



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

AT NAIROBI

**MILIMANI LAW COURTS
CIVIL CASE NO. 360 OF 2001**

ADXCESS LTD.....APPLICANT

VERSUS

COMMUNICATION COMMISSION OF KENYA.....RESPONDENT

RULING

By the Amended Notice of Motion dated 15.5.2001 and amended on 19.6.2001 applicant applies for:

1. An order of prohibition directed against Communications Commission of Kenya (CCK) Prohibiting it from issuing intra Corporate VSAT DATA NETWORK License to GILAT ALL DEAN (AFRICA) LTD
2. An Order of Certiorari to remove into the High Court and quash the decision Order by CCK granting GILAT ALL DEAN (AFRICA) Ltd an Intra Corporate VSAT DATA NETWORK license

The application is based on five grounds namely:

1. The Respondent (CCK) did not follow a proper legal and Transparent procedure in nominating Gilat Alldean (Africa) ltd
2. The applicant raised an objection to the license being issued as was solicited in the Kenya Gazette but the Respondent refused to consider the objection. 3. Respondent is required by law to consider such objection
4. That the respondent is acting illegally, arbitrarily and wrongly.
5. It is just and reasonable to quash the decision of Communications Commission of Kenya

By S. 77(1) of the Kenya Communications Act 1998, (the Act), an application for a licence under the Act should be in the prescribed form and accompanied by such fees as may be prescribed. By section 78 (1) of the Act the CCK is required to give notice in the Gazette at least 60 days before granting a licence specifying the matters stipulated in S. 78(1) (a) (b)(c) of the Act including specifying the time with which written representations or objections in respect of the proposed licence may be made to the commission.

The CCK is required by S. 78(2) of the Act to consider the application taking into account any

written representations or objections received. As section 79 of the Act provides, the Commission may upon expiry of the period of Notice in the Kenya Gazette grant a licence to the applicant if satisfied that the applicant should be licensed subject to the conditions that it may prescribe. As provisions to s.79 provides where the Commission does not grant a license it is required to notify the applicant in writing of the reasons for refusal within 60 days of such refusal.

In the present case, the Commission published in the Kenya Gazette of 26.1.2001 a notice that two companies had made an application for a license as required by S. 78(1) of the Act. By a letter dated 15.2.2001, the applicant in this case sent an objection to the granting of a license to Gilat All dean (Africa) Ltd – the interested party. The letter of objection states in the relevant part thus:

“This type of service offering should have been made public by CCK to allow either a tender process or an applications process by all interested parties. Since neither of aforementioned process took place, we are hereby presenting our objection to the issuance of a licence for this type of service. If the objection is not accepted, we therefore demand that our application fore an equivalent licence intra Corporate USAT Data NetWorK” - be granted in conjunction with that for Gilat Alldean (Africa) Limited”

Previously on 12.2.2001, the applicant had forwarded an application for a similar licence to CCK

On 17.4.2001, applicant filed an application for leave to apply for orders of prohibition and certiorari under certificate of urgency on the ground that the Board of CCK was scheduled to meet on 19.4.2001 to approve the licence without considering the objection by applicant. The application was fixed before Amin J. for hearing. It was during the High Court Easter Vacation . Amin J. noted that the application was based on surmise and conjecture. He refused to certify it as urgent and to hear it during High Court Vacation. He advised applicant to proceed in the usual manner. Dr. Kiplagat for the Respondent contends that Amin J. rejected the application for leave and that the application for leave was irregularly renewed subsequently and leave granted.

But I do not understand the Ruling of Amin J, as dismissing the application for leave to apply for orders of prohibition and certiorari. Rather, I understand his ruing as rejecting that part of application which sought leave for the application to be heard during High Court Vacation.

I have studied the supplementary affidavit of Joshua Kipchumba Chepkwony, a Director of the applicant sworn on 3.8.2001.

He deposes in para. 4, that the issuance of the licence to the interested party was discussed by Board of CCK on 19.4.2001 but that a licence was not issued as the interested party did not fulfill all conditions for the grant of licence. He has annexed a copy of the extract of the minute of the Board meeting of 19.4.2001 which purports to show that the application for licence by the interested party was approved. Mr. Chepkwony however deposes that it is not true that the licence was issued to interested party as on 23.4.2001 the directors of the interested party were at the offices of the Secretary of the Respondent pursuing the licence. He has annexed a copy of a letter from interested party to the Respondent dated 24.4.2001. A copy of the Agenda of full Board meeting of the Respondent scheduled for 19.4.2001 is also annexed. It shows that the Board was to consider the licensing of intra Corporate USAT NETWORK among other things.

The extract from the minutes of Board dealing with licensing of intra Corporate USAT NEATWORK states:

“The Board has in principle approved the licensing of M/S Alldean Africa ltd to construct operate and provide intra Corporate Vast system and services. This would be subject to furnishing the board

with

(i) The licence fees that ought to be charged and the criteria of such fees and

(ii) A copy of the draft licence

The company should also present to the Commission, its business plan and configuration of the proposed Network so as to ensure that it will only be used to provide the licensed system”

It seems from the contents of the letter dated 24.4.2001 from the interested party to the CCK, that, by that letter the interested party was complying with the conditions set by the Board. Indeed, on 24.4.2001, the applicant’s counsel told Kasanga Mulwa J. that:

“The licence was approved on conditions which have not been fulfilled even though It has been approved”

Mr. Joseph Omo the CCK Secretary filed a further affidavit on 22.8.2001. He deposes thus:

3 ”That a duly convened meeting of the respondent on 19th May, 2001 the Respondent as required by the law to do so deliberated on the application of Gilat Alldean (Africa) limited

4 ”That the respondent considered all the observations, comments and objections to the said grant

4 That after a careful and informed process the Board of Directors in exercise of powers donated by Kenya Communications Act approved the application by the said Gilat. Alldean (Afriac) limited and authorized the issuance of a licence to the aforesaid applicant”

From the foregoing, the correct position regarding the application for a licence by the interested party seems to be that the Board in principle approved the application on 19.4.2001 subject to applicant fulfilling some conditions. The application was officially approved on 19.5.2001 and authority to issue a licence to the interested party given.

On 25th.4.2001 Mulwa J. made an order as follows:

“I grant a temporary injunction to the effect that the approved licence shall not be granted to the applicant for licence or be issued the same to the applicant until 14.5.2001”

The record shows that the order was not extended until 21.5.2001 when Mulwa J. ordered that status quo to remain and that the licence remain unissued until 29.5.2001.

It is not therefore correct as the applicant’s counsel contends that the deliberations of the Board on 19.5.2001 were in breach of the Court order. There was no court order in existence on 19.5.2001 in favour of the applicant. This application must be determined on the basis of the grounds to support the application and within the ambit of the communication Act. By S. 25(1) of the Act, the Commission has power to grant a licence if an application is made in the prescribed manner and subject to the conditions that it may deem necessary.

As S. 5 of the Act provides, the purpose for which the commission is established is to licence and regulate telecommunication radio – communication and postal services in accordance with the provisions of the Act. The commission is required to have regard to matters stipulated in s. 5(4) of the Act in the performance of its functions. Regarding the licensing of Telecommunication services, the Act does not stipulate any conditions which an applicant for a licence must fulfill before the commission can grant a licence. The Commission is given discretion to decide whether or not the applicant for a licence should be licensed and it so on what conditions. The licensing procedure is set out in S. 77, S. 78 and S.79 of the Act. Applicants counsel concedes that the licensing procedure in s. 78 (1) of the Act has been complied with. I have considered the four grounds on which the application is based. It seems that the main ground of the application is that the Commission did not take into account the objections made by the applicant as required by the S. 78(2) of the Act. But as Dr. Kiplagat for the applicant contends the application for

leave was made even before the Commission had held a meeting scheduled on 19.4.2001 which was to consider the application by the interested party.

The applicant objected to the application on the grounds that the type of service should have been made public to allow either a tender process or an application process by all interested parties. The Act does not provide that the Commission should give a notice to public that it intends to offer any service to the public. The Act does not provide for determination of the application on the basis of a tender process. Indeed, the Act leaves free any interested member of the public to make an application for a licence to provide a service that he intends to provide. The duty imposed on the Commission is to give notice to the public of such application and to invite and consider any representations or objections. There was no statutory duty on the Commission to invite tenders from members of the public in general. There was nothing to stop the applicant or any member of public from making an application for a licence to the Commission. It follows that, the grounds of objection forwarded to the Commission had no legal basis. In any case, Mr. John Omo deposes in his affidavit sworn on 22.8.2001 that all the objections were considered by the Board before the application by the interested party was approved on 19.5.2001. There is nothing to rebut that fact.

The application for an order of prohibition is misconceived.

Firstly, as I have attempted to show above, there is nothing to show that in considering the application of the interested party, the Commission was acting without jurisdiction or in excess of its jurisdiction or contrary to the Rules of natural justice or in contravention of the Act.

Secondly, the commission approved the application for licence in principle on 19.4.2001 and proceeded to grant the licence on 19.5.2001. When the decision has already been made whether in excess or lack of jurisdiction or in violation of the Act, an order of prohibition would not be efficacious against the decision so made - See Kenya National Examination Council and Republic Exparte Geoffrey Gathenji Njoroge - C.A No. 266 of 1991 (unreported). The Application for Order of Prohibition has been overtaken by events.

As regards the application for an order of certiorari, the applicant does not specify whether it is the decision of 19.4.2001 or the decision of 19.5.2001 which is to be quashed. As I have stated above, applicant has not shown either that the Commission had no jurisdiction to grant the licence or that it acted in excess of its jurisdiction or that it breached the Rules of Natural justice in granting the licence. Certainly, the Commission had jurisdiction to grant the licence. The Commission had no statutory duty to invite tenders or members of the public to make applications for licences. By grounds in the objection forwarded to the Commission, applicant was imposing a duty on the Commission which the Parliament had not imposed on the Commission. The order sought is discretionary. It appears that the application was made in bad faith and is motivated by the desire of the applicant to get a licence himself and not by a desire to see that the Commission performs its function in accordance with the Act in the interest of the public.

The application has no merit and it is dismissed with costs to the respondent and to the interested party.

E. M. Githinji

Judge

14.12.2001

Githinji J.

Mr. Malik present

Mr. Maingi holding brief for Dr. Kiplagant present

Mr. Nyangau absent