IN THE COURT OF APPEAL AT NAIROBI

CORAM: OUKO, M'I NOTI & J. MOHAMMED, JJ.A.

CIVIL APPEAL (APPLICATION) NO. 121 OF 2012

BETWEEN

COMMUNICATIONS COMMISSION OF KENYA ……..…
APPELLANT/RESPONDENT

AND

TETRA RADIO LIMITED ……..... RESPONDENT/APPLICANT

(An application to strike out Civil Appeal No 121 of 2012 filed on 15th June 2012 from the judgment and decree of the High Court of Kenya (Gacheche, J)

dated 24th June, 2011 in HC MISC CA NO.141 "B" of 2008)

****

RULING OF THE COURT

On 7th March, 2013, the applicant, *TETRA RADIO LIMITED* took out the Motion on notice before us, seeking to dismiss or strike out Civil Appeal No.

121 of 2012 filed in this Court by the respondent on 15th June, 2012. The basis upon which the dismissal or striking out of the appeal is sought is that the respondent is in blatant contempt of court, having disobeyed the order of the High Court that is the subject of the said appeal. The motion is expressed to be taken out under *rule 1(2) of the Court of Appeal Rules* "and all other enabling provisions of the law". If we understood Mr S. Musalia Mwenesi, learned counsel for the applicant correctly, the applicant is simply invoking the inherent jurisdiction of this Court to uphold its dignity and authority and to protect the administration of justice and the rule of law. The applicant thus firmly believes that the best or the most efficient way to achieve those noble ends is the dismissal or striking out of the respondent's appeal.

The short background to this application can be easily pieced together from the affidavits filed by the parties and the annextures thereto. These are the affidavit in support of the application, sworn on 6th March, 2013 by Jacquieline Wakonyu Mwai, a director of the applicant and the opposing affidavit, sworn on 22nd April, 2013 by John Omo, the respondent's secretary.

Following a US$ 5.2 million bid by the applicant for award of a license to construct and operate commercial trunk radio network in the UHF band, the respondent, by a letter dated 18th October, 2002,

advised the applicant that it had been awarded the bid. Whether the award amounted to award of a licence is contested. Be that as it may, disagreements subsequently arose between the parties regarding fulfilment of conditions of the award and by a letter dated

18th October, 2007 the respondent cancelled the applicant's award. On 1st April, 2008, the respondent initiated judicial review proceedings in the High Court (High Court Miscellaneous Civil Application No 141 of 2008) seeking, among others, an order of *certiorari* to quash the said decision of the respondent and an order of prohibition to stop the respondent from *"utilizing, appropriating, allocating, activating, allowing to be used or in any other manner prejudging the exclusive use by the applicant of the frequency range between 370 MHz to 470MHz (both inclusive)."*

On 11th April 2008, the High Court (*Dulu, J.*), granted, *ex parte*, the leave sought and, in the following terms, ordered the same to operate as stay of the respondent's decision of 18th October, 2008:

> *"That leave so granted to apply for the orders of certiorari and prohibition do operate as a stay of the decision of the Communications Commission of Kenya dated 18th October, 2007 purporting to cancel the commercial trunked radio operator licence issued to the applicant and also a stay against the Communications Commission of Kenya prohibiting the Communications Commission of Kenya from utilizing, appropriating, allocating, activating, allowing to be used or in any manner prejudicing the exclusive use by the applicant of the frequency range between 370 MHZ to 470 MHZ both inclusive provided that the main motion is filed and served within 21 days from the date hereof and in default the stay orders will automatically lapse."*

The above order was served upon the respondent and the applicant duly filed the motion within 21 days of the date of the order as directed. It appears that after that, the parties focused their energies and efforts in fighting the main application for judicial review and, until much later, nothing was heard again about the order of Dulu, J.

The application for judicial review was heard by Gacheche, J who, by a judgment dated 24th June, 2011, quashed the decision of the respondent and prohibited it from *"utilizing, appropriating, allocating, activating, allowing to be used or in any other manner prejudicing the exclusive use by the applicant of the frequency range between 370 MHZ to 470 MHZ (both inclusive)."*

Aggrieved by that judgment, the respondent filed Civil Appeal No 121 of

2012 which the present application seeks to obliterate. Pending the hearing and determination of the appeal, the respondent applied in the High Court, in October, 2011, for stay of execution of the orders of Gacheche, J. On 22nd December, 2011, the parties recorded a consent order, in which they agreed to stay execution of the High Court order until 30th June, 2012. Thereafter, the order of stay of execution was extended by consent until 22nd January, 2013 when the parties finally agreed to stay execution of the order until Civil Appeal No 121 of 2012 is heard and determined.

Barely two months later, the applicant woke from what it suggests was blissful ignorance of the true facts. The applicant was spurred into action by what its director Ms Mwai, calls the respondent's *"startling admissions"* in separate litigation, that the orders of the High Court had been disobeyed. That litigation, filed on 18th January, 2013, was *High Court Miscellaneous Civil*

Application No. 16 of 2013, <u>Huawei Technologies Co Ltd vs The Public</u>

<u>Procurement Administrative Review Board (PPARB) and Another</u>.

We do not have to concern ourselves with the intricacies of that litigation; it will suffice to note that Huawei had responded to a tender by the defunct Ministry for State for Provincial Administration and Internal Security for the supply, installation, testing and commissioning of the national surveillance, communication, command and control system in the national police system. Upon being declared

unsuccessful, Huawei requested PPARB for review and when that request too failed, it moved the High Court for orders of *certiorari*

to quash the decision of the PPARB and mandamus to compel PPARB to re- evaluate its request for review. Messrs Mohammed & Muigai Advocates, who are on record for the respondent in this application and in the appeal, were the advocates on record for Huawei.

When the applicant got wind of the litigation, it applied to be enjoined in the application contending that the subject matter of the tender was the provision of trunked radio service in the 400 MHZ frequency band, in respect of which it already had a court order in its favour. Ultimately the application was withdrawn on 27th February, 2013 by consent, including that of the applicant.

Before us Mr Mwenesi submitted that this Court has inherent jurisdiction to uphold its dignity and authority and to protect the administration of justice and the rule of law by dismissing or striking out a filing by a party who is in breach of a court order. Learned counsel further submitted that the applicant had learnt of the blatant violation of the order of the High Court in the course of the hearing of Misc Civil Application No. 16 of

2013 when it transpired that the respondent had allocated frequency bands between 370 MHZ to 470 MHZ contrary to the court order and that the respondent had not denied being in breach of the court order. Mr Mwenesi urged that it was not the business of any party to second-guess the court or to purport to interpret a court order; all parties were obliged to obey and comply with orders of the court until they were reviewed or set aside.

While conceding that the applicant had not taken out contempt of court proceedings against the respondent, Mr Mwenesi submitted that that was an alternative option, the existence of which did not preclude the approach that the applicant had taken. As far as counsel was concerned, the current application was the most efficient and efficacious way to uphold the authority and dignity of the Court.

Mr Mohammed Nyaoga, learned counsel, who appeared with Mr Geoffrey Imende, learned counsel, for the respondent, launched a two pronged assault on the application. The first plank challenged the jurisdiction of the Court to entertain the application, while the second posited that even if jurisdiction existed, no contempt of court had been established to warrant exercise of jurisdiction.

Mr Nyaoga submitted that the jurisdiction of this Court to strike out or dismiss an appeal and the grounds upon which that jurisdiction is to be exercised is regulated by *rule 84 of the rules of this Court*. Under that rule, jurisdiction can be exercised in three situations, namely if no appeal lies, if some essential step has not been taken, or if such step has not been taken within the prescribed time. Counsel submitted that the present application did not fall within any of the three recognised grounds for dismissing or striking out the appeal.

Learned counsel further faulted the applicant for purporting to invoke the inherent power of the Court. It was submitted that the inherent power of the Court was not a rogue power to be invoked at the whim of a party, but was

instead residual power to be invoked for the ends of justice, but only when there is no specific power conferred by law. In the present case, it was argued, the law has provided adequately for the instances when an appeal may be dismissed or struck out, which did not include the kind of application preferred by the applicant. Counsel concluded that inherent power of the Court cannot be invoked where there is a prescribed remedy.

Developing the argument further counsel cited the decision of the

Supreme Court in *THE BOARD OF GOVERNORS, MOI HIGH SCHOOL, KABARAK VS MALCOM BELL & ANOTHER, S C PETITION NOS. 6 & 7 OF*

2013 where the Court held that the inherent powers of a court are not substantive powers upon which a party can found a cause of action; that such powers do not confer jurisdiction and therefore cannot form the basis for assumption of jurisdiction where none has been created; and that inherent powers are purely endowments to enable the court discharge and regulate its constitutional and legal mandate. To the same effect, the decision in *AMEER*

KASSIM LAKHA VS MISTRY JADVA PARBAT & CO LTD & ANOTHER, *CIVIL APPEAL (APPLICATION) NO 296 OF 2001* was cited. In that matter a judge of this Court declined an invitation, in an application under *Rule 76(1) of the former rules of the court*, to ignore the provisions of the rule and instead invoke inherent powers. The Judge expressed himself as follows:

> *"My jurisdiction is limited by law and not inherent. I have considered rule 1(2) of the rules. It does not allow me to ignore the existing rules. In any event, even if I had inherent powers, I would still be restricted to exercising such*
>
> *jurisdiction only in cases where there are no clear legal remedies provided. In the matter before me, it is clear that provisions of rule 4 of the rules of court would have taken care of the situation and so the situation does not call for exercise of inherent jurisdiction to ensure justice is done."*

Counsel submitted that the applicant had other specific remedies granted to address the issues that it was raising and that the Court should decline, in the circumstances, to invoke inherent jurisdiction.

On his part Mr Imende contended that the applicant had failed to establish that the respondent was in contempt of court. First, he argued, the order alleged to have been violated, namely, the order of Dulu, J dated 11th April, 2008, had not been produced and was not before the Court. In addition, he contended, that order was superseded and overtaken by events the moment Gacheche, J issued the order of 24th June, 2011.

Secondly, counsel argued, the order that was presented before the Court was that of Gacheche, J, which is not the order alleged to have been violated. Counsel submitted that in any event, that order was effectively stayed by consent and therefore could not form the basis for the kind of application before the court or an application for contempt of court. He relied on the decision of this Court in *KIUNGANI FARMERS CO LTD VS MBUGUA*, *(1984)*

KLR 476 for the self-evident point that a party is not in contempt of court where the execution of the order alleged to have been breached had been stayed by the court.

Thirdly, Mr Imende took umbrage at the applicant's assertion that it had learnt that the respondent had allocated the frequencies in issue from the filings in *High Court Miscellaneous Civil Application No. 16 of 2013*.

Counsel submitted that even before the applicant obtained the order from

Dulu, J, some frequencies within the frequency bandwidth 370 Mhz to 470

Mhz had already been allocated to national security agencies and other third parties, and that fact had been disclosed to the applicant, who had not raised any objection. He cited two affidavits sworn by John Omo that ante dated

High Court Miscellaneous Civil Application No. 16 of 2013.

The first was a replying affidavit sworn on 21st April, 2009, and filed in the High Court on 22nd April, 2009, in which Mr Omo deponed that the respondent did not have the frequencies referred to by the applicant and therefore could not be prohibited from using what it did not have. The second affidavit was sworn on 5th October, 2011, in support of the application before this Court for stay of execution in

which it was deponed that the frequencies

2.3-2.5 allocated by the court as additional frequencies to the respondent were already in use by government radio systems and interference therewith was likely to negatively affect provision of essential service to the public.

Lastly, counsel argued that depending on how the order of the High Court is interpreted, it is still possible to fully comply with the order, were it not for the fact that it had been stayed. As we understood it, Mr Imende's argument was that the applicant had tendered for and was awarded allocation

of frequencies *within* the range of 400 Mhz (370 Mhz to 470 Mhz). The

respondent had assessed that 2 Mhz paired bandwidth of spectrum within the frequency band 370-470 Mhz would be adequate for the applicant. However, the applicant ended up being awarded the entire frequency bandwidth *between*

370 and 470 Mhz. Still, counsel urged, there was adequate bandwidth within the frequency band 370-470 Mhz which could be allocated to the applicant if the respondent's appeal was not ultimately successful.

We have no doubt in our minds that our courts have inherent power to ensure compliance with their orders, that is, the unwritten or implied power which emanates from the very nature of the institution of the court and without which the court cannot function properly or at all. Indeed, the

Supreme Court, in *The Board of Governors, Moi High School, Kabarak vs Malcom Bell & Another* (supra) recognised the power of the court *"to safeguard itself against contemptuous or disruptive intrusion from elsewhere"* as one of the indisputable attributes of its inherent power. In a suitable case, the court will even refuse to hear a contemnor before it, until he has purged the contempt. See *HADKINSON VS HADKINSON, (1952) 2 ALL ER 567.*

However, we ask ourselves, is the application before us such a case? With profound respect to the applicant, we do not think so. No court of competent jurisdiction has adjudged the respondent guilty of contempt of court. The respondent itself does not admit that it is in contempt of court and has put forth several grounds why it is not in contempt of court (including in particular the stay of execution of the order in question); grounds which, on the face of it cannot be described as frivolous. It is, in other words, not an open and shut case of contempt of court on the part of the respondent. The application before us is not a contempt of court application; Mr Mwenesi readily admits as such, and states that he does not see the reason why he should institute contempt of court proceedings when he can approach the court the way he has done. We have thus not been requested to, and we cannot, even with the best of charity, transform the application before us into an application for contempt of court. However, before us is an application, at the heart of which lies a presumption that the respondent has already been adjudged guilty of contempt of court or at the very least, has admitted being in contempt of court. So, we are not being asked to hear and determine whether the respondent is in contempt of court, we are being asked to visit upon it the consequences of contempt of court without any application for such order ever having been made, let alone a court of competent jurisdiction having pronounced it.

We do not think it is necessary for us to address the many side issues provoked by this application; if the applicant is serious about upholding its rights under the order of the High Court or the dignity of the court, it must, in the absence of the respondent admitting to being in contempt of court, first initiate proper contempt of court proceedings. As and when a competent court has adjudged the respondent to be in contempt of court; and only then, can we be moved to consider the orders sought in this application.

In the meantime, this application has absolutely no merit, cannot form the basis for dismissal or striking out of CIVIL APPEAL NO. 121 OF 2013; and the same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of November, 2013.

W. OUKO

JUDGE OF APPEAL

K. M’INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

J. MOHAMMED

---------- JUDGE OF APPEAl

wg