



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION E780 OF 2020

(CMCC 2063 OF 2020)

IBSE RADIO LTDAPPLICANT

VERSUS

ANGAAF RADIO LIMITED.....RESPONDENT

RULING

CERTIFICATE OF URGENCY APPLICATION

On 17th June 2020, the Plaintiff/Applicant filed under certificate of urgency stay of execution of the Trial Court's Ruling/Orders of 9th June 2020 pending hearing and determination of the application and an intended appeal.

The gist of the Applicant's application is that the Trial Court confirmed mandatory *ex parte* orders without service of the application to the Respondents and being given audience.

The orders granted have the adverse impact of stopping broadcast via the Defendant's Radio station. The effect is to endanger the Defendant's investment of Ksh 33million, threaten livelihoods of employees, place media partners at risk and it is against the public interest owing to the need for media sensitization during the Corvid -19 pandemic period.

These mandatory orders determined the entire suit and the substratum of the Plaintiff's case.

It was alleged that the Plaintiff failed to disclose the fact that the Plaintiffs transferred the frequencies to the defendant in September 2018 at a consideration and have been in possession and use since then.

This Court on reading the application granted *ex parte* the following orders on 17th June 2020;

1. The Court granted interim stay of execution of the Trial Court orders of 9th June 2020 for 14 days pending the application being served to the Respondent and file Replying Affidavit to the Application.
2. The Applicant shall file memorandum of appeal and the impugned Ruling/Order and serve within 14 days
3. The matter shall be mentioned *inter partes* on 1st July for directions.

On 3rd July 2020, the Respondent represented by Counsel Mr Abdirazak informed this Court that upon service of the orders of 17th June 2020 to the Trial Court the court declined to proceed with the hearing awaiting direction of this court, whether the matter proceeds in the Trial Court or the High Court.

The Respondent filed Replying Affidavit and deposed that the Trial Court issued Interlocutory orders designed to preclude the Applicant from continuing to interfere with the frequency belonging to the Plaintiff.

It was deposed that these orders were overtaken by events as the said orders were already implemented, the Applicant is no longer using the frequency and the appeal is academic exercise.

The Respondent indicated that the appeal was premature as the matter had not been finally determined.

The Respondent alluded to the fact that the Applicant is filing various applications to delay the hearing of the dispute as it knows that its case has no possibility of success.

The Applicant failed to comply with the Trial Court's orders of 28th May 2020 by filing the Replying affidavit and enable the Court consider submissions to give a Ruling.

The geographical jurisdiction of the High Court is Marsabit High Court which delivered a Ruling now attached to the Affidavit. The Applicant if displeased with the said order should have appealed against the decision in the Court of Appeal.

On 13th July 2020, after this Court received the Respondent's Affidavit, Mr Wakoko the Applicant's Counsel informed Court that the Memorandum of appeal was now filed. Counsel stated that the Applicant required the stay of execution of the orders issued on 9th June 2020 because the ownership and/or transfer and use of frequency had been determined by issuance of injunction to have the Defendant stop use of the frequency.

The Parties were to appear in the Trial Court on 14th July 2020 and they required this Court's order on proceeding with the matter.

The Applicant admitted that the matter was heard in Marsabit High Court and pleaded the fact in the certificate of urgency application.

The High Court in Marsabit ruled that the appropriate forum for hearing and determination of the dispute/suit is Chief Magistrate's Court in Nairobi. The High Court Marsabit did not deal with/address the issue of grant of injunction as a preliminary objection was filed with regard to the appropriate forum/Court to hear the suit as there were 2 cases; one filed in CM's Court Nairobi and the one in Marsabit High Court.

Whilst attending the Trial Court on 28th May 2020, the Court granted *ex parte* orders that a temporary injunction was issued restraining the Defendant/Respondent from in any way dealing with Plaintiff's frequency 100.3 and its radio equipment pending hearing and determination of the application.

On 9th June 2020, the Duty Court confirmed the orders of 28th May 2020 and ordered OCS Marsabit to enforce the said orders issued on 28th May 2020. These are the orders subject of intended appeal. The Applicant annexed the Certificate of Urgency filed before the Trial Court that necessitated the grant of *ex parte* injunction against the Defendant/Applicant.

The Applicant informed the Court that the Plaintiff and Defendant are sister Companies 3 Directors own 49% of the Defendant and 50% of the Plaintiff.

In fact, it is the Plaintiff who wrote to CAK the regulatory body by letters dated 19th September 2018 and 25th September 2019 requesting transfer of 2 of the 5 frequencies to Defendant **103.3 Marsabit & 102.5 Moyale**.

On 12th May 2020, CAK granted the Plaintiff's request that the Defendant ***will continue to broadcasting on 100.3 MHz in Marsabit and 102.5 MHz in Moyale, while Biftu Radio will remain switched off and its license application will not be processed in those two locations until this matter is resolved.***

The Plaintiff through Counsel Mr Abdirazak replied that there is no dispute that the Plaintiff owns the Frequency as shown by the license attached to the Replying Affidavit. The Defendant/Applicant did not file an Agreement for transfer of the frequency. The Plaintiff has never transferred or leased its frequency to the Defendant who is a stranger and trespasser.

Pursuant to **Regulation 5(3) of Kenya Information & Communications (Radio & Frequency Spectrum) Regulations, 2010** a licensee is prohibited from transferring frequencies assigned and rights therein without the written consent of Communications Authority of Kenya (CAK)

According to **Regulation 17** of the above Regulations a Licensee who misuses the License is liable to a fine of Ksh 1,000,000/-

The Letter of 11th September 2019 warned the Plaintiff against misuse of the License, despite this warning the Defendant continues to use the Plaintiff's frequency without authority of the Plaintiff and CAK.

Therefore, the Applicant/appellant is alleged to be seeking that the Court sanctions an illegality that the Defendant has contravened statute; no consent from CAK has been produced to confirm approval of transfer and use of frequency. The Court should not aid an illegality.

The High Court in Marsabit upheld the Preliminary Objection on the basis of *sub judice* and the Court failed/refused to grant injunction as no consent was produced. The applicant are seeking through the back door to circumvent orders of the Marsabit High Court.

Without the Consent from CAK in compliance of the statute the Defendant/Applicant failed to establish a *prima facie* case to warrant grant of injunction or an arguable appeal. There cannot be a *prima facie* case where there is violation of statute and/or criminality.

The Plaintiff/Respondent cited the case of **Countryside Broadcasting Co Ltd vs Go Communication & CCK Civil Suit 12 of 2010 High Court Nairobi.**

DETERMINATION

The issues for determination by this Court are;

Whether there is an appeal lodged for hearing and determination by the Appellant?

Whether this Court has jurisdiction to hear and determine the application seeking stay of execution of orders by the Trial Court granted on 28th May 2020 and confirmed on 9th June 2020?

Whether by virtue of the Ruling of Marsabit High Court this Court's ex parte orders are to circumvent those orders and yet those orders are not on appeal?

ANALYSIS

The Defendant/Applicant filed Memorandum of Appeal and application seeking stay of execution of the Trial Court's orders of 9th June 2020 which were confirmation of temporary injunction orders of 28th May 2020. These orders were/are to stop the Defendant from broadcasting using the Plaintiff's frequency and radio equipment until the application and/or suit was /were heard and determined.

Article 165 3 (a) & (e) COK 2010 grants the Court unlimited original jurisdiction in civil and criminal matters but subject to legislation that confers any other jurisdiction. The High Court lacks jurisdiction to hear a dispute in the 1st instance whose subject matter value is less than Ksh 20 million.

By virtue of **Section 11CPA** a matter ought to be heard at the lowest Court of 1st instance in the hierarchy of Courts and after determination an aggrieved party may pursue a review of the order(s) from the Trial Court or appeal against the decision. The High Court has jurisdiction to hear and determine appeals from Magistrates' Court.

Section 6 CPA prescribes that the Court where the matter is filed first shall hear the matter first, and other subsequent suits filed between same parties over the same dispute shall be stayed. From the above provisions, the matter is rightfully and legally before the Magistrate's Court as the Trial Court where the suit between parties was first filed. The Court has jurisdiction to hear and determine the suit in the 1st instance barring any other legal impediments.

In the instant matter, the Trial Court granted *ex parte* orders on the basis of the evidence pleaded on 28th May 2020. The grounds for the application were that some of Plaintiff's directors incorporated the Defendant and started using Plaintiff's frequency which was in violation of the licence and without mandatory consent from the regulator CAK.

On 9th June 2020, after the Respondent appeared in Court and explained relevant circumstances to the Trial Court which would determine whether to affirm, vary or vacate these orders. The Defendant/Applicants filed Notice of Motion seeking review of the *ex parte* orders as the Plaintiff's failed to disclose that it willfully transferred to the Defendant at a consideration in September 2018. It was alleged that the Plaintiff intended to transfer the frequency to a new 3rd Party Biftu Radio. It is not clear what was the outcome of the application for review.

According to both parties' submissions, the Trial Court granted orders on 28th May 2020 and the Duty Court confirmed these orders on 9th June 2020. The orders amounted to closing down the Defendant's transmission and the matter was determined before hearing. The Appellant's spirited efforts to obtain a certified copy of the Ruling before the hearing of the application were unsuccessful. The resulting orders granted on 28th May 2020 and 9th June 2020 are annexed to the application.

The Applicant on filing the appeal to these orders in this Court, the Court issued the *ex parte* orders that are now sought to be set aside.

On the submission that these *ex parte* orders issued on 17th June 2020, have the effect of this court sitting on appeal of Marsabit High Court which refused to grant orders and this Court has no appellate jurisdiction to orders of the High Court, a court of similar equal and competent jurisdiction, this Court submits;

Marsabit High Court Civil Case 2 of 2020 filed by the Defendant Ibse Radio Limited against Plaintiff, Angaaf Radio Limited, 3rd Party Radio station Biftu Radio Station and CAK as interested Party and sought temporary injunction. The Plaintiff entered appearance and filed Preliminary Objection and invoked **Section 6 & 11 of the CPA** that there was a similar matter in **CMCC** Court. The order of the Court was/is that the Preliminary Objection was upheld that the hearing of the suit between Plaintiff and Defendant shall proceed in **CMCC** Court. The issue of grant of injunction was not canvassed.

This Court agrees with this position as set out by law. What is in this court is an appeal of interlocutory orders and not hearing and determination of the dispute. This issue of the appeal was not before Marsabit High Court and therefore is within purview of this Court to address.

The Plaintiff/Respondent submitted that that this Court's interim orders to stay orders of 9th June 2020 would amount to enforcing and sanctioning illegal conduct by the Applicant which borders on criminality. The Plaintiff/Respondent stated that the Defendant failed to obtain consent from CAK as required by statute and therefore use of the frequency was/is illegal.

Without getting into substance of the suit, the Plaintiff claims as licensed owner of the frequencies, that the Defendant in flagrant violation of

the terms of the licence, uses the Plaintiff's frequency without transfer and consideration and without written approval of Communication Authority of Kenya.

The Defendant claims the frequencies were freely and willingly transferred for consideration of **Ksh 930,000/-** to CAK on behalf of the Plaintiff in unpaid license fees. The defendant operated broadcasting since 2018 with approval of the Plaintiff and without interference. The Defendant deponed that they are sister Companies Directors in both Radio Station Companies own shares.

The Plaintiff wrote to Communications Authority of Kenya on 19th September 2018 and informed the Regulator that they were in the process of opening up a new radio station Ibse Radio and wished to transfer 2 of its 5 frequencies and sought guidance and advice from the Authority. The Plaintiff wrote again to the Regulator on 25th September 2019 on the same issue.

The Plaintiff wrote letters dated 20th April 2020 & 6th May 2020 to the Regulator and in reply on 13th May 2020, confirmed from their records that the Plaintiff on boarded the Defendant as sister station vide the Plaintiff's letter of 19th September 2018 and can therefore not claim to be having interference.

The Authority directed the Plaintiff was to maintain status quo where the Defendant continues broadcasting and Biftu Radio is switched off and its license application will not be processed until the matter is resolved.

Both the Plaintiff and Defendant have competing and compelling claims and arguments that can only be determined fully upon hearing and determination of the suit after testing the veracity of each party's claim.

At the interlocutory stage it is not possible to establish which of the 2 parties holds a valid and legal claim.

Whereas the Respondent informed this Court that the Defendant's use of frequency without written consent of the Regulator which is a statutory requirement is an illegal act and the Court cannot sanction illegality, the Regulator vide its letter of 12th May 2020 seemed aware of the anomaly and approved the Plaintiff's request vide letters of 19th September 2018 and 25th September 2019 to granted the Defendant authority to broadcast pending resolution of the dispute.

From the totality of these facts, this Court finds that it ought to preserve the substratum of the suit for hearing and determination by the Trial Court and for this Court pending appeal so as not to render the appeal nugatory.

Although the Defendant/Applicant has not established a *prima facie* case to warrant injunctive orders maintenance of *status quo* ante to preserve the subject matter is appropriate in the circumstances.

In the case of *Saifudeen Abdullahi & 4 Others Mombasa High Court Civil Cause No 11 of 2012*, Hon. F. Tuiyot J. stated;

“In my view, an order to status quo to be maintained is different from an order of injunction both in terms of the principles for grant and practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.....It does not depend on proof of right or prima facie case.....An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order of status quo.”

The *ex parte* temporary stay of execution granted for 14 days on 17th June 2020 was to preserve the subject matter of the suit and not to determine any party's right(s) in the dispute. Having heard the parties on the stay of execution pending appeal, am constrained to stay the orders of the Trial Court of 28th May 2020 confirmed on 9th June 2020 so as to revert to *status quo* ante, preserve the subject matter, the situation as it was when parties came to Court.

This is because by virtue of **Order 42 Rule 6** the impugned orders of 9th June 2020 had the effect of closing down the Defendant Radio Station before determination of the claim, adversely affecting Defendant's contractual obligations with media partners, employees and exposing the Defendant to losses and claims for damages from 3rd Parties. All these factors amount to substantial loss and hence merits stay of execution to maintain *status quo*. The stay of execution is conditional to security to be provided by the Applicant by **Order 42 Rule 6 (2) (b) CPR 2010**.

DISPOSAL

- 1. The application to set aside vary or vacate the Court's orders of 17th June 2020 is denied.**
- 2. The stay of execution of orders of 9th July 2020, is extended to stay in force until hearing and determination of the appeal.**
- 3. The hearing and determination of the substantive suit shall be before the Trial Court.**
- 4. The Appellant shall deposit in Court or held in a joint account held by the parties respective lawyers on record, Ksh 500,000/- within 30 days**

5. The appeal shall be processed in the normal process and when pleadings close, the matter shall be set down for directions and hearing of the appeal.

6. Each party shall bear own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 20TH JULY 2020.(VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. WAKOKO FOR DEFENDANT/ APPELLANT

MR. MWITI H/B MR. ABDIRAZAK FOR PLAINTIFF/ RESPONDENT

COURT ASSISTANT- E. TUPET