services from the HUB, for three years, and on the further condition that the 1<sup>st</sup> Plaintiff's nominee would execute a reseller agreement with the Defendant.

Mr. Adipo, advocate for the Defendant contends that the terms of the proposal were not incorporated into the substantive contract document, and must therefore be deemed to have been rejected. To my mind, the failure to incorporate the said terms into the contract document would not necessarily imply rejection thereof. I believe that the court is obliged to examine the circumstances surrounding the contract, including the conduct of the parties, in order to ascertain whether or not there was an agreement on the said proposal.

In that regard, I note that it is the Defendant's case that the Agreement dated 20<sup>th</sup> December 2002 was "**dead**" because the 2<sup>nd</sup> Defendant had failed to obtain the requisite licence, for resale services, from the Communications Commission of Kenya.

I understand the Defendant to be acknowledging that the 2<sup>nd</sup> Plaintiff and the Defendant did sign the Agreement dated 20<sup>th</sup> December 2002. Indeed, there is an Agreement titled:

**"KENSAT RESELLER AGREEMENT BETWEEN**

**TELKOM KENYA LIMITED AND COMMCARRIER SATELITE SERVICES LIMITED"**

The said Agreement is dated 20<sup>th</sup> December 2002, and was signed by Mr. A.K. Cheserem, the Managing Director of Telkom Kenya Limited on the one hand; and Mr. Anjum Chaudry, the Chairman of Comcarrier Satelite Services Limited.

It is submitted by the Defendant that the Agreement dated 20<sup>th</sup> December 2002 never came into operation, as the 2<sup>nd</sup> Defendant never obtained the requisite licences. Therefore, the Defendant insists that it only provided reseller services to the 1<sup>st</sup> Plaintiff, pursuant to some oral agreement. On the other hand, the Plaintiffs insist that the 2<sup>nd</sup> Plaintiff did not need to be licensed. They say that it was only the owner of the HUB, who in this case was the Defendant, who was supposed to have been licensed.

In relation to the issue of licensing, both sides appear to have forceful arguments. However, as the said issue is at the very core of the dispute herein, I believe that it is important for the court to desist from expressing a view on it, at this interlocutory stage. In my considered opinion the issue may be best determined by the Communications Commission of Kenya, who may have to tell the trial court whether or not the 2<sup>nd</sup> Plaintiff needed to be licenced; or if it was only necessary for the Defendant to be licenced.

But, come what may, both sides to this case acknowledge that the Agreement dated 20<sup>th</sup> December 2002 was duly executed. Clause 29 of the said Agreement stipulates as follows:-

**"29. ARBITRATION AND DISPUTE RESOLUTION.**

**The parties agree that, they will make every and all good faith efforts to resolve the disputes between them in an amicable and informal**

- (a) If after 30 days from the commencement of such negotiations the parties have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred to Arbitration.**
- (b) All disputes, differences or questions between TKL and CSSL with respect to any matter or thing arising out of or relating to the Agreement other than a matter or thing as to which the**

**decision of the Company is to be final and conclusive, and except and in so far as may otherwise be provided in the contract shall be referred to the arbitration of two persons, one to be appointed by TKL and one by CSSL. The two arbitrators, shall thereafter appoint an umpire.**

**(c) In the event that the said two arbitrators cannot reach an agreement on the appointment of an umpire within 30 days, the same shall be nominated by the Chairman of the Chartered Institute of Arbitrators, Kenya Chapter.**

**(d) The Arbitration proceeding shall take place in accordance with the provision of the Arbitration Act, shall be conducted in English and shall take place in Nairobi, Kenya under the Rules of Arbitration of the Chartered Institute of Arbitrators Kenya Branch, Act 1995 of the Laws of Kenya.**

**(e) The Arbitral award shall be final and binding and judgement upon the award may be entered or application for judicial acceptance or confirmation of the award may be made in any competent court having jurisdiction hereof.”**

I am satisfied that the existence of that very elaborate provision for arbitration, in the Agreement which was executed by both the Defendant and 2<sup>nd</sup> Plaintiff, is prima facie proof that the Plaintiffs have established a case with a probability of success. In effect, the Plaintiffs have met the first condition for the grant of an interlocutory injunction, as was laid down in the celebrated case of **GIELLA v. CASSMAN BROWN & CO. LTD [1973] E.A. 360.**

The next consideration relates to the question as to whether or not the applicants would suffer irreparable loss or damages, which could not be adequately compensated by an award of damages. It is my understanding that even if an applicant had established a prima facie case with a probability of success, he would still not be entitled to a temporary injunction unless he also demonstrated that he would otherwise suffer such injury or loss as would be incapable of compensation by way of damages.

Under clause 14, headed “LIMITATION OF LIABILITY”, it is provided as follows:-

**“The liability of TKL and CSSL in contract, tort (including negligence) or otherwise is limited to US Dollars 2 million for any incident, or series of related incidents, giving rise to any loss of or damage to physical property, subject to a maximum of US Dollars 3 million for all such incidents in any period of twelve months.”**

It is clear from the foregoing provision that the two parties to the Agreement dated 20<sup>th</sup> December 2002, had consciously laid down the maximum liability to each other. Therefore, one could argue that if the Plaintiffs did suffer loss as a result of the Defendant’s termination of the Agreement, the Plaintiffs could be adequately compensated by an award of damages: that argument sounds very reasonable.

But, nonetheless I believe that the issue is deeper than that. As the applicant’s advocates pointed out, the figures set out, in clause 14 of the Agreement would be the equivalent of about Kshs. 150,000,000/=, at today’s rates of conversion. That is certainly a colossal sum. The Plaintiffs contend that the sum is so large that the Defendant was incapable of meeting it.

To my mind, the mere fact that parties may have expressly spelt out the quantum of compensation which would be payable to the party who is wronged, would not, by itself imply that the said party would be so compensated. The sum might be so large that the party who was supposed to pay it, might not have the ability to meet it. If that were to happen, the wronged party would have suffered an irreparable injury.

In this case, the position is that the HUB, which is at the very centre of the dispute was put up by the 1<sup>st</sup> Plaintiff. The said Plaintiff or its nominee was to recover its expenses by running the said HUB, and charging a premium to the ultimate consumer. However, in the meantime, the ownership of the said HUB vested in the Defendant. Therefore, the Defendant provided the services to the Plaintiffs, for resale. In the circumstances, I hold the view that if the Defendant were allowed to terminate the Agreement at this

stage, before the issue in dispute were resolved, it would not only have acquired the HUB, which was put up at the 1<sup>st</sup> Plaintiff's expense; it would also have removed the Plaintiffs from reselling the services so as to recover its expenses. That cannot be right, for how would the Plaintiffs be expected to recover its costs?

It must also be remembered that one of the main reasons why the 1<sup>st</sup> Plaintiff won the tender to supply, instal and commission the HUB was because it had agreed to recover its costs over a period of three years after commissioning. It is therefore only fair and just that the Plaintiffs be afforded the opportunity to recover its expenses.

But, at the same time, the Plaintiffs readily acknowledge that the HUB belongs to the Defendant. Therefore, the Plaintiffs must pay the Defendant for the services which emanate from the HUB. However, there is a dispute as to the amounts payable. According to the Defendant, the sum was US Dollars 172,139.59, as at 31<sup>st</sup> August 2005. however, the Plaintiffs insist that the sum did not exceed US Dollars 3,268.33.

Obviously, the gap between the parties is very wide indeed. And I do recognize what I consider to be the main reason for the said discrepancy. The Plaintiffs are applying the rates from the Agreement dated 20<sup>th</sup> December 2002, whilst the Defendant is applying the "Kensat Trariffs" which are applicable to all its customers. Therefore, one of the other issues that must be resolved soonest, through the process of arbitration, is the tariffs which will govern the relationship between the parties herein.

In the meantime, I do not think that it is right for the Defendant to insist on charging a rate that was not contractual. To that end, I hold the view that the Defendant's reliance on an alleged oral contract has not been demonstrated. As the Plaintiffs said, how could the Defendant expect anybody to believe that such a big contract, worth tons of money, was regulated by an oral contract, whereas even for the simple contracts wherein the Defendant provides the regular telephone services, it insists on written contracts.

But, at the same time, I believe that the Plaintiffs should not be granted the opportunity to benefit from the Defendant's property, without paying a requisite fee for the same.

I therefore, find that the only equitable way of resolving this issue, on a temporary basis, pending the arbitration is by granting an interim injunction to restrain the Defendant from terminating the Agreement dated 20<sup>th</sup> December 2002. However, as a pre-condition, the Plaintiffs are required to pay to the Defendant the equivalent of U.S. Dollars 50,000. The said sum is to be paid within the next TWO WEEKS from today, failing which the Defendant may be at liberty to terminate the supply of services to the Plaintiffs. The sum of U.S. Dollars 50,000 if deposited with the Defendant will be applied to offset the debt in its books. The Plaintiffs will then be required to pay to the Defendant such sums as are payable under the Defendant's Kensat Tariffs, which are applicable to the Defendant's other customers. Whilst, I recognise that such payments are way above the sums which the Plaintiffs say are contractual, I believe that it is only by making the said payments that the Defendant's position will ultimately be protected, in the event that it should win. On the other hand, if the Plaintiff did ultimately win, and they continued reselling the Defendant's services, they would merely have prepaid for the said services.

Meanwhile, there shall be a stay of these proceedings, pending the arbitration process. The parties are directed to set in motion the said arbitration process, forthwith, in accordance with the provisions of Clause 29.

Finally, costs of the application dated 11<sup>th</sup> May 2005 are awarded to the Plaintiffs.

Dated and Delivered at Nairobi this 14<sup>th</sup> day of November 2005.

**FRED A. OCHIENG**

**JUDGE**