REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY COURT

MILIMANI LAW COURTS

CIVIL CASE NO 147 OF 2014

AIRTOUCH CONNECTIONS LIMITED.....PLAINTIFF

VERSUS

ESSAR TELCOM KENYA LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 14th April 2013 and filed on 16th April 2013 was brought under the provisions of Order 39 Rule 1 & 2, Order 40 Rule 1, Order 52 & Rule 13 (sic) of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and all enabling provisions of the law. Prayer No (1) was spent. The application sought the following orders:-

1. **Spent**
2. **THAT a Mareva Injunction do issue restraining the defendant/respondent, its agents, servants, employees or whatsoever name called from selling and or disposing of its assets pending the hearing an determination of this application and suit.**
3. **THAT a Mareva Injunction do issue restraining the defendant/respondent, its agents, servants, employees or whatsoever name called from selling and or disposing of its assets pending the hearing an determination of this suit.**
4. **THAT in the alternative to prayer 2 and 3 above, the defendant/respondent, be ordered to deposit/furnish security to court in the sum of Kshs 17,586.026.05 same being the amount claimed by the Plaintiff/applicant pending hearing and determination of this suit.**
5. **THAT costs of this application be provided for.**

THE PLAINTIFF'S CASE

2. The Plaintiff's application was supported by the Affidavits of Dominic Mong'are Ogeto that were sworn on 14th April 2014 and 18th June 2014. Its case was that on or about 5th October 2009, the Plaintiff entered into a E1 Service Agreement dated 15th October 2009 (hereinafter referred to as "the Agreement") with the Defendant whereby the Defendant was to provide E1 services to the Plaintiff on agreed terms and conditions. However, on 4th November 2009, the Defendant suspended the Plaintiff's account as a result of which the Plaintiff suffered loss (sic), financial

losses and or business disadvantages in the sum of Kshs 17,586,026.05.

3. There was real risk of the Plaintiff not being able to enforce its judgment against the Defendant as the Defendant was in the process of disposing of its businesses and assets in Kenya and had no other known assets in Kenya.
4. Its written submissions were dated and filed on 18th June 2014.

THE DEFENDANT'S CASE

5. In opposition to the said application, Sundaraman Pattabiraman swore a Replying Affidavit on 4th June 2014 on behalf of the Defendant herein. It was filed on 5th June 2014. It pointed out that in the aforesaid Agreement, it was to offer preferential calling rates to its customers whereupon a link was set up. However, it disconnected the Plaintiff's account in accordance with the terms of the said Agreement after it noticed that some its customers were making calls to international destinations when the outbound roaming service had not yet been made available to the said customers. As a result of such activity, it incurred a bill that was approximately Kshs 1,000,000/=.
6. Its argument was that the Plaintiff had misconstrued the effect and purport of discussions that it had entered into with third parties and that that the Plaintiff had sought to intervene and countermand commercial undertakings between the Defendant and the said third parties and for which the Plaintiff had no interest. It said that even if the negotiations with other third parties materialised, it would still continue to exist and to own assets more than USD 25 million.
7. It contended that it was presumptuous for the Plaintiff to have asserted that the Defendant was indebted to it when the matter had not been heard on merit and prayed that the Plaintiff's application be dismissed for being unmeritorious and an abuse of the court process.

LEGAL ANALYSIS

8. The Plaintiff referred its dispute with the Defendant to Communications Commission of Kenya (CCK) which termed the said Agreement as an Interconnection Agreement and directed the Defendant to reinstate the link. Being aggrieved with the decision by CCK, on 20th October 2010 the Defendant filed **Judicial Review Application No 18 of 2010** where Gacheche J (as she then was) found that CCK lacked jurisdiction to make the decision that it did. She also found that the said Agreement was not an Interconnection Agreement as the Plaintiff and the Defendant had no similar systems. An appeal at the Court of Appeal by CCK against the decision of the said learned judge was withdrawn on 10th July 2013.
9. It was not clear whether the said withdrawal was endorsed and adopted as an order of the Court of Appeal. What is evident, however, is that the judgment of the learned judge to the effect that CCK had no mandate to interfere with the E1 Agreement and that it ruling was null and void *ab initio* was not set aside or varied and is what is obtaining at this particular time.
10. The basis of the Plaintiff's application was that there was need for the court to grant an interlocutory Mareva injunction so as to prevent the judgment of this court being rendered nugatory/ineffective by the Defendant's intention to dispose of its assets. It submitted that the process of the sale of the Defendant's assets though undisclosed and the conclusion date not known, the same was ongoing. The Defendant contended that its proposed transaction with the third parties did not entail the sale of all its assets and that it had assets of USD 25 million and would continue to exist.
11. In arguing that it was entitled to a Mareva Injunction, the Plaintiff argued that it had it had met all the criteria set out in the case of **Giella vs Cassman Brown Company Limited [1973] E.A** which was that:-
    a. **The applicant must have shown a *prima facie* case with a probability of success.**
    b. **The applicant must have shown irreparable injury of the injunction was not granted.**
    c. **If the court was in doubt, then it would decide the application on a balance of convenience.**
12. These conditions must be met before a Mareva Injunction can be granted. This was a position that was held by Kasango J, and which this court agrees with, in the case of **Central Bank of Kenya vs Giro Commercial Bank Limited & Another [2007] 2 E.A. 93**. However, the power of a court

to grant of Mareva Injunction is a discretionary one and is only used in limited circumstances

13. In the case of **Mareva Compania Naviera SA vs International Bulk Carriers SA [1975] 2 Lloyd dis Rep 509** which was referred to by both the Plaintiff and the Defendant, Lord Denning MR stated as follows:-

"In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment (emphasis court)**, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him from disposing of those assets."**

14. In the same case, while agreeing with Lord Denning MR, Roskill LJ observed that interlocutory injunction was granted on three (3) grounds which he gave as:-

"First, this ship was on time charter from the plaintiffs to the defendants on the New York Produce Form…secondly, there has been what would seem to be a plain and unexcused default in the payment of the third half-monthly installment…thirdly, that third installment fell due when the ship was under voyage charter from the time charterers to the President of India as voyage charterers."

15. Evidently, this case would not assist the Plaintiff as it was not sufficient that there be a real risk of assets being disposed of before judgment could be enforced but rather that the disposing of such assets would have to be undertaken with a view to defeating any judgment that would be entered in its favour. The *mala fide* disposal of such assets is an integral part of the Plaintiff's argument that would persuade this court to grant it a Mareva Injunction. There was no inkling of such demonstration to the court by the Plaintiff or at all.
16. The Plaintiff did not provide any evidence of what the Defendant's transaction entailed. Indeed, it did not rebut the Defendant's assertions that the Defendant had assets of USD 25 million and would continue to exist. It did not also demonstrate that there was any nexus between its claim and the Defendant's discussions with other unknown third parties. Indeed, it was also not clear when the Defendant's dealings with third parties commenced and when the same were expected to be concluded as the Plaintiff's claim arose sometime in 2009 and the question of whether or not the said discussions were in bad faith intended to defeat the Plaintiff's judgment, if any.
17. The only inference of the Defendant's transactions with unknown third parties was contained in the Plaintiff's letter to the Defendant dated 19th March 2014. In the absence of evidence that the said transactions was connected to the Plaintiff's claim, the court would run the risk of granting adverse orders to stifle commercial considerations by the Defendant as the orders sought would have the effect of restraining the Defendant from selling or disposing its assets to other parties.
18. In addition, the Plaintiff did not also furnish the court with concrete evidence that the Defendant would not meet its claim. In its said letter of 19th March 2014, it was clear that certain arrangements had been made for the parties who were acquiring the Defendant's assets to ensure all liabilities were addressed before the acquisition of the Defendant's assets. This state of affairs was the Plaintiff's own admission in which it stated in its letter of 19th March 2014:-

"We are alive to the fact that the parties set to acquire your business are under obligation to ensure all liabilities are addressed precedent to the proposed acquisition or provided for in the sale agreement."

19. A Mareva Injunction is not to be given to an applicant to secure its claim as a secured creditor though the order would have the effect of doing so. It is granted to protect the efficacy of court proceedings to ensure that a defendant does not act in such a way as to defeat the judgment that the court might at the end of the day deliver in favour of an applicant. In the case of **Fourie vs Le Roux & Ors [2007] UKHL 1 at Para 2, [2007] 1All ER 1087**, Lord Bingham declared thus:-

"Mareva (or freezing) injunctions were from the very beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets

with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign."

20. For the foregoing reasons, the court was not satisfied that the Plaintiff had provided concrete evidence that the Defendant was acting in bad faith in dissipating its assets in the discussions it had been having with third parties relating to its assets or that there was a real risk that the disposal of the Defendant's assets which would have the effect of frustrating its fruits of judgment. It was not sufficient to allege the fact, the Plaintiff was required to demonstrate that the Defendant was acting fraudulently in its dealings with third parties to defeat its judgment. The Plaintiff would therefore not succeed in Prayer No (3) of its application herein.
21. As regards Prayer No (4) of its application, the court notes that the Plaintiff's case against the Defendant was one for breach of contract on the basis that the Defendant had disconnected the E1 Service. As was rightly submitted by the Defendant, parties have a right to terminate a contract between them in accordance with the terms and conditions of the contract. This would not automatically mean that the one who terminated the contract owed the other the monies in question.
22. The Plaintiff's claim for Kshs 675,800/= being deposit it paid the Defendant, the total compounded interest it accrued on the facility it borrowed from Barclays Bank of Kenya Limited in the sum of Kshs 1,328,089.73, set up cost in the sum of Kshs 1,974,117.74 and loss of business in the sum of Kshs 13,608,018.58 giving a total sum of Kshs 17,586,026.05 is one for special damages. These would need to be specifically proven as the Defendant had not admitted the same. In fact, the computation of the sum of Kshs 13,608,018.58 was not enumerated making it difficult for the court to determine the exact amounts due to the Plaintiff without hearing and analysing evidence from both parties. There was therefore no clear evidence of indebtedness as was in the case of **Mareva Compania Naviera SA vs International Bulk Carriers SA** (Supra).
23. Having considered the pleadings, affidavit evidence, the written submissions and the case law in respect of the parties' case, the court finds and holds that it neither has power nor jurisdiction to give orders whose effect would be to secure the Plaintiff's claim as a secured creditor as was observed in the cases of **Fourie vs Le Roux & Ors** (Supra) and **Mareva Compania Naviera SA vs International Bulk Carriers SA** (Supra).
24. The court finds that as the Plaintiff failed to discharge its burden of showing that it had met the criteria that was set out in the case of **Giella vs Cassman Brown Company Limited** (Supra), the court was not inclined to exercise its discretion in its favour. If the contents of its letter dated 19th March 2014 were anything to go by, the balance of convenience titled in favour of the Defendant as the persons acquiring the Defendant's business were required to ensure all liabilities were addressed prior to the proposed acquisition.
25. The Plaintiff's alternative prayer was not based or hinged on any known provision of the law as it was intended to have the effect of securing a debt, which had not been proven in the first instance. This is therefore not a case that the court could exercise its discretion to grant the orders that had been sought by the Plaintiff.

DISPOSITION

26. For the reasons foregoing, the Plaintiff's Notice of Motion application dated 14th April 2014 and filed on 16th April 2014 was not merited and the same is hereby dismissed with costs to the Defendant.
27. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 4th day of December, 2014

J. KAMAU

JUDGE