



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC MISCELLANEOUS NO. 83 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 15<sup>th</sup> July, 2019)**

**NRG MEDIA LIMITED.....CLAIMANT**

**VERSUS**

**ANDREW KIBE MBURU .....RESPONDENT**

**RADIO AFRICA LIMITED.....PROPOSED INTERESTED PARTY**

**AND**

**ELRC MISCELLANEOUS NO. 84 OF 2015**

**NRG MEDIA LIMITED.....CLAIMANT**

**VERSUS**

**MICHELLE KAMENE GORO .....RESPONDENT**

**RADIO AFRICA LIMITED.....PROPOSED INTERESTED PARTY**

**RULING**

1. The Applications before the Court are dated 3<sup>rd</sup> July, 2019, brought under Section 12(1), (3), (4) of the Employment and Labour Relations Court Act and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all other enabling provisions of the law seeking for orders:-

- 1. That this application be certified as urgent and be heard ex-parte and service be dispensed with in the first instance;***
- 2. That the Applicant Radio Africa Limited, be and is hereby enjoined in the suit as an Interested Party;***
- 3. That this Honourable Court be pleased to set aside the Orders issued by this Honourable Court on 28<sup>th</sup> June, 2019, and***
- 4. That this Honourable Court be pleased to grant such further Orders as it may deem just and expedient in the circumstances of this case;***
- 5. That costs of this application be provide for.***

2. The application is premised on the grounds that:-

- 1. That the Proposed Interested Party/Applicant, is a media conglomerate that owns and runs six (6) radio stations in Kenya; Kiss FM, Classic FM, Radio Jambo, Smooth FM, Gukena FM, and East FM.***
- 2. That the Proposed Interested Party/Applicant is the current employer of the Respondent, with whom they entered into an***

*employment contract on 14<sup>th</sup> June, 2019 as a content creator and radio presenter.*

*3. That as per the terms of the employment contract, the Respondent commenced working on 20<sup>th</sup> June, 2019, and is already creating content for the Proposed Interested Party/Applicant. The Respondent has since also been going through induction and is being prepared to go on air as a radio presenter for the Proposed Interested Party's Radio Station, popularly known as KISS FM on 8<sup>th</sup> July, 2018.*

*4. That on 28<sup>th</sup> June, 2019, this Honourable Court issued a temporary Order of Injunction barring the Respondent from inter alia, performing services for, carrying or being engaged, or indirectly or publically identifying with the promotion of, any other radio station within the Republic of Kenya or in any business which competes with the business of the Applicant.*

*5. That the temporary order of injunction adversely affects the Proposed Interested Party's substantial investment in the said radio station and in the Respondent.*

*6. That the said order of injunction will lead to substantial loss and damage to the Proposed Interested Party/Applicant's business and commercial interests if not set aside.*

*7. That the orders issued by the Honourable Court on 28<sup>th</sup> June, 2019, are prejudicial to and affect the Proposed Interested Party/Applicant's rights and obligations under the terms of the employment contract between it and the Respondent.*

*8. That the Proposed Interested Party/Applicant has made substantial financial investment in promotional campaigns towards the Respondent's upcoming peak time radio show at the proposed interested party's radio station and the injunctive Orders will lead to substantial loss and damage if the said Orders of 28<sup>th</sup> June, 2019 are not discharged and/or set aside.*

*9. That the proposed interested party was not joined as a party to the suit and thus was not given an opportunity to be heard.*

*10. That as both the Respondent's current employer and the Applicant's competitor, the Proposed Interested Party is thus affected by this Honourable Court's orders of 28<sup>th</sup> June, 2019.*

*11. That in order to enable the Court to effectively and completely adjudicate upon all matters arising in the suit, Proposed Interested Party/Applicant should be enjoined as an interested party.*

*12. That any prejudice or loss that the Applicant is apprehensive of can be compensated by damages.*

*13. That it is in the interest of justice that this application be allowed.*

3. The applications are supported by the affidavits of Linda Musita the Head of Legal at Radio Africa Limited, the Proposed Interested Party/Applicant wherein she reiterates the grounds on the face of the application. She has annexed documentation to the affidavit in support of the substantial investment made in the Respondents which the orders of 28<sup>th</sup> June, 2019, they allege have an adverse effect in the Proposed Interested Party's commercial interest.

4. The application is opposed and the Claimant/Respondent has filed a Replying affidavit and Preliminary Objection.

5. In the Replying Affidavit sworn by one Auma Okelo the Head of Legal at the Claimant/Respondent she states that the Respondent entered into an Employment Contract with Applicants on 1<sup>st</sup> July, 2018 wherein the Applicants were to serve in the capacity of Radio presenter within the programming department and one of her descriptions included coordination with producers to develop program material which description is similar to what the Applicant has taken up at the Proposed Interested Party's Station.

6. That the Respondents were advised to seek independent legal advice before executing her employment contract with the Applicant, and such acknowledgement was signed off by her on the last page of the contract.

7. That the employment contract entered into with the Respondent provided for a surviving non-compete clause of up to 3 months after termination of employment. The Respondent avers that this clause was necessary for some of its employees due to the commercial competitive nature of radio and entertainment industry.

8. That to ensure fair labour practice, the Employment Contract also provided that the employee would be entitled to full pay during the non-compete period. That on 11<sup>th</sup> June, 2019, the Respondents tendered their resignation after giving three months' payment in lieu of notice. The Respondent accepted the resignation and reminded the Respondents to honour their obligations especially the surviving clauses, under the Employment Contract.

9. The Respondent contend that they learnt that the Respondents had secured employment with the Proposed Interested Party and intended to commence employment with it as from 1<sup>st</sup> July, 2019. She avers that she wrote to the Proposed Interested Party notifying them of the Respondents' obligations under the Employment Contract and notified them of the binding non-compete agreement between the Claimant and the Respondents.

10. That this Court's constitutional mandate is to determine disputes relating to employment and labour relations and the Proposed Interested Party's application is grounded on a commercial claim. That the proposed interested party's radio stations have been operational and the

Court Order has not affected its business in any way.

11. That should the Court vacate its orders the Claimant/Respondent would be greatly prejudiced because it has already paid the Respondents their salaries and the Respondents have been unjustly enriching themselves by earning from two employers.

12. The Preliminary Objection dated 5<sup>th</sup> July, 2019, in respect of the Certificate of Urgency dated 3<sup>rd</sup> July, 2019 and the Notice of Motion Application dated 3<sup>rd</sup> July, 2019, is based on the grounds that:-

**1. The application is incurably defective, incompetent, misconceived, frivolous, vexatious and therefore an abuse of Court process.**

**2. This Proposed Interested Party's application offends Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act.**

**3. The Claimant's claim is misconceived, misdirected and misled and therefore the prayers sought cannot stand in law.**

**4. The entire claim by the Proposed Interested Party is an abuse of the process of this Court and ought to be dismissed with costs.**

13. The Proposed Interested Party has filed a Replying Affidavit in response to the notice of Preliminary Objection dated 5<sup>th</sup> July, 2019, and state that the same is an abuse of the Court process and is only meant to delay the expedient determination of the matter.

14. That the Proposed Interested Party has a recognisable stake in the matter having employed the Respondent on 14<sup>th</sup> June, 2019 and as such the Orders issued on 28<sup>th</sup> June, 2019, are prejudicial and detrimental to the Proposed Interested Party's commercial interests in terms of advertising sold and scheduled to be aired on the Respondent's show as from 8<sup>th</sup> July, 2019.

15. That the said Orders in as far as it bars the Respondent from proceeding with her employment with the Proposed Interested Party/Applicant, will result in loss of ratings and number of listeners, whilst jeopardizing the consistency of its corporate brand.

16. That as a matter of public interest the Proposed Interested Party/Applicant's Radio Station, Kiss FM, has 10 Million listeners a month who tune into the station daily and will be affected by the Court's orders if the Respondent is not on air on 8<sup>th</sup> July, 2019.

17. That Article 162(2)(a) of the Constitution of Kenya, 2010, creates the Employment and Labour Relations Court and is not a bar to a party affected by an Order issued by the said Court from making an application to be enjoined in such proceedings despite there being no nexus between any of the parties and the Intended Party to the proceedings.

18. Further, that Section 12 of the Employment and Labour Relations Court Act grants the Court jurisdiction to inter alia make any Orders or any other appropriate relief as the Court may deem fit. The Proposed Interested Party urges the Court to dismiss the Preliminary Objection and proceed to recognise the Proposed Interested Party as a party in order to effectively determine the suit.

#### **Claimant/Respondent's submissions**

19. It is submitted that the Court's jurisdiction derived from Article 162 (2) (a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act. The Respondent contends that an employment relationship does not exist between the Respondents and the Proposed Interested Party and the Proposed Interested Party has not referred the Court to any other law that would give Court jurisdiction over the matter.

20. The Claimant/Respondent also submits in support of its Preliminary Objection that the Court cannot entertain the claim for the reason that the same is commercial in nature, which is beyond the scope of the dispute before the Court. That the Proposed Interested Party is seeking to interfere with orders granted by the Court within an employment dispute rightly before this Honourable Court as it is fearful that it will undergo substantial commercial loss, which fear in the Claimant's view lies before the wrong forum.

21. That the non-compete clause is admitted by all the parties herein including the Proposed Interested Party and as such there is no basis for the lifting of the Orders of 28<sup>th</sup> June, 2019. That the Application lacks merit and should be dismissed with costs.

22. I have considered all the averments of both parties. The Proposed Interested Party seeks to be enjoined in this matter and avers that as at 20<sup>th</sup> June 2019, they had already signed a contract with the Respondents. This was way before this claim was filed on 25<sup>th</sup> June 2019. Since there was already an established employer-employee relationship between the Interested Party and the Respondents the matter will fall within the purview of Section 12 of the Employment Act. I therefore allow the Proposed Interested Party to be enjoined in this matter.

23. In the same vain, the Preliminary Objection will fail because it is based on the premise that the Proposed Interested Party has no employment relationship in this matter with any party herein. I therefore find the Preliminary Objection has no merit and I therefore dismiss it accordingly.

24. Costs of these applications will be in the cause.

**Dated and delivered in open Court this 15<sup>th</sup> day of July, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kingori with Mumbi for Claimant/Applicants – Present

Manda with McCourt for Interested Party and Respondents – Present