



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO.E567 OF 2019

MULTICHOICE KENYA LIMITED.....APPLICANT

VERSUS

SAFARICOM PLC.....1ST RESPONDENT

JAMII TELECOM LIMITED2ND RESPONDENT

AND

KENYA COPYRIGHT BOARD.....1ST INTERESTED PARTY

COMMUNICATIONS AUTHORITY OF KENYA...2ND INTERESTED PARTY

RULING

1. The applicant herein, Multichoice Kenya Limited, instituted the instant proceedings through an amended Notice of Motion dated 28th November 2019 wherein it seeks the following orders:

1. Spent

2. A temporary order as per Section 35D(2) of the Copyright (Amendment) Act 2019 do issue to the respondents to prevent or impede the use of its service to access a service, website place, domains or facilities (and as may be replaced, amended or moved from time to time) situate in or outside Kenya that is used to infringe the applicant's copyright as contained in the takedown notice dated 29th October 2019 pending the hearing and determination of this application.

3. A permanent injunction as per Section 35D(2) of the Copyright (Amendment) Act 2019 do issue to the respondents to prevent or impede the use of its service to access a service, website place, domains or facilities (and as may be replaced, amended or moved from time to time) situate in or outside Kenya that is used to infringe the applicant's copyright as contained in the takedown notice dated 29th October 2019 pending the hearing and determination of this application.

4. The cost of this application be provided for .

2. The application is brought under Section 35D(2) of the Copyright (Amendment) Act 2019 and is premised on the grounds that:-

1. Despite being duly served with a takedown notice pursuant to Section 35B of the Copyright (Amendment) Act 2019 (hereinafter the Act), the respondents have disregarded the notice- have failed to acknowledge or act on it, neither have they given their reasons for failing to comply with it.

2. The respondents continue to host or allow content to be hosted on their networks very well knowing that the same infringes on the rights of the applicants.

3. By operation of Section 35D of the Act, the applicant moves to this honourable court to seek grant of an interim injunctive relief against the respondents.

4. The respondents intend to move to the High Court to challenge the constitutionality of Section 35B,35 C and 35D on account

that their views were not taken into account, the applicant is apprehensive that this will have the effect of defeating the very reason the Act was amended hence the applicant rights will continue to be infringed leading to irreparable economic loss.

5. It is clear that the respondents do not intend to comply with the takedown notices nor the provisions of the Act. On that premise, it is only fair and just that this application be certified urgent, heard forthwith and orders sought therein granted.

3. When the matter came up for directions on 29th January 2019, **Mr. Omondi**, learned counsel for the applicant sought the leave of the court to present 2 expert witnesses to testify in the matter. The said application was opposed by **Mr. Imende** and **Miss Nderu** learned counsel for the 1st and 2nd respondents respectively on the basis that no basis had been laid for the calling of the expert witnesses and that the matter had been initiated through a Notice of Motion and not a plaint or originating summons, thus allowing no room for the calling of witnesses.

4. Counsel argued that the summary process invoked by the applicant, being Section 35D of the Copyright (Amendment) Act 2019 does not permit for the calling of witnesses to give oral evidence.

5. It was the respondent's position that the applicant should not convert the Notice of Motion into a plaint. Counsel however stated that they are not opposed to the filing of the affidavits of the said expert witness.

6. The issue for determination is whether a party can present oral evidence/witnesses in an application initiated by way of Notice of Motion.

7. Even though the practice in our courts has been to have applications supported by affidavits and not oral evidence, I find that there are no hard fast rules to preclude a party, who wishes to present oral evidence in support of an application from doing so. In **Olkiomba Limited & 5 Others –V- the County Council of Narok** [2002] eKLR the court compared the Kenyan Order 18 of the Civil Procedure Rules with the corresponding Indian Order 19 and the English Order 41 RSC and found that the Kenyan procedure gives affidavit a wider scope. The court held:-

“Here, the court has power to call for affidavit evidence, call the deponent to give oral evidence and also to be cross examined on it, the court also may strike out scandalous, irrelevant or oppressive affidavits and, can introduce any affidavit to be used in any suit and to (not to notice) irregularity in form or misdescription of parties and not to reject any affidavit because it was sworn before the case was started.”

8. In Mombasa Misc. Civ. Application No. 42 of 2011, **Republic v The Ministry of Roads & Another**, it was held that that the court has discretion to allow for the cross-examination of witnesses in an application in order to ascertain the truthfulness and accuracy of a fact in issue or relevant fact in the proceedings before it as long as such discretion is exercised judicially.

9. Having regard to the position taken in the above cited cases, I find whether or not to allow oral evidence to be adduced in an application initiated by way of an originating Notice of Motion is at the discretion of the court, which discretion must be exercised judicially. In the instant case counsel for the applicant intimated that he intends to call two expert witnesses to give oral evidence in view of the novelty of the matter before the court. I note that the respondents did not indicate that they will suffer any prejudice if oral evidence is presented in the matter.

10. Having found that there are no hard fast rules precluding the presentation of oral evidence in applications. I allow the applicant's prayer for leave to call the two experts, namely, Professor Wamandi and Barry Cole as long as the statements or affidavit of the intended witnesses are filed and served on all the parties before the hearing date. I also grant corresponding leave to the respondents to present oral evidence of expert witness (es), if they deem it necessary upon filing the said witnesses' statements/affidavits.

Dated, signed and delivered in open court at Nairobi this 17th day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Omondi for applicant.

Mr. Imende for 1st respondent

Miss Nderu for 2nd respondent

Mr. Macharia for Mbogo for 2nd interested party.

Court Assistant: Sylvia