REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 6 OF 2018

JAMII TELECOMMUNICATIONS LTD.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....RESPONDENT

RULING

The application before me is dated 21.11.2018 wherein the County Government of Uasin Gishu, herein referred to as the applicant seeks orders that the orders of this honourable court issued on 24th April, 2018 allowing the Petitioner's application dated 29th March 2018, January 2018 issuing an injunction restraining the respondents, agents, servants or assigns from interfering with the Petitioners Optic fibre or infrastructure and further directing that the respondents do restore the petitioners infrastructure and optic cables destroyed on 27.3.2018, which orders ought to be stayed, reviewed or set aside pending hearing and determination of this application.

The application is based on grounds that the application dated 29th March, 2018 has not been determined on merit as the applicant herein has never been heard. The applicant states that the order issued by this honourable court does not preserve the status quo ante of a particular matter or situation obtaining but directs the applicant on substantive issues which ought to be heard. The orders issued by this honourable court acts on issue of facts and evidence which can only be dispensed with by both parties being heard. The orders issued by this Honourable court have not been granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.

That the petitioner's application and the affidavit of one Wilson Kipruto Setim fails to establish a prima facie case with a very high probability of success and that the issues raised thereto are capable of monetary compensation and does not warrant the injunctive orders issued. That it is trite law that in an ex-parte application when the court does not have the benefit of hearing the other party, the applicant has a duty to conduct the application with utmost good faith and make full and frank disclosure of all material facts to which the petitioner herein failed to disclose the meeting held and resolutions made with the respondent on the 29th March, 2018. That the petitioners have indicated on several occasions after the said meeting of their intention to withdraw the suit and abide by the agreed terms, only to proceed in court and seek the said orders;

It was stated that when the advocate on record appeared before court, the intent for negotiations had not been dispensed with thereby delaying the filing of reply to the Petition and the application by the petitioners. That such delay or any omission by the advocate on record should not be vested on the applicant herein. That further on non-disclosure, the petitioner failed to state that indeed, they do not and never have an approval from the respondent allowing the works of setting infrastructure, laying fiber optics in the ground or overhead or anything relating to the subject of their petition.

That the applicant herein is the County Government of Uasin Gishu with mandate as per the Fourth Schedule of the Constitution; the County Government Act; the Physical Planning Act to carry out administrative duties related to the subject issue and that the said orders without giving opportunity to be heard, curtails the provisions of the constitution and exposes the respondent/applicant herein to loss of revenue.

That it is fair, just and expedient therefore, to set aside the orders of this honourable court dated 24th April, 2018 be stayed, set aside and or reviewed.

That if the said orders are not stayed, set aside or reviewed, the substantive issues raised in the applicant's petition shall be rendered nugatory due to their predetermination.

That it is in the best interest of justice to set aside the orders dated 24th April, 2018 and set the application dated 29th March, 2018 and the petition down for hearing and determination on merits.

The application is supported by the affidavit of Stephen K. Lel, the County Attorney for the applicant who states that the order issued does not preserve the status quo ante. That upon the order being served, there were meetings held to amicably resolve the dispute and it was agreed that the petitioners were to stop their actions until approved. The petition was to be withdrawn with no orders as to costs. The

petitioners proceeded to court until material disclosure. The delay to respond by the application was due to the out of court negotiation. The response is meritorious and that petitioners suffer no prejudice. The applicant suffers prejudice due to torn planning activities.

In the replying affidavit, the respondent through Reece Mukhabani Mwani states that the applicant has come to court with unclean hands and seeks to mislead this court. The applicant despite being served failed to enter appearance or to appear in court on 19.4.2018 when the application dated 29.3.2018 was fixed for hearing. The applicant filed a Notice of Appointment on 20.4.2018 but did not file any response to the petition. On the 2.7.2018, the applicant failed to attend court despite being served with the mention notice. The matter was fixed for highlighting on 8.10.2018 and one Mutahi attended court and prayed to be given more time to file and serve submissions. He was given 21 days. Instead of filing submissions, the applicant filed the application dated 21.11.2018. the respondent denies the existence of any negotiations.

Mr. Chepkilot learned counsel for the applicant submits in a nutshell that the delay in appearing before this court was caused by the intention by the parties to have the matter amicably settled. Mr. Mutai misled the court by taking a date for highlighting submissions whilst he was not in conduct of the matter. The applicant submits that the response raises triable issues and that the applicant is capable of paying costs.

Mr. Mukhabane, learned counsel for the respondent submits that after the determination of the application, there is nothing more. The prayer lapses on the ruling date. Moreover, that the applicant should not blame the advocate.

I have considered submissions from both parties through their able counsel and do find that the application seeks to set aside the orders made on 19.4.2018 and issued on 24.4.2018.

The principles to be applied in setting aside the above said orders are well settled in the case of **Pithon Waweru Maina V Thuku Mugira (1983), eKLR.** The principles governing setting aside of ex-parte judgments obtained in the absence of an appearance or defence by the defendant or upon failure by the defendant to attend the hearing were stated as follows:

> *a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just.*
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> *b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. As stated in* ***Shah V Mbogo (1967) EA 116 at 123*** *and* ***Shabir Din V Ram Parkash Anand (1955) 22 EACA 48***
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> *c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that as a result there has been injustice.*
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> *d)* Additionally, *the court has no discretion where it appears there has been no proper service (Kanji Naram V Velji Ramji (1954) 21EACA 20.*
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> *e)* It is also important to note that *a discretionary power should be exercised judicially and in a selective and discriminatory manner not arbitrarily and idiosyncratically Smith V Middleton (1972) SC 30.*

It is not in dispute that the applicant was served with the Notice of Motion dated 29th March 2018 but did respond to the same. The application dated 29.3.2018 was fixed for hearing on 19.4.2018, the applicant was served but failed to attend. No proper explanation is given for failing to attend the hearing of the application. He was served with mention notice for directions slated on 2nd July 2018 but did not attend. Moreover, negotiation cannot bar a party from complying with procedure and attending a hearing.

> *In Paul Njoroge vs The Attorney General and others, HC Misc. Case No. 90 of 2004 Justice W. S. Deverell, faced with inability due to negotiations had this to say;*
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> **"… I consider that it was a risky strategy for the applicants to delay filing the record of appeal on the strength of verbal negotiations, which do not appear to have been reduced to writing at any material stage. It would have been prudent to have 19 complied with the requirements laid down in the rules while the alleged negotiations were ongoing and to have confirmed their existence in writing at some stage. As it is, I am not in position in which I can make any meaningful decision as to who is telling the truth as to the existence of the alleged negotiations. The burden of proving their existence is upon the applicants who now wish to rely upon them and I am of the view that this burden has not been discharged".**

This authority summarizes my opinion on this ground. I am not in position in which I can ascertain whether, in truth, these negotiations took place and, if they took place, and whether the objective was to find a way forward over this matter or to frustrate it. The burden of proving that they took place, what the objective was, and with what the result was upon the Applicant who now wish to rely on them. In my opinion, this burden was not discharged. The respondent cannot be affected adversely by unevidenced consultations which they knew nothing about.

I do find that the applicant has not demonstrated that there was any hardship in attending court as scheduled. Moreover, public interest dictates that due process be followed in decision making and therefore the applicant is not justified in destroying the cables already laid down by the respondent without following due process. The application is dismissed with costs. However, the respondent ought to demonstrate that the applicant approved the laying down of cables within the disputed area for purposes of proper planning and therefore, this court orders that ***upon compliance with the orders made on 19th April 2018, the status quo*** be maintained and therefore no further activity be undertaken pending the hearing and determination of the petition. Costs of the application to the respondents in any event. Orders accordingly.

Dated and delivered at Eldoret this 30th day of April, 2019.

A.OMBWAYO

JUDGE