



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 561 OF 2014

GEORGE OCHIENG OWITI

BARRACH W. OTIENO

PAUL MOYI ABONG

Suing on their own behalf and on behalf

Of 943 other former employees of Telkom (K) Limited **CLAIMANTS**

VERSUS

TELKOM KENYA LIMITED RESPONDENTS

RULING

1. The Claimants through their Notice of motion dated 28th April 2014 brought under the provisions of Rule 19(1) and (2), 14(6), (9)(1) and (4) of the Industrial Court (Procedure) Rules and all other enabling provisions of the law seeking for orders that a temporary injunction to issue restraining the Respondents through themselves or other parties on their instructions from entering into a sale agreement for the sale of the listed assets (listed properties) in the application, pending hearing of both the application and the main suit and that the Respondent do prepare an inventory of all its properties both movable and immovable or alternatively through a gazette notice the Respondent to confirm the listed properties as belonging to them. The application is supported by the annexed affidavit of Barrach W Otieno. The Respondent filed their Replying Affidavit sworn by Ivy Ngana opposing this application.

3. Further orders sought are that the Respondent be restrained from selling its assets to third parties until the Claimant's claims have been settled. That the Respondent to prepare and file an inventory of all properties both movable and immovable and in the alternative the Respondent to file and serve an affidavit to confirm which of the properties listed under Kenya Gazette Supplement No 59A of 5th November 1998, on the transfer and vesting of assets and liabilities to the Respondent still exist and are unsold or in the name of the Respondent and also state their current market value and further that the Claimants be granted leave to represent 943 other former employees of the Respondent and also leave be granted to enable the Claimants amend the claim and the further amended claim or amended claim dated 28th April 2014 be deemed as filed. This application is supported by the annexed affidavit of Barrach W Otieno.

4. On 11th June 2014 the Claimants filed another Notice of Motion pursuant to rule 14(7), 16(1) & (2) of the Industrial Court (Procedure) Rules, section 24(1), (3) (a & (d), 7(a) of the Labour Institution

Act seeking for orders that the Respondent be directed to produce and or serve the Claimants with copies of the title deeds in properties listed by the Claimants to enable them carry out searches at the lands registry. This application is supported by the annexed affidavit of Paul Moyi Abong.

5. The Respondent filed their Replying Affidavit on 9th June 2014 and 30th June 2014 sworn by Ivy Ngina in opposition to both applications respectively.

6. The Claimants applications are based on the grounds that;

- a. The Claimants are former employees of the Respondent having been retrenched as part of the government restructuring programme which saw 2500 employees' layoff, 996 other former employees retrenched alongside the Claimants filed suits in **HCC NO. 216 OF 2007 John Ochanda and Others versus Telkom Kenya Limited [consolidated with HCC NO. 219 OF 2007 Naphutali Kanyoro and Others versus Telkom Kenya Limited] and HCC NO. 255 Moses Obiero and Others versus Telkom Kenya Limited** which cases have already been concluded;
- b. The plaintiffs in the 3 previous suits which raise similar claim as that of the instant Claimants were awarded khs. 150,000.00 in golden handshake each, severance pay at the rate of 2 1/2 months' salary for each completed year of service, costs and interest, which award was affirmed by the Court of Appeal in Civil Appeal No. 207 of 2012 Telkom Kenya Limited versus John Ochanda & 996 Others;
- c. The claim was filed in June 2011 and now included 943 employees seeking similar compensation for being underpaid in terms of severance pay and non-payment of golden handshake as was paid to other employees laid off in phase II of the retrenchment and as awarded by the court in the above named previous suits for 996 other former employees
- d. The Respondent is in serious financial crisis and has negotiations with third parties for the sale or transfer of its properties and the Claimants are apprehensive that unless an order of injunction is issued restraining the sale, they stand to lose their entitlement of 2 ½ months' salary as well as golden handshake;
- e. The Respondent has begun disposing of its properties and given its liquidity crisis may end up going into insolvency thus critically making it impossible for the former employees to realise the fruits of their judgement unless the court restrains further sale and disposal of the properties until the claim by the Claimants is settled; and
- f. A list of some of the properties listed as belonging to the Respondent have been annexed for purposes of court orders to the Respondent to file a full inventory of its remaining undisposed properties with their current market valuation.

7. Further grounds in the subsequent application are that the Claimants require leave to file further affidavit to respond to the Respondents replying affidavit dated 26th May 2014 to annex further documents relating to title deeds subject of the suit; there are documents in the possession of the Respondent and which are crucial to the Claimants establishing the current status or ownership of the properties subject of the injunction in this suit; this court has power to order such production, especially in light of the fact that the Respondent in their replying affidavit have stated that some of the properties listed have already been sold and the Claimants have no way of carrying out an official search save by an order directing the Respondents to produce copies of the said titles to enable an official search at the lands registry which cannot be conducted without the said copies.

8. The Respondents on their part in reply through the affidavit of Ivy Ngana the chief legal and regulatory affairs of the Respondent stated that the Claimants are not the Respondents former employees and require proof and the facts in **HCCC NO. 216 OF 2007 & 255 OF 2007** do not relate to 996 Claimants and when the Respondent lost in **Civil Appeal No. 207 of 2012** an application with the Supreme Court for leave to appeal being **Motion No. 17 of 2014, Telkom Kenya Limited versus John Ochanda & Others**. That the claim herein is alleged to be similar to previous claims filed by John Ochanda seeking almost similar orders to which the Respondent has filed a defence and there is no guarantee that they will succeed simply because the other case before the High Court was in their favour.

9. The Respondent also state that they are not in any financial crisis and there is no evidence to show that the Respondent is insolvent. The sale by the Respondent of properties to third parties does not mean the claim will not be settled if successful and any third party taking up assets will also take up liabilities. The claims for golden handshake and severance pay are speculative and cannot be a basis for the court to grant orders sought as there is no judgement and reliance on Respondent's liquidity is unsubstantiated. The Respondent is still trading and engaging in business as usual, it has obligations to its employees and other third parties and where the orders sought are granted this will severely affect operations.

10. That the Respondent is owned by two shareholders, France Telkom or Orange East Africa Limited which owns 70% of the shares and 30% is owned by government of Kenya. There is no evidence that the government share will be sold thus affecting the public interest.

11. The listed properties by the Claimants are not indicative that they belong to the Respondent and the order sought may lead into fettering with third party rights who are not parties herein. The Respondent has a right to deal with its properties as they deem necessary, there are over 1500 employees and to confine the listed properties will impinge on other third parties rights. There is no decree in any of the cited suits to warrant attachment for the Claimants to allege that the Respondent is disposing their properties to their detriment. The applications should therefore be dismissed.

Submissions

12. Both parties filed their detailed written submission in support of their case. The ruling herein therefore is with regard to both applications now filed by the Claimants

13. The Claimants submitted that they are former employees of the Respondent having been retrenched and laid off and out of the 2500 such former employees, 996 filed three suits in the High Court; which suits have been concluded. In the concluded suits the plaintiffs claimed for kshs.150, 000.00 in golden handshakes each, severance pay at 2 ½ years months' salary for each completed year, costs and interest, which was confirmed by the Court of Appeal in **Civil Appeal No. 207 of 2012, Telkom Kenya Limited versus John Ochanga & 996 Others.**

14. The Claimants also submitted that the Claimants filed their claim in June 2011 and now includes 943 former employees seeking similar compensation for being underpaid in terms of severance pay and non-payment of golden handshake as was paid to other employees in phase II of the retrenchment and as awarded by the court in **HCC No. 216 of 2007 John Ochanda and Others versus Telkom Kenya Limited [consolidated with HCC No.219 of 2007 Naphutali Kanyoro and Others versus Telkom Kenya Limited] and HCC No. 255 of 2007 Moses Obiero** and others versus Telkom Kenya Limited. That the Respondent being in serious financial crisis and negotiating with third parties for the sale or transfer of the company as well as its property and the Claimants are apprehensive that unless an order of injunction is issued restraining these transactions their claims will be negated.

15. The Claimants also state that there is a prima facie case against the Respondents with high chances of success and for the balance of convenience and to avoid suing in futility the court should allow the application to avoid them suffering irreparable loss and damage. The Claimants rely on the case of **Giella versus Cassman Brown Co. Ltd, Civil Appeal No. 51 of 1972, 358, Munai Isaac Opondo & others versus Kenya Railways Corporation, Civil Case No.35 of 2007, 10** to support their arguments in support of the applications.

16. The Respondents submitted that the Claimants base their assertions in the applications on newspaper articles questioning their liquidity and hence their apprehension without basis that the Respondent will be unable to settle any judgement made against them. That the Claimants have not satisfied the threshold in asking for the Respondent to furnish them with an inventory of their properties, the information relied upon is unsubstantiated not deserving the orders sought. The Respondents cite the case of **Giella versus Cassman Brown Co. Ltd, Civil Appeal No. 51 of 1972, 358**, which set the principles of injunction as;

- a. *An application must show a prima facie case with a probability of success*
- b. *An injunction will ordinarily not be granted unless the applicant might suffer irreparable injury*
- c. *When the court is in doubt, it will decide the application on a balance of convenience*

17. That the Claimants applications have not met the above set threshold. The claims forming the basis of the application remain unsubstantiated and Respondent relied on the findings of the court in **Wamwere versus the AG [2004] eKLR**. Should the application be allowed, the Respondent will be unable to charge any of its properties to financial institutions in order to secure funds to aid it in its commercial activities. This is a commercial reality and essential to any business to grow. The burden of proof rests with the Claimants to prove or disprove a matter of fact; a Claimant bears the burden of proof as under section 107, 108 and 109 of the Evidence Act as held in **Daniel Toroitich Arap Moi versus Stephen Mwangi Mureithi [2014] eKLR**. The application should therefore not be allowed.

Determination of the issue

Based on the two applications by the Claimants, the issues that arise are;

Whether the application has good basis for the grant of orders sought; and

Whether the orders sought can be granted in the interim.

19. On both the applications by the Claimants dated 28th April 2014 and 11th June 2014 I find several uncontested issues with regard to the Claimants prayers under the provisions of Rule 14(6) and (7) of the Industrial Court (Procedure) Rules with regard to amendment of pleadings with leave of court. Based on the attached drafts and the same not being contested by the Respondent, being satisfied this is a reasonable request having been addressed at the commencement of proceedings and in the interests of justice, this will be allowed.

20. Equally with regard to orders sought under the provisions of Rule 9(1) and (4) of the Industrial Court (Procedure) Rules, I find in this case there are more than one Claimants all being 944 inclusive of the Claimants and the suit herein has been instituted against one Respondent their former employer, one statement of claim as filed by the Claimants on behalf of all the other Claimants is deemed as adequate on the basis that there is a schedule of the names of the other Claimants with their descriptions and the nature of claims they have against the Respondent. This will be allowed.

21. The Industrial Court (Procedure) Rules do not allow the reliance of parties on procedures as under the Evidence Act. I note the extensive submissions of the Respondent in this regard and note that the Evidence Act does not apply with regard to production, request for documents or summons of witnesses before the Industrial Court. That much is necessary to state here.

22. The other orders sought are contested and will be addressed separately.

23. The Claimants application is seeking to have their claims secured by the Respondent through restraining orders stopping the Respondents from selling or disposing off their listed properties as outlined by the Claimants to third parties or alienating them in a manner that once they have a judgement the Respondents will be unable to satisfy it. Further the Claimants seek for orders to secure their claims by having the Respondents submit an inventory of their properties and copies of title deeds to enable the Claimants apply for searches at the Lands Registry.

24. Claims relating to redundancy or benefits that may arise out of a work relationship arise under section 40 of the Employment Act and other sections with regard to any stated benefit/s. Upon evidence and proof of the same, there are outlined remedies that the Court may grant as under section 49. A claim for unfair retrenchment, lay off or rationalisation process can however be traced through the tenets outlined under section 43 of the Act where an employer is under a mandatory duty to give reasons for termination in a case of dismissal or termination of an employment contract;

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. [Emphasis added].

25. In this case, the claim by the Claimants is based on various facts among them being that they are former employees of the Respondent and upon termination of 2500 employees following a staff rationalisation programme 966 former employees were paid Kshs.150,000.00 and golden handshake together with 2 ½ months' salary as severance pay. This package of a golden handshake and severance pay were not paid to the Claimants and noting that the 966 employees' claims have now been confirmed by the High Court and the Court of Appeal in their judgements in **HCC No. 216 of 2007 John Ochanda and Others versus Telkom Kenya Limited [consolidated with HCC No.219 of 2007 Naphutali Kanyoro and Others versus Telkom Kenya Limited]** and **HCC No. 255 of 2007 Moses Obiero and others versus Telkom Kenya Limited**. And **Civil Appeal No. 207 of 2012, Telkom Kenya Limited versus John Ochanga & 996 Others**, the Claimants seek similar payments from the Respondents.

26. These are the core facts to the claim. Without going into the merits, these facts cannot be ignored while addressing the merits of the applications before court. I am guided by the cited authorities especially the decision in **Giella versus Cassman Brown Co. Ltd, Civil Appeal No. 51 of 1972, 358**. It is important to restate the facts in this case shortly as;

An interim injunction was granted in the High Court to stop the appellant competing with the Respondent his former employer on the basis of a covenant by him not to engage in a similar undertaking in any of the six major towns of East Africa.

27. The principles that now emanate from these facts are crucial to consider in any other case when granting an injunction. There must be a prima facie case with high chances of success, the applicant will suffer irreparable injury and where the balance of convenience lies. But these are not the only principles that a court must consider in a case that relates to labour relations, the aspect of unfairness as outlined by this Court in **Elizabeth Washeke & 62 Others versus Airtel Networks (K) Limited & Another, Cause 1972 of 2012**; must be addressed as well. Parties in an employment relationship must work within the parameters of fair labour relations to ensure justice for both the employee and the employer. The basis of the injunctions sought by the claimants must be looked at within the realms of the employment relationship that the claimants state has since terminated and are motivated to move this court following the success of litigants under secondary suits before the high Court and the Court of Appeal. An applicant seeking for injunctive orders of the nature as the claimants are seeking to secure their interests in advance, apart from establishing a prima facie case with high probabilities of success must also have evidence beyond mere inferences. In matters of business takeover, sale and or transfer of an interest from one entity to the other and in this case by an employer, there are obligations that must be cleared and or secured. Where there are legal claims outlined in law and do not require call of evidence then there would be a liability that arise from an employer who fail to meet these legal requirements and an employee or former employee with a lodged claim has reason to be apprehensive. However the opposite must apply, where the nature of evidence an employee possess require the call of evidence, to secure such a right in advance would be to prejudice the other party, the employer. Without going into the merits of the claim, this much will suffice. See **Industrial Cause No. 1411 of 2011, Catherine Raini versus CMC Holding Limited**.

28. In this case therefore, the matters forming the basis of the claims arising from a redundancy process, where a party is not paid the legal dues that they are entitled to and or benefits that can be established from the employment relationship itself without recourse to production of documents to secure such claims; the law will suffice. These legal claims where they are due are as of right and no amount of delay by a Respondent who owes such claims can cure any effort to circumvent the same. However in this case, the basis of the claims is matters outlined under other suits that several other plaintiffs not party to this claim have through judgement by the High Court and Court of Appeal been successful. Therefore this Court must resort to the call of evidence with regard to the claims for a golden handshake and severance pay to adjudge on the issues at hand with due cognisance of fair labour practices and the referenced suits before the High Court and the Court of Appeal.

29. To this end, it would be in the interests of justice and within the purview of fair labour relations to call for full hearing of the matter before granting the orders sought by the Claimants. Noting the extensive submissions and presentations made by the Claimants in this regard and noting the high number of litigants involved the circumstances of the case demand that the matter be heard on priority basis on dates and timelines that the court will direct the parties to abide by. This will facilitate the parties in going into the merits of the case to enable the court give final orders herein.

The two applications by the Claimants dated 28th April 2014 and 11th June 2014 will not be allowed in the interim. Noting the reasoning above and the need to hear the matter on priority basis, there will be no orders as to costs. Save for the following orders;

- a. **Amended claim dated 28th April 2014 be deemed as filed;**
- b. **upon service the Respondent will have 14 days to amend their defence;**
- c. **the claim and statement of the Claimants is herein allowed and evidence to proceed by the call of one Claimants for and on behalf of the 943 other Claimants set out in the schedule attached to the claim;**
- d. **No orders as to costs.**

Delivered in open court at Nairobi this 17th Day of September 2014

M. Mbaru

Judge

In the presence of:

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Outlined assets by the Claimants as;

1. LR NO.209/9537 – store, engine room and equipment room standing on 16.368 acres off Enterprise Road, Nairobi
2. LR No.3170/20 GTI-Gilgil-standing of 23.34 acres, comprising of a warehouse and a workshop, mechanical workshop and auxiliary block, electronic and printing press etc.
3. LR 214/224 Muthaiga Estate plot of Naivasha Avenue Muthaiga, comprising a double storey building and telephone exchange standing on 1.2 acres;
4. LR 3734/558 Mageta Road Lavington – a bungalow house standing on 1.093 acres;
5. LR 209/2830 – supplies depot and office I LungaLunga Road Industrial Area Nairobi comprising a warehouse, telephone and purchases offices, a bonded warehouse, standing on 1.55 acres;
6. Kisumu Municipality/Block 3/39 comprising an engineering building on Bandari Road Industrial Area Kisumu, standing on 3.07 acres;
7. Nairobi Block – 92/120 Cross Road Estate- Westland standing on 0.591 acres, comprising a bungalow house;
8. 1/88 George Padmore Road Kilimani, comprising a 4 bedroom bungalow house with a servant’s quarters standing on 0.73 acres.
9. LR.NO.209/7054 – Ex-Telecoms House, Haile Selassie Avenue (A multi storey commercial building standing on 0.632 acres).
- 10.LR.NO.209/9537 – Store, engine room and equipment room standing on 16.368 acres off enterprise road, Nairobi.

- 11.LR.NO.7656 – Transmission Station on Ngong Road, standing on 19.000 acres (comprising of a sports club house, transmitting station, 22 residential units & other items).
- 12.LR.NO.13170/20 GTI – GILGIL – standing on 23.340 acres, comprising of a warehouse and a workshop, mechanical workshop and auxiliary block, electronic and printing press etc.
- 13.LR NO.209/6719 – South Hill Microwave station – upperhill, standing on 0.673 acres – compromising a repeater radio station.
- 14.LR.NO 2952/11 – a telephone exchange house, comprising of office blocks, standing on 0.500 acres, on lower Kabete Road.
- 15.LR.NO.1870/X/35 Wetlands Exchange, comprising of a main building, garage, garage and servants quarters on sports road Westlands.
- 16.LR.214/224 Muthaiga Estate plot, off Naivasha Avenue Muthaiga, comprising a double storey building and telephone exchange, standing on 1.20 acres.
- 17.LR.NO.11R/39B/Kiambu BLOCK – telephone exchange standing on 0.500 acres.
- 18.LR.3734/558 Mageta Road lavington - a Bungalow house, standing on 1.093 acres.
- 19.LR.2116/300 – Kitale Telephone Exchange, Mumias highway Kitale town, standing on 0.500acres.
- 20.ELDORET/BLOCK/7/50 – Eldoret telephone house, standing on 0.487 acres.
- 21.NYERI MUNICIPALITY – BLOCK 1/101 – Main General Post Office.
- 22.NYERI MUNICIPALITY/BLOCK/1108/16/11- Kimathi street Nyeri town standing on 0.344 acres.
- 23.KARATINA TOWN BLOCK/11/114 – Telephone Exchange Karatina Town, standing on 0.750 acres.
- 24.WANJARE/BOGIA KUMU 918 PART-KISII MUNICIPALITY, - VHF station, standing on 0.250 acres.
- 25.SUNA MIGORI EXCHANGE, standing ON 0.643 acres Migori Town.
- 26.LR.209/2830 – Supplies deport and office in Lung Lunga Road Industrial Areas Nairobi, comprising a warehouse, telephone and purchase offices, a bonded warehouse, standing on 1.5500 acres.
- 27.KWALE/DIANI BEACH BLOCK/3052 DIANI – Telephone exchange, standing on 0.501 acres, Diani Beach road.
- 28.NAIROBI/8803 Current Telephone Exchange on Dagoretti Road, Karen shopping Centre, standing on 0.245 acres.
- 29.KISUMU/MUNICIPALITY/BLOCK 7/335 & 336 comprising a General Post office and Telephone House, on Oginga Odinga Raod town Centre, standing on 0.462 acres.
- 30.KISUMU/MUNICIPALITY/BLOCK 7/334 a carrier house, off Oginga Odinga Road town centre, standing on 0226 acres.
- 31.KERICHO 631/526 – Kericho Telephone House, on Temple Road. Kericho town, standing on 0.482 acres.
- 32.NAKURU/BLOCK 6/29 – A building comprising the an accounts section, telephone exchange, printing, standing on 0.550 acres.
- 33.KISUMU MUNICIPALITY/BLOCK 3/39 comprising an engineering building on Bandari Industrial Area Kisumu standing on 3.070 acres.
- 34.MACHAKOS MUNICIPALITY BLOCK 1/60 (909/117) ON Konza Road Machakos Town standing on 0.524 acres.
- 35.KILELESHWA 209/3005/a- Kileleshwa Telephone Exchange, off Mander Road, standing 0.600 acres.
- 36.NAIROBI BLOCK – 92/120 Cross Road Estate – Westlands, standing on 0.591 acres, comprising a bungalow House.
- 37.NAIROBI BLOCK 75/5, Kariongi Telephone Exchange, off Mumia South road, standing on 1.268 acres.
- 38.LR.209/8638 NAIROBI WEST EXCHANGE, on Langata Road, standing on 1.000 acres.
- 39.LR.NO.1160/129 Langata Telephone Exchange, standing on 0.498 acres.
- 40.LR.209/5808 JAMHURI EXCHANGE, on Joseph Kangethe Road, standing on 0.556 acres.
- 41.LR.209/792 MILIMANI TELEPHONE EXCHANGE, off Valley Road, standing on 1.055 acres.
- 42.1/188 GEORGE PADMORE road, Kilimani, comprising a 4 bedroom bungalow house with a servants quarters, standing on 0.730 acres.

- 43.LR.NO.8953/GIGIRI TELEPHONE EXCHANGE, on Red hill Road, standing on 0.618 acres.
- 44.10119/1 & 11592 RUARAKA TELEPHONE EXCHANGE, standing on 0.229 & 0.250 acreage.
- 45.Spectrum frequencies/airwaves that CCK has awarded to Telcom Kenya Limited and operated France Orange and subject intended to be leased to 3rd parties.