



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA
CAUSE NO. 654 OF 2014

MICHEAL AKEYO
NAPHUTALI KAYORO
JOHN KHOYI OCHANDA
JOSEPH OKOTH ODONGO CLAIMANTS

VERSUS

TELECOM KENYA LIMITED 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT

Mr. Oluoch for Claimants / Applicants

Mr. Wetangula for 1st Respondent

M/S Kabiru for 2nd Respondent

RULING

1. Application dated 16th April 2014 seeks the Court to issue an order of a temporary injunction restraining the 1st and 2nd Respondents from entering into a sale agreement for the sale of Telkom Kenya Limited to a 3rd Party or selling any of its listed properties pending the hearing of this Application interpartes and thereafter confirm the order pending the hearing and determination of the main claim.

Hon. Marete J. granted prayer 1, 2 & 3 of the Notice of Motion *ex parte* on 16th April 2014.

2. The import of the order issued by the Court was to pre-empt the hearing of this application interpartes, by issuing an interim injunction pending the hearing and determination of the main claim.

3. However on 15/5/2014 when the matter came before me for directions, I noted the anomaly and lifted the grant of the interim orders pending the hearing and determination of the main suit to allow the hearing and determination of this Application interpartes.

4. Grounds in support of the Notice of Motion are set out on the face of the application and in the

Supporting Affidavit of Michael Akeyo inter alia;

1. the plaintiff / Applicant obtained judgment against the 1st Defendant on 28th September 2011, a judgment which has been upheld by the Court of Appeal in **Civil Appeal No. 207 of 2012, Telkom Kenya Limited Versus John Ochanda & 996 others.**
2. an application to have the matter heard by the Supreme Court on 2nd Appeal was dismissed on 9th April 2014.
3. the 1st Respondent is in serious financial crisis and is in negotiations with 3rd parties for the sale or transfer of the company as well as its property and the Plaintiffs are apprehensive that unless an order of injunction is issued restraining the sale to a 3rd party, they stand to lose the award of 2^{1/2} months salary as well as golden handshake awarded to the retrenchees in **Case No. 216 of 2007 John Ochanda & others versus Telkom Kenya Limited** [consolidated with **HCC No. 219 of 2007; Naphutah Kanyoro and others versus Telkom Kenya Limited and HCC No. 255 of 2007; Moses Obiero and others versus Telkom Kenya limited.**

5. That the 1st Respondent upon disposal of its prime properties may end up going into insolvency thus critically making it impossible for its former employees to realize the fruit of their judgment. The list of some of the properties intended for sale is set out on the face of the Application.

6. The main suit seeks a declaration that the intended sale and disposal of assets of the 1st Respondent would totally impair the plaintiffs ability to realize the fruits of its judgment and an injunction do issue to restrain the intended sale and disposal of the 1st Respondent's assets to a 3rd party until proper agreeable arrangements have been put in place to secure the said payments or settle the award in the judgment of **Hon. Justice Mwera** and affirmed by the Court of Appeal.

7. The Application is opposed vide Replying Affidavit of Ivy Ngana the Chief Legal & Regulatory Affairs Officer of the 1st Respondent. The nub of the opposition is as follows;

1. the Claimants / Applicants have in various Applications sought to execute the judgment at the High Court which Applications are still pending. This duplicity of moving applications at the High Court and before this Court simultaneously is an abuse of Court process.
2. that the matters in issue in this suit are subject of the litigation pending at the High Court and therefore this Court is precluded from proceeding with the trial on substantially similar matters pending before the high Court.
3. that no cogent proof has been placed before Court to show that the 1st Respondent is disposing of the properties and may end up insolvent. The claimants only rely on unsubstantiated newspaper cuttings in this respect.
4. that the 1st Respondent continues to trade as seen from the illegally obtained minutes of the Board of Directors of the 1st Respondent.
5. no evidence has been tabled before Court to prove that the listed properties belong to the 1st respondent and the onus rests on the Applicants to do so.

8. Determination

The law

The conditions for the grant of an interlocutory injunction were set out in the case of **Giella V. Cassman Brown Ltd [1973] EA 358** as follows;

The Applicant must show;

1. a *prima facie* case with a probability of success;
2. that if the injunction is not granted the Applicant will suffer irreparable injury that cannot be remedied by an award of damages;

3. if in doubt the Court shall decide the Application on the balance of convenience.

9. The Court has evaluated the opposing facts set out by the parties and the Court at this point is in doubt whether;

- a. the issues before this Court are subject of pending suits before the High Court.
- b. whether the properties listed in this application belong to the 1st respondent.
- c. if the said properties belonged to the 1st Respondent and were subject of negotiations with intent to sell to 3rd parties, the interest of the Applicants would be best served by injunction the intended sale as opposed to attaching the proceeds of the intended sale, if at all.
- d. the intended sale, if at all, would result in irreparable injury to the Applicants that cannot be compensated by a monetary award.

10. Given the circumstances, the Court is given to decide this matter on the balance of convenience.

It is the Court's considered view that it is prudent and convenient to allow the 1st Respondent to continue carrying out its business including realizing its own assets provided the proceeds of such business transactions is partly used in paying off its debts including the judgment debt owed to the Claimants / Applicants.

11. The execution processes available to the Claimants / Applicants in terms of our law suffice for that purpose.

12. For these reasons, the Application to confirm the injunction pending the hearing and determination of the main suit is dismissed.

Dated and Delivered in Nairobi this 13th February, day of 2015

MATHEWS N. NDUMA

PRINCIPLE JUDGE