



**Ibse Radio Limited v Angaaf Radio Limited (Commercial Appeal E078 of 2020)
[2023] KEHC 23154 (KLR) (Commercial and Tax) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E078 OF 2020
JWW MONG'ARE, J
OCTOBER 5, 2023**

BETWEEN

IBSE RADIO LIMITED APPELLANT

AND

ANGAAF RADIO LIMITED RESPONDENT

*(Being an application for stay of execution of the Ruling and
Consequential Orders of the Magistrates Court at Nairobi (Hon. G.A
Mmasi – S.P.M delivered on 9th June 2020 in CMCC 2063 of 2020)*

JUDGMENT

1. By a Memorandum of Appeal dated June 19, 2020 the Appellant filed the appeal herein seeking to stay the execution of the ruling and consequential orders of the Hon. Magistrate in CMCC No. 2063 of 2020 on the following grounds:
 1. That the learned magistrate erred in law and fact in failing to discern that the *ex-parte* orders as framed were mandatory orders which determined the suit without affording the appellant an opportunity to raise its case.
 2. That the learned magistrate erred in law and fact in appreciating that the impugned radio frequencies had been transferred to the appellant by the respondent at a consideration in September 2018 and have been in use ever since.
 3. That the learned magistrate erred in law and fact in finding that the *ex-parte* Orders were properly granted yet the respondent had concealed material facts from the honorable court and thus leading to the Grant of the said Orders.



4. That the learned magistrate erred in law and fact in failing to down its tools for want of jurisdiction, both pecuniary and choice of location of filing suit.
 5. That the learned magistrate erred in both fact and law in assuming jurisdiction over a matter the Regulator, which was not made a party to the suit, was already seized of.
 6. That the learned magistrate erred in fact and law by granting orders against public policy and interest.
2. The appellant filed written submissions dated March 10, 2023. From the submissions by the two issues emerge for determination, to wit:-
- a. Whether the dispute before the trial court was filed prematurely before the exhaustion of the statutory dispute resolution mechanisms set out in the governing law.
 - b. Whether the trial court had the requisite pecuniary and geographical jurisdiction to try the matter as filed.
3. In addressing the issue “Whether the dispute before the trial court was filed prematurely before the exhaustion of the statutory dispute resolution mechanisms set out in the governing law.” The court notes the argument put forward by the Appellant that the dispute before the court relates to use of the Radio Frequencies whose management and control are governed by the [Kenya Information and Communications Act](#). Under the said Act, section 46L provides a detailed dispute resolution process that should be followed to resolve disputes arising from use and management of Radio Frequencies. The said section provides as follows:-
1. “All broadcasters shall establish and maintain a procedure, by which persons aggrieved by any broadcast or who allege that a broadcaster is not complying with this Act, may file complaints.
 2. The procedure referred to in subsection (1) shall be submitted to the Commission for approval.
 3. Where any person alleges that he has exhausted the procedure mentioned in subsection (1) but is not satisfied with the remedy offered or action taken, he may appeal to the Commission.
 4. Complaints made under this section shall be made in writing within thirty days of the breach under subsection (1) and shall set out the grounds upon which they are based, the nature of damage or - injury suffered as result of the broadcast or the violation complained of and the remedy sought.”
4. The appellant argues that filing the case directly in court without first applying the dispute mechanism provided by the governing statute offended the doctrine of exhaustion. The appellant cited the decision in [Martin Kabubii Mwangi v County Government of Laikipia](#) (2019)eKLR where the court stated “the exhaustion principle enunciated in precedents such as the case of [Secretary, County Public Service & another v Hulbbhai Gedi Abdille](#)(supra) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of the litigant from choosing whether to follow the provisions of section 77 of the [County Governments Act](#). The claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out.” This doctrine of exhaustion requires parties to exhaust the internal dispute mechanisms when a dispute arises and only come to court when all else fails and as a last resort.



5. The second issue raised by the Appellant was “whether the trial court in Nairobi had the relevant pecuniary and geographical jurisdiction to entertain the suit as filed.” The Appellant argued that the value of the subject matter was Kshs.33,000,000/- and therefore above the pecuniary jurisdiction of the Chief Magistrates Court. Secondly, the cause of action arose in Marsabit which had both a Chief Magistrate’s Court and a High Court and hence filing the matter in Nairobi amounted to forum shopping as the Milimani Chief Magistrates court amounted to forum non conveniens and that the Marsabit Court was the convenient location to try the matter and not Nairobi.
6. In their response to the above argument the Respondent argued that the matter was moot since the orders being sought to be set aside or lapsed by operation of the law and therefore the appeal before the court was an academic exercise. The respondent argued that the said orders, even if they had not been vacated by the court, had lapsed by operation of the law since they were issued over 3 years ago and by operation of order 40 automatically lapsed after the expiry of 12 months if not extended. The respondent did not respond to the issue of the exhaustion doctrine and the existence of an internal dispute resolution mechanism set out by the governing statute.
7. On the question of jurisdiction, the respondent argued that at the time of filing the present appeal the appellant was yet to pay for the counterclaim and as such the same had not been admitted which would automatically oust the jurisdiction of the Magistrates Court. As to the geographical jurisdiction question, the Respondents argued that there had been a similar application in the Marsabit Law courts and that the Resident Judge observed that since both parties to this suit had been incorporated and registered in Nairobi, then a suit relating to the two could be filed in the Magistrates court at Nairobi. The Respondent urged the court to find the appeal was unmerited and dismiss the same with costs.

Analysis and Determination

8. I have considered carefully the rival arguments by the parties. As argued by the appellant the [*Kenya Information’s and Communications Act*](#) section 46L has set out an elaborate dispute resolution mechanism that is to be used to resolve disputes related to use and management of Radio frequencies. I note that the parties did not attempt to apply the same before moving to the court to obtain orders restraining each other as they did. I therefore agree that the doctrine of exhaustion is not discretionary but mandates parties to adhere to those provisions in the first instance and only resort to the court process when all else has failed. I therefore find and hold that the dispute as filed was premature. Parties should first seek to resolve their disputes as per the governing law before moving the court.
9. On the second issue of jurisdiction on pecuniary jurisdiction I note from the record of appeal that the counterclaim contains a prayer for payment of Kshs.33,000,000/- being the total investment by the defendant, among other prayers and therefore by virtue of the said prayer, the suit should have been transferred to the High Court as the Chief Magistrates Court lacked the requisite pecuniary jurisdiction to try the matter and issues arising therefrom. On the twin issue of geographical jurisdiction which has been raised, I note that the two businesses operate and are located in Marsabit County which has equally competent Magistrates Court and a High Court and I am persuaded that there was no good reasons for the parties to have the matter filed in Nairobi.
10. In conclusion therefore, I find and hold that the Appeal as filed has merit and the same is hereby allowed with costs to the defendant. The suit in the Lower Chief Magistrates Court is therefore struck out. Parties are directed to resolve the dispute as provided for under Order 46L of the [*Kenya Information and Communications Act*](#), in the first instance. It is only after they have exhausted the mechanisms therein that they can move to court for determination of any outstanding issues.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER
2023**

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Wakoko holding brief for Mr. Wangira for the Appellant.
2. Mr. Oginga holding Brief for Mr. Abdirazak for the Respondent.
3. Amos - Court Assistant

