REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

CIV SUIT 15 OF 00

ROYAL MEDIA SERVICES LIMITED……PLAINTIFF

-VERSUS

TELKOM KENYA LIMITED……..1ST DEFENDANT

COMMUNICATIONS COMMISSION OF KENYA…….2ND DEFENDANT

KENYA BROADCASTING CORPORATION…….3RD DEFENDANT

RULING

Background

The Applicant (Royal Media) was granted Broadcasting licences for Nairobi, Mombasa, Nyeri, Saba Saba, Nyambene, Nanyuki, Kinangop and Rongai. To enable it to broadcast Royal Media made arrangements with the first defendant (Telkom) to make use of the existing facilities belonging to Telkom.

Telkom was subsequently allocated broadcasting frequencies to broadcast from these various points. As part of the arrangement Telkom would permit Royal Media the use of its transmission Towers and other facilities. On 7.1.2000 Telkom disconnected these facilities at Londiani thereby disabling Royal media from Broadcasting to Rift Valley, Central (Nyandarua) and Nyanza provinces. The defendant went to court on 8.1.2000 seeking orders to prevent the Telkom from interfering with operations of its Broadcasting activities and to have the equipment's reconnected. Royal Media was granted a temporary injunction ordering Telkom to reconnect the equipment. On 11.1.2000 Telkom came to court asking for a Stay of the Temporary Order on the grounds that the Order to disconnect the equipment came from the second defendant, Communications Commission of Kenya (C.C.K) and therefore they would be unable to comply with the Court Order. A Stay of the Temporary order was granted.

The CCK were made a party to the present proceedings and it was agreed that the matter be set down for hearing on 28.1.2000 to hear the application to review the stay granted on 14.1.2000. This application was to be heard together with the other application for injunction. The submissions did not start until when the counsel for the plaintiff started his submissions on the applications against the three defendants. The application against the Attorney General who had been joined to the proceedings, was

left to be argued later.

The hearing of this matter has taken almost three weeks causing great hardship to other litigants who have had their matters adjourned to accommodate the hearing of this suit. Alive to this inconvenience I directed that the court sit on Saturday the 19th February 2000 to see whether submissions could be concluded in a more timely manner. I was wrong and submissions continued to the 21st February 2000. I, however, wish to thank the Counsels for the very able submissions made and the great assistance they have offered to the Court through these extensive research into what is evidently a new and technical area of Law.

The first point taken was whether orders can be made under Order 39 when there is no subsisting suit. Dr. Kamau Kuria submitted that the High court has established a long tradition of granting orders before the filing of suits to secure and protect the interests of justice. He referred to the case of Theuri V. The Law Society of Kenya Misc. Civil Application No. 33 of 1984 and Gachara V. Kahura in Misc. Application No. 267 of 1996.

Dr. Kiplangat stand was that in these cases the jurisdiction of the court was derived from Section 3A of the Civil Procedure Act that is the inherent power of the Court. This power must be first invoked to apply and if not invoked, the application of 8.1.2000 must only come under 39 of the Civil Procedure Rules. After examining the authorities submitted, I do agree that for an application coming under Order 39 of the Civil Procedure Rules there has to be a suit first filed but, I am of the strong view that an application should not be dismissed because it does not conform to the procedural requirement. As Shah J.A. said in the Leisure Lodges Ltd. case a formal defect should not be fatal to an application when it can be cured by an amendment

In this case the applicant had definitely quoted the wrong rules but on the other hand the application he made is quite clear what remedies he wants from the court and it is sufficiently demonstrative of the application the defendant is to face. I would hold that the application is not fatally defective.

On the question of issuance of Summons Dr. Kiplangat attacked the proceedings as not complying with Order IV Rule 3 (5) of the Civil Procedure Rules and submitted that they are a nullity. The plaintiff having not filed the pleadings of 11.1.2000 without the summons, the application offended the provisions of the Order.

It is true that the burden of filing a suit and summons is the responsibility of whoever is filing. I am not prepared to hold that once the application is filed failure to file summons is fatal to the whole proceedings. A suit becomes a live once the suit is filed. I would not dismiss the application on the basis that it was brought under the wrong rules.

Evidence & Facts

The plaintiff in its applications dated 8.1.2000, 27.1.2000 and 3.2.2000 sought amongst other prayers Mandatory Injunctions against Telkom, CCK, and KBC respectively.

The plaintiff in support of the first application put forward the argument that the defendant entered into an agreement with the plaintiff on 12.10.99 in which the plaintiff was allowed to connect its equipment to that of the defendant to enable the plaintiff to broadcast to the people living in Rift Valley Provinces.

In Breach of this Contract the Defendant disconnected its equipment thereby terminating the Broadcasting services.

The 1st defendant, Telkom Kenya Limited in reply maintained that the agreement relied upon by the plaintiff does not create Contractual Relationship capable of being enforced as there was no consideration and it was too vague to be enforced. It was also the position of the defendant that the Orders sought for by the plaintiff were in defiance of directions given by the Kenya Communications Corporation which is the regulatory body charged with the responsibility of policing the operations of broadcasting. As to the reliefs sought by the plaintiff the defendant's position is that injunction can not issue. Since the act complained of had already taken place. Dr. Kamau in his submissions argued that at this stage of the proceedings the court was not required to go into the depth of the complaints raised but to see whether there is a prima facie case with a probability of success. With regard to the transmitter in Londiani, it was the plaintiff's position that by the letter of 5.8.98 the plaintiff was authorised to put up the transmitter in Londiani and that consequently the plaintiff could use the frequency 100.5. It is not correct that the plaintiff was covering areas outside the authorised areas through its broadcasting since there is no known technology to prevent broadcasting being heard outside the area granted in the licence. The plaintiff made extensive reference to the letter of 26.7.99 from the 1st Defendant asking the plaintiff to re-engineer the existing frequency used in Rongai to cater for the area he wanted to cover in its Broadcasting. In addition to the rights available to the plaintiff under the Civil Procedure Dr. Kamau submitted that under the provisions of Sections 82 and 84 of the Kenya Constitution the Plaintiff can go to Court under Section 84 and seek the same reliefs sought in the application. In dealing with this application it is necessary to examine the relationship between the plaintiff and the Defendant. The plaintiff having been granted a licence to Broadcast made arrangements with the Defendant to make use of the existing facilities owned by the Defendant. There is no dispute that such arrangements were made by the parties. It is also common ground that following these arrangements the plaintiff started broadcasting using the Rongai facilities. There is also agreement between the parties that the frequency used in this area was frequency 100.5.

The Defendants arguments centered on the points that the Rongai facilities granted to the plaintiff did not entitle the plaintiff to set up its equipment in Londiani as it did. It is necessary at this stage to refer to the letter of 8.10.99 which was relied upon by the plaintiff as forming the basis of the agreement between the parties I deem it necessary to produce it in extensor. It is from Mrs. M. Githiri for Assistant General Manager/Planning & Engineering to Royal Media Services Limited Attention of Mr. Karanja Njoroge

"We are pleased to confirm that we shall meet your requirement on the captioned request as follows:

1. The equipment (Citizen Radio) will be accommodated in the AT & T Equipment Room.

2. The antenna should be mounted on top of the steel tower.

3. Filters must be used to minimize Radio interference with TKL systems.

4. TKL shall avail fully maintained AC power (with standby DEG. Charges for accommodation a rental and power supply will be submitted to you in due course.

Please inform us when you commence installation in order to make proper arrangements with our Nakuru office.

Yours sincerely

(Signed)

M. GITHIRI (MRS)

For: Assistant General Manager/Planning & Engineering" It is on the strength of this letter that the plaintiff is asking for an Order to reconnect the equipment and for an injunction restraining the Defendant from interfering with the plaintiffs Broadcasting equipment at Londiani. In answer to the points raised by Dr. Kamau for plaintiff Dr. Kiplagat for the Defendant submitted that the Londiani transmitter was put there illegally because:

1) It was using the Rongai frequency 100.5 which must be placed in Nakuru at 036 E05, 00S15. This is in accordance with the allocation of Frequencies by International Telecommunication Union.

2) The letter of 8th October, 1999 does not amount to an Agreement.

3) The coordinate for Frequency No. 100.5 is different from the one used by the plaintiff at Londiani.

4) The equipment used had not been type approved by the defendant as required by Section 36 2 of the Kenya Communication Act.

Frequencies are granted after extensive consultation with the ITU and those applying and those neighbouring users of other Frequencies which might be interfered with by a given Frequency. A Frequency once given cannot be changed. The Defendant argued that the plaintiff finding difficulties in using the Rongai Transmitter looked around and found Londiani which had electricity and therefore easy to use for transmission purposes and proceeded to put its equipment there irrespective of the frequency it was using which is the 100.5. The plaintiff answer to this was that the defendant had agreed to the use of the Londiani transmitter. The defendant gives the coordinates for the Frequency 100.5 quoting the ITU original application for that Frequency as Rongai (NKR) Longitude 35.E.44, Latitude 0058, HASL ALTITUDE. 3009M, TX POWER 1000W, AG ANTENNAE GRIN 9.

While the Plaintiff accepts that the Frequency it had to use in the Nakuru area is the Frequency 100.5 gives its location as: Rongai (WKR) Longitude (degrees) 35 E 44. Latitude (degree) 00508 HASL Altitude 3009M, Tx Power 1000w. A.G. Antennae 9.

There is clearly a dispute as to the proper sitting of this Frequency between the parties and for the Court to determine who is right between the parties it will clearly need more evidence. The location and sitting of this frequency is important in determining whether the defendants were justified in shutting down the plaintiff's transmitter in Londiani. The Contract between the parties and which I have quoted herein is contested that it does not amount to an enforceable agreement. While the defendant accepts that the letter was written by the defendant they say there is no consideration. The paragraph reading "charges for accommodation a rental and power supply will be submitted to you in due course" they are said to be too vague to be a consideration. In support of this approach Dr. Kiplagat referred to a number of cases on the question on specific performance. In Kinyanjui V. Stanley it was held that specific performance was available as the contract was land and damages were not available and there was a valid contract. Dr. Kamau countered that there was consideration and part performance of the contract in that the plaintiff had been transmitting before the disconnection. There was another aspect of this letter, which was raised by Dr. Kamau. Another letter dated 8.10.99 by the same writer but which contains a sentence reading "In order to confirm no interference to our systems, we are requesting for a test run as we await approval for charges for accommodation and rental". The Plaintiff maintains that this clause was not in the original letter of 8.10.99, which forms the basis of the Contract. The Plaintiff says that this is a forgery aimed at justifying the absence of consideration in the Contract.

The Defendants in their reply to the charge that they breached the Contracts between them and the plaintiff including the Nakuru Contract said that the Plaintiffs were using equipment which were not

approved as required by Section 36 (2) of the Kenya Communications Act. The Plaintiff is simply saying that the Defendants have approved this equipment by their conduct. They had supplied all the technical details asked for by the Defendant and for the Defendant not asking for any more information and by allowing the Plaintiffs to start using the equipment, this amounted to approval. The information from the affidavit by the Plaintiff and from the letter dated 2.7.97, from Kenya Posts and Telecommunications Corporation, does not come out clearly as at what stage the type approval of the equipment is to be carried out whether it is before the use of the equipment or whether it is at any stage even after the equipment is installed. The question is, if the Act prescribes that the equipment must be inspected and approval granted, could it be said that the Plaintiffs equipment was approved since the Defendants did not object to their use" Is the Defendant estopped from now claiming that the approval was not granted in the face of Statutory provision" The licences granted to the plaintiff contains the condition that the equipment to be used shall be subject to type approval evaluation standard by the defendants relevant branch.

Dr. Kamau for the Plaintiff submitted that Section 41 of the Communication Act by requiring a notice be given imports consideration of the Rules of Natural Justice. It was on the whole Dr. Kamau's submission that once Section 84 of the Constitution is invoked any relief, which touched on the Constitutional rights, can be obtained. This argument was met with the answer that first the relationship between the parties was purely Contractual. The agreement sought to make provision for accommodating the Plaintiff in the existing arrangements owned by the Defendant. This arrangement being a Contract between the plaintiff and the defendant did not import a breach of human rights in anyway.

As for this contract the Defendant was entering into the arrangement as a party who owned the equipment which the Defendant did not own and it was a purely commercial undertaking. Even if the Defendant breached the contracts it will have done so as a party to the contract it will not be discharging its quasi-judicial functions.

The issue, which emerges, is whether the plaintiff can invoke the provisions of the Constitution related to the fundamental rights. Dr. Kamau made extensive reference to a number of decided cases in the Commonwealth countries and some American authorities as well. Dr. Kiplangat's submissions amounted to saying that the relationship between the parties being purely Contractual the Plaintiff cannot invoke Section 84. To invoke Section 84 of the Constitution one has to show that there is a wrong committed which amounts to a breach of the fundamental rights as contained in the Constitution.

With regard to the 2nd Defendant, the applicant is asking for restraining orders against the 2nd defendant to be restrained from interfering in any manner with the plaintiff's use of its Broadcasting Frequencies and Equipment in Nakuru, Saba Saba, Nyeri, Nanyuki, Nyambene and Rongai (Londiani Hill) or otherwise contravening the plaintiff's rights under Section 75–77 and 79 of the Constitution. The plaintiff is also asking for orders restraining the Defendant from intimidating the plaintiff and coercing it not to seek reliefs from this Honourable Court and to stop the 2nd Defendant from inducing the 1st Defendant and the 3rd defendants to break their transmitter facilities/contracts with the plaintiff until this suit is heard and determined.

The Grounds in support of this application are that the 2nd Defendant disabled or caused to be disabled the Londiani Transmitter and that on 21.1.2000 the 2nd defendant withdrew the plaintiff's broadcasting frequencies.

In the supporting affidavit by Mr. Karanja, the General Manager of the Plaintiff depones that unlike what was alleged by the Defendant, the Plaintiff had paid all monies due in form of fees and that the 2nd

Defendant had not given any notice of any condition breached by the Plaintiff in connection with the licences granted to it. Dr. Kamau for the Plaintiff submitted that:

a) That Section 41 of Kenya Communication Act imports the application of Natural Justice because where the liberty of an individual is concerned the affected person must be given a chance to be heard.

b) The 2nd Defendant being a Corporate body an injunction can issue against it.

c) The 2nd Defendant is a Public Authority and as such its activities in regulating the licences for Broadcasting should be guided by the principles of Rule of Law.

Dr. Kamau felt that Section 6 of Kenya Communication Act, which establishes the Membership of the Board, does not adequately guarantee the rights given by Section 79 of the Constitution as the majority of the members are government appointees. For an authority relied on the case of the Sri Lanka of Athukorare & others vs. Attorney General of Sri Lanka, 1997 which decided that since frequencies are limited regulation of Broadcasting is essential to prevent monopolistic domination and that the Regulatory authority must be an independent body.

On the Contention that, the Court has no jurisdiction to grant an injunction under the circumstances of this Section he submits that the court has jurisdiction under the provisions of section 84 of the Constitution which prevail over the provisions of the Kenya Communication Act.

The Defendants' views on this application are that the injunctions sought are not available. All the applications being brought under Order 39 of the Civil Procedures Rules, the applicant cannot resort to Section 60 of the Constitution, as this does not found a cause of action. The Plaintiff to invoke the Constitutional Section, he has to show that there is a breach of Section 36 of the Kenya Communication Act. There are other Broadcasters in the country who continue to Broadcast because they do not involve themselves in co-sitting arrangements with the Defendants which contract the plaintiff committed breach of. It was also the Defendants stand that all disputes under the act should be referred to the Tribunal established under Section 102 of the Kenya Communication Act. The Tribunal is established by an Act of Parliament and cannot be said to be illegal. Dr. Kamau for the Plaintiff maintained that Sections 84 of the Constitution grants reliefs which are available under Order 39 of the Civil Procedure Rules and under the inherent jurisdiction of the court.

With regard to the application against the 3rd Defendant the reliefs sought are for Orders that the 3rd Defendant be compelled by a mandatory injunction to switch on the Plaintiff's Transmitting Stations they had switch off in breach of the Agreement between them. The 3rd Defendant should also be restrained from interfering with the Plaintiff's Transmitting Equipment or otherwise. Contravening the Plaintiff's rights under Sections 75, 77 and 79 of the Constitution.

The Law

The orders sought by the applicant in these applications are of temporary injunctions and the courts apply the established principles as laid down in the Giella v. Cassman Brown & Co. Ltd. (1973) E.A. At the interlocutory stage the court is not concerned with the merits or demerits of the case itself as filed in the suit. These principles are that:

1) The applicant must show a prima facie case with a probability of success.

2) The applicant must show that he would suffer irreparable injury which would not normally be

compensated by an award of damage.

3) When the court is in doubt it will decide the application on the balance of convenience.

The procedure followed is to decide the issues by affidavit and such applications are meant to effect a speedy and effective remedy to a person aggrieved by a clear breach by another party and where the dispute turns on a question of fact about which there is conflict of evidence the courts will genuinely decline to interfere and leave the matter to be determined through a hearing by evidence. See Rv. Fulham Rent Tribunal Ex P. Zerek (1951) 2KB1.

The application for interlocutory reliefs are made through orders 39 of the Civil Procedure, Section 3A by invoking the inherent jurisdiction of the court or through section 84 of the Constitution. If the matter touches on the Fundamental rights of an individual as established in our Bill of Rights.

It has now been established that Mandatory Injunctions can only be granted by invoking the inherent jurisdiction of the court under Section 3A of the Civil Procedure Act as was established in the court of Appeal case (belle marson) and not under order 39 of the Civil Procedure Rules.

FINDINGS

Having gone through the facts and evidence, I would like now to apply them to these principles of the law. At all times I bear in mind the caution that the Court of Appeal has issued with regard to what I should apply my mind to at this stage. In the case of Stanley Munga Githunguri Vs. Jimba Credit Corporation Limited Civil Appeal No. 144 of 1998 the Court of Appeal stated that at the stage at which this matter is presently all that I am required to do is to determine whether the Plaintiff applicant in this case has presented a prima facie case which may well succeed.

MANDATORY INJUNCTION

The plaintiff in its applications dated 9th January, 2000, 27th January, 2000 and 3th February, 2000 sought amongst other prayers, mandatory injunctions against Telkom, CCK and KBC respectively. The said applications are stated to be brought under Order XXXIX of the Civil Procedure Rules. The three defendants have all adopted a similar line of opposition; that mandatory injunctions cannot issue under Order XXXIX and that in any event mandatory injunctions are not available to the plaintiff herein on account of the subsisting circumstances at the time the applications were brought.

I propose to deal with the latter proposition first. It is common ground that as on the 8th January, 2000 when the plaintiff came before me Telkom had already disabled the plaintiff's equipment at Londiani; this having taken place on the 7th January, 2000 and so necessitating the application of the 8th January, 2000. By its letter of 21st January, 2000 CCK cancelled all frequency assignments to the plaintiff and so on the 28th January, 2000 when the plaintiff sought orders against CCK the frequencies had already been cancelled. It is common ground that KBC disabled the plaintiff's Nyambene transmitter on the 26th January, 2000 and disabled the plaintiff's Nyeri transmitter on the 2nd February, 2000.

In Dr. Kiplagat's submission, a submission that Mr. Mwangi Chege for KBC wholly adopted on behalf of his client, the point is now settled that a mandatory injunction cannot issue under Order XXXIX. The authority for this proposition is the case of Belle Maison Limited vs. Yaya Towers Limited Civil Case No. 2225 of 1992 in which Bosire J. as he then was, stated that: This court does not have jurisdiction under O.XXXIX to grant a mandatory injunction. Its powers under that order are clearly spelled out. It can only grant a restraining injunction at interlocutory stage under the order.

Based on this authority Dr. Kiplagat submitted that the whole matter of a mandatory injunction became mute as quite evidently the applications brought by the plaintiff were all under the Order XXXIX. Dr. Kuria does take the position that although he did not plead the inherent jurisdiction of the court, nevertheless the court should use its inherent jurisdiction to grant the prayers sought.

Even if the plaintiff could make a case that Order XXXIX could form a basis for issuing a mandatory injunction, Dr. Kiplagat further submits that the requirements for the grant of a mandatory injunction have not been met by the plaintiff. The plaintiff has through the support of several authorities submitted that the requirements for the grant of a mandatory injunction are well settled. In the court of Appeal decision of Kamau Mucuha vs. The Ripples Limited Civil Application No. NAI 186 of 1992 the Court quotes a passage from the English case of Locabail International Finance Limited vs. Agroexport (1986) 1 ALL E.R. 901 which states that:

The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be granted only in a clear case. I feel bound to say that, to my way of thinking, this I understand the position, specific argument was not directed at the hearing before him to the level of conviction which required to be conveyed to the court before a mandatory injunction could properly be granted.

Quite evidently, the nature of a mandatory injunction is such as must require its grant to be made in cases which are clear or where the guilty party has undertaken a blantantly illegal course of action which the court needs to remedy. The Belle Maison case is a good illustration of the considerations for the grant of a mandatory injunction to obliterate what was plainly an illegal action on the part of the defendant, that is, the non-compliance with the requirements of section 111 (g) of the Transfer of Property Act. Dr. Kiplagat submits that the plaintiff''s case is not a clear case nor has the plaintiff shown that the conduct of the defendants is in any manner illegal. Dr. Kiplagat submitted that on the facts before the court there is no showing that the defendants have, prima facie, acted illegally. The defendants' action may very well be held, after full hearing, to have been lawful and not in breach of any of the Plaintiff's rights unlike in the Belle Maison case where the action of the defendant was blatantly illegal and a full hearing could not have disturbed that finding.

Therefore, Dr. Kiplagat and Mr. Chege submit that the plaintiff has failed to put before the court evidence that would enable the court order a mandatory injunction. I agree. I cannot at this stage without further evidence being adduced make a safe determination that any of the defendants has violated any right of the plaintiff or that any of the defendants has committed a wantonly illegal act or that the plaintiff's case is clear one.

I also find that this is not a case in which I can fall back on the residual powers of a court of equity to do justice. I follow the warning in the case of Paul Gachara vs. Gitere Kahura Misc. Civil Application No. 267 of 1996 in which this court stated that:

The general position of the Courts of equity has always been, that in determining whether to exercise its discretionary power to grant an equitable remedy, a court will not grant the remedy where the result would necessitate a breach by the respondent or defendant of a prior contract with a 3rd party, or would compel the respondent (defendant) to do that which he is not lawfully competent to do: the applicant must show that in seeking the relief, he does not call upon the other party to do an act which he is not lawfully competent to do.

In this case the 1st and 3rd Defendant have stated categorically that if the orders sought by the

plaintiff are granted then the effect of such orders would be to compel the said defendants to act in breach of the Kenya Communications Act (KCA). I am not required to make a finding that will be the case but on the evidence before me it may very well be that obedience of such orders will result in a breach of KCA. This is a consequence that I have to bear in mind in considering whether I ought to make an order to specific performance. So that the exercise of this court's equitable jurisdiction cannot aid the plaintiff.

RESTRAINING ORDERS

Quite apart from orders of mandatory injunctions sought by the plaintiff against the defendants the plaintiff has also sought restraining orders by way of injunction against all the defendants. That an injunction can issue against the 1st and 3rd defendants there can be no doubt. However, as against the 2nd defendant Dr. Kuira referred to the case of Richard Chirchir and Another vs. Henry Cheboiwo and Another Civil Application No. NAI 253 of 1992 to support the proposition that an injunction can issue against a public body such as the 2nd defendant. I agree that an injunction can issue against the 2nd defendant. I was not addressed on whether an injunction can issue against the government and I do not wish to make any comment on this point.

Dr. Kiplagat attacks Dr. Kuria's submission on two levels. First, Dr. Kiplagat urges me to accept the submission that the plaintiff's applications for injunctions are hopelessly incompetent because they have been instituted way after the acts complained of have taken place. There are no threats by the 1st , 2nd or 3rd defendants. In the case of Esso Kenya Limited vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991 Masime J.A. states:

From the material before the trial judge it was abundantly clear that by the time the suit and the application were filed the operators agreement had been terminated in accordance with its provisions. In the event the only course open to the respondent was to sue for damages if as he contended the termination breached the agreement.

In another case which I was referred to Nyamodi Ochieng - Nyamogo and Another vs. Kenya Posts & Telecommunications Corporation Civil Application No. NAI 264 of 1993 the Court of Appeal makes the following pronouncement:

That being so the order obtained six months later on 8th October, 1993, seeking to restrain the corporation is clearly not capable of being enforced. It was conceded on behalf of the applicants that both the applications before the High Court which has been refused and had thereby given rise to the appeal forming the basis of an application before the 3 Judges bench, had sought an injunction to restrain only and not a mandatory injunction for reinstatement. It is clearly wrong to accuse or punish the officials of the corporation for failing to comply with an order to restrain from retiring six months after the offices had been officially abolished.

In the instant case I have already found that a mandatory injunction cannot issue out of Order XXX!X and consequently a restraining injunction without a mandatory injunction cannot issue.

Further support can be found in the case of Eric Makokha and 4 Others vs. Lawrence Sagini and 2 others Civil Application No. 20 OF 1994 (12/94 UR)Relief under Section 84 of the Constitution This was perhaps the most difficult question I was called upon to determine Dr. Kamau Kuria raised the issue that the plaintiffs constitutional rights were infringed by the conducts of the defendants.

I will deal with the Constitutional issues pertaining to the relationship between the 1st and 3rd

defendants.

The entire jurisprudence of rights in law presupposes the existence of an obligation so that if one party is obligated in law then a right with that respect to that obligator is created. A right cannot exist intra parties if the terminology can exist in this sense, but can only come into existence when there is legal contact between more than one.

In the classical case of the State versus the individual on the undertaking by the State to afford the individual certain accommodations the individual will expect the State to guarantee to him certain rights.

Both Mr. Chege and Dr. Kiplagat consistently and stubornly queried the plaintiffs claims that there existed constitutional concerns arising from the relationship between the plaintiff and the 1st and 3rd Defendants.

The Original plaint filed against the 1st Defendant made no mention of this claim (it could be that everything was done hurriedly and on the heat of the moment because of the need for speed) but subsequent amendments and re amendments introduced constitutional claims against the 1st and 3rd Defendants. To my mind the plaintiff can claim as a right Constitutional or otherwise from the 1st and 3rd Defendants relief if by operation of Law the 1st and 3rd Defendants were obliged to accommodate the plaintiff in its endevours. I am posing the following question:

What obligation did the 1st and 3rd defendant have to the plaintiff. If at the time the plaintiff approached the 1st Defendant to place its transmitter equipment at the 1st Defendant's Londiani Station the 1st defendant had stated that it was not minded to accommodate the plaintiff, could plaintiff have come to court and said that the 1st defendant was obliged to allow such accommodation" If the answer is yes, then a right existed. If the answer is no, no right existed. For Constitutional right to accrue, there must, of necessity exist a constitutional obligation. In this case the plaintiff would have to show that the Constitution obliges Telkom and KBC to accommodate the plaintiff. The plaintiff was not able to show how this can be inferred from the Constitution. Dr. Kuria submitted for days and at length that the plaintiff's right to broadcast was being injured by, inter alia, the 1st and 3rd Defendants conduct. However, as a matter of facts and law I find that the relationship between the plaintiff and the 1st and 3rd defendants was purely contractual. It is possible that there is a misunderstanding about the roles the 1st and 3rd plaintiffs play as bodies with administrative powers which are quasi-judicial and their capacities as bodies corporate to enter into private contracts with any party they choose under normal legal terms that govern private contracts. When in the exercise of these powers the 1st and 3rd defendants enter into private contracts with the plaintiff there cannot arise an implication that the contracts are governed by considerations under the constitution. Neither can such contract be considered as a matter of a breach of administrative duty just because they are public authorities. The relationship between the plaintiff and 1st and 3rd defendants being contractual, I HOLD that a breach of the contract does not amount to an infringement of a fundamental right. Apart from this Dr. Kiplagat and Chege objected to the plaintiff's submissions on Constituional issues on account of the provisions under which the applications have been brought under. They pointed out that all the applications were brought under order 39 of the Civil Procedure Rules which cannot grant jurisdiction to litigate matters under section 84 of the Constitution. In support of this submission Dr. Kiplagat referred to the case of KAMLESH PATTNI & ANOTHER V. REPUBLIC - MISC. CRIMINAL APPLICATION NO. 481 OF 1995 In which the High Court held that applications under Section 84 of the Constitution must be through the Rules of the Civil procedure Act. Dr. Kuria submitted that a litigant can ask for any orders under Section 84 regardless of the requirements of the Rules under the Civil Procedure. The Section would appear to support what Dr. Kuria says. It is however a fact that no rules have been made under the Section by the Chief Justice and a need arose through other cases for an interpretation of the section. In the case of Kamlesh Pattni the

High Court interpreted this Section and gave the guidelines as to what procedure should be followed.

For my part I would lean for the more liberal interpretation of this Section so that there be less fetters based on procedural technicalities but so long as whatever method is used it will afford a notice to the respondent that the application is being brought under Section 84 by invoking the Section then it would in my view meet the requirement of Section 84. The liberty at all times remains with the applicant to choose the process and relief he wishes to obtain under Section 84 of the Constitution. What the Judges said in this case of Kamlesh Pattni, that once the applicant chooses a certain method he is bound to stick to it so that there is no blending of that application with others from other jurisdictions makes sense. The plaintiff did not in the present applications invoke section 84 of the Constitution and the defendants complaint that they were ambushed and that the reference to the constitutional rights acted to their prejudice as they could not with any degree of certainty establish the nature of the case they were required to meet is well founded. Order 39 of the Civil Procedure Rules which was used by the defendant can not be said to have invoked Section 84 of the Constitution. This order 39 of the Civil Procedure Rules provide reliefs which are limited and cannot be stretched to include reliefs sought under the Constitution which are not invoked. For these reasons the reliefs based on Constitutional clauses against 1st and 3rd defendants would fail.

With regard to the 2nd defendant its position is different from the 1st and 3rd defendants. By the nature of its functions, it has some obligations to the plaintiff which could be subject to constitutional inquiry..

Although what I find in regard to the 1st and 3rd defendants with regard to Order 39 of the Civil Procedure rules could apply to the 2nd defendant, I shall nevertheless examine the merits of the constitutional claims against the 2nd defendant with a view to seeing whether the plaintiffs rights were violated. Dr. Kuria in the early part of the submissions stated that Kenya Communication Act was unconstitutional and that in its application it is also unconstitutional. He quoted the case from Sri Lanka earlier cited, in which the court held that certain provisions of a bill to liberarise the media were inadequate in that they left the control in the hands of the executive and declared the bill illegal. Of relevance is to see whether the acts by the 2nd defendant contravened the provisions of Constitution which is relevant to the acts complained of.

Section 79 (2) b of the Constitution in the relevant portion provides that:

(a) Nothing contained in or under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question makes provision:-

(b) That is reasonably required for the purpose of regulating the technical administration or the technical operation of telephone, broadcasting or television…..".

The plaintiff did not seek, to show that this provision was unreasonable or is inconsistent with the provision of the Constitution that protects the rights complained of. Instead the plaintiff took the line that it has complied with all the conditions demanded of it by the 2nd defendant. At the end therefore it becomes the question of deciding whether the plaintiff has complied with the conditions or not. The conflicting evidence from the affidavits and the evidence given by Mr. Karanja when he was cross-examined on his affidavit on the question of the payments it is clear that, there is a dispute as to whether these conditions were complied with. The Sri Lankan case quoted sought before a Bill went to Parliament to declare certain aspects of the Bill as illegal as being against the Constitution of Sri Lanka as they were found to be discriminatory and to be setting up a regulatory body which would lack sufficient independence for the purposes of the required regulation. This case is therefore not relevant

when the plaintiff is fighting to show that he has complied with the regulations under Kenya Communication Act and those of the Kenya Broadcasting Act. Perhaps the decision could have been of some relevance before the Kenya Communication Bill went to Parliament but not after.

The plaintiff consistently raised the point that the defendants kept on increasing the reasons for its actions against the plaintiff thereby giving the impression that the plaintiff was discovering the reasons after its action. This may well be so. Judging from the evidence available in the affidavits it does appear that the relationship of cohabitation between the 1st and the 3rd defendants was created when the parties enjoyed cordial relationship which existed until the cohabitation went sour resulting in a court action. Once the matter became litigous the parties would naturally seek to justify their actions by resorting to what should have been done and what is not done unless the doctrine of estopped applies. The law appears to support the view that a party can justify an action by a reason which is available. See Scammel (G) and Nephew Ltd. V. Ouston (1941) AC where it was said.

“It is true that when the appellants broke off the affair they gave reasons for doing so which they could not justify. But when they were sued for breach of contract they were entitled to resist the claim on any ground that was available regardless of reasons, which they had previously given. If a party repudiated a contract giving no reasons at all, all reasons and all defences in the action partial or complete would be open to him”.

To the extend that the cohabitation was no longer in existence the defendants are within their rights to defend the suit by any available defences. If as the defendants have submitted there is no prima facie showing that KCA is unconstitutional, the plaintiff can only succeed in obtaining relief under section 84 by showing that the conditions imposed by the 2nd defendant in the exercise of its regulatory regime under KCA and under powers donated by Section 79 (2) (b) are unreasonable. The plaintiff did not seek to attack the 2nd defendant’s conditions as being unreasonable but sought to show that it had complied with all the conditions. However, the 2nd defendant has submitted that the plaintiff was hopelessly in breach of all conditions.

At this stage and before I leave this item, I can confirm that under the proper conditions Section 84 of the Constitution does afford redress against a breach of any of the Fundamental Rights contained in the Constitution. I have had the advantage of comparing the provision of this Section with similar provisions in other commonwealth countries.

I also read the several decisions on the applications of this Section notably the Privy Council decisions on (1) Olive Casey Jaundoo and the Attorney General of Guyana (2) Societe United Docks & Others v. Government of Mauritius (3) Hinds and others v. Attorney General of Jamaica (4) Maharaj v. Attorney General of Trinidad and Tobago.

I agree with Dr. Kamau Kuria’s submission that this Section guarantees access to the court by means of a simple application for the enforcement of the rights they guarantee only subject to the provisions of sub-section 6 of the Section. Without having to decide or go into the merits of the respective cases of the plaintiff and the 2nd defendant I wish to make reference to some of the conflicting facts relied upon by the parties and make a determination on the balance of convenience since on the facts before me I am unable to form a reasonable basis for believing one set of facts as opposed to the other conflicting set of facts.

(a) Licence Fees

The plaintiff has through its own authorities admitted that all jurisdictions the world over charge a fee

for utilising frequencies and therefore the imposition of a licence fee is not a prima facie unreasonable condition imposed by the 2nd defendant upon the plaintiff. I did set out in great detail the terms and conditions under which the plaintiff was allocated frequencies by the 2nd defendant and the fees such allocations attracted. The plaintiff says that it was not in arrears with regard to payment and that it had reached an agreement with the 2nd defendant not to pay for the frequencies in accordance with the express conditions of their issue but to pay for them only after the plaintiff brings them into use.

As evidence of this agreement the plaintiff has produced a copy of a letter written by the plaintiff to the 2nd defendant. There is no acknowledgement and the 2nd defendant denies that such an agreement was ever reached. What is the prima facie evidence before me with regard to the payment of fees" I find myself unable, without more evidence, to find sufficient basis for holding that the express and acknowledged terms of the licence fees agreed were subsequently altered by mutual consent of the parties. Furthermore, the fact that the plaintiff made payment of at least one subsequent frequency allocation in circumstances which creates the inference that no agreement to waive the terms of frequency allocations had been reached also creates doubt as to the existence of the agreement that the plaintiff says was entered into. On this issue I find that there is no basis at this stage to disprove the express assertions by the 2nd defendant that there was non-compliance with the payment terms of the frequencies.

(b) Type-approval Condition

The 2nd defendant has elaborately explained the rationale and basis for requiring type-approval. Mr. Odongo’s affidavit sworn on the 28th January, 2000 and at paragraph 14 details the reasons for this condition which include, inter alia, checking for harmful electro-magnetic radiation, confirming frequency oscillator stability and certifying that there is proper insulation of equipment. Some of these requirements are public safety requirements. There is no prima facie showing that the imposition of this condition is unreasonable. The plaintiff has also failed to show that there is prima facie evidence that it had complied with this condition.

(c) Location of Londiani Transmitter

To understand the logic of the requirement for approval of transmitter sitting the 2nd defendant led the court through the frequency regime of Kenya and the International instruments that govern this field. Although very technical in nature I found this submission crucial in understanding the controversy generated by the plaintiff’s sitting of the Rongai/Nakuru frequency 100.5 at Londiani. Without making a finding on the facts the plaintiff asserts that the 2nd defendant had already approved Londiani geographical coordinates for sitting the plaintiff’s transmitter. The 2nd defendant asserts that the frequency coordinates submitted by the plaintiff indicated that frequency 100.5 was to be located at 36 E 05 and 00 S 15 coordinates which marks the International Telecommunications Union approved site for this frequency. The 2nd defendant also asserts that if Londiani had been approved from the very beginning why are the plaintiff’s letters referring to “looking” for a site or “ discovering” Londiani Hill, terms not consistent with a prior approval of the site for Rongai frequency 100.5.

I am satisfied that there are international obligations to which Kenya is committed to under the International Telecommunications Union regime and on the balance of convenience it is best that the possibility of breaching these obligations is limited pending the determination of the permissible transmission site for Rongai frequency 100.5. I have also to bear in mind that under Section 35 of KCA, a criminal offence is created for persons who fail to comply with siting requirements for equipment under section 36 of KCA, so that to allow the plaintiff’s application may entail the sanctioning of a criminal offence. The above matters till the balance of convenience in favour of the 2nd defendant.

(d) Failure of Natural Justice

I find myself in the same situation as the court in Teresa Shitakha v. Mary Mwamodo and others (1982 – 1988) 1 KAR where the Court of Appeal held that:

“While it was of the highest importance that the rules of natural justice were observed in any decision affecting the rights or office of the applicant, the court was only concerned at the interlocutory stage in applying the principles governing the granting of temporary injunctions, as set out in Giella v. Cassman Brown & Co. Ltd. (1973) EA 358 at 360, not with the merits or demerits of the case itself as commenced by the plaint in the High Court”.

The facts before me cannot afford me reasonable certitude on the extent of the hearing the plaintiff received from the 2nd defendant, whether the plaintiff had sufficient notice of the charge it was to meet, whether the plaintiff had sufficient opportunity to contradict the 2nd defendant’s claims, and so forth. This is a matter that will require hearing and determination of the facts first.

The contradictory and inconsistent material before me does not permit me to make any of the injunctive orders the plaintiff is seeking at this state and I decline to do so.

(e) Other Issues

As I have stated above the plaintiff has not made out a prima facie case nor has it satisfied me that it may succeed at the full hearing of this matter. Quite apart from the difficulties that the plaintiff faces with regard to the matters stated above, Dr. Kiplagat has also submitted that with regard to the arrangement between the plaintiff and the 1st defendant, the same is not supported by consideration and cannot, therefore, constitute a contract. Nor can it be said to constitute a lease because on the authority of Paul Hecht vs. S.T. Morgan (1957) E.A. 741 no exclusive possession is granted. As a consequences the accommodation was a bare licence not supported by consideration. In this regard I bear in mind what was stated by the Court of Appeal in B.P. Shah Limited vs. Kisumu Market Service Station Limited that:

A notice determining a licence revokes the licence immediately on service and the notice becomes operative on the expiration of a reasonable time from the date of service, and this is so even though the notice states a period of time for the vacation of the premises which is held to be too short. No particular period of time need be stated in the notice.

The 1st defendant terminated what it now submits was a licence agreement not supported by any consideration. Dr. Kiplagat further submits that the prayer for specific performance on the part of the plaintiff against the 1st defendant is also untenable as the arrangement between the plaintiff and the 1st defendant is not supported by consideration, nor does there exist a valid contract between the plaintiff and the 1st defendant. He further submitted that the remedy of specific performance is unavailable where performance may constitute breach of law which the 1st defendant submits would be the case. So is the plaintiff’s case against the first defendant a clear one"

As I pointed out earlier the court would need more evidence on this issue. The breach complained is not clear as would entitle the court to issue an injunction as the matter will have to be determined first as to whether there was a contract in the first instance. It is not possible at this stage of these proceedings to declare the plaintiff’s case is a prima facie one with a likelihood of success and because of that I would not grant the prayers sought at this stage.

In my view the solution to this problem lies in setting down the hearing of this suit as soon as

possible. I did not address myself in this ruling on the question whether the case should go to the tribunal or not. I did not do so because I feel that, that is a matter which can be dealt with before the hearing of the main suit.

CONCLUSION

For the above reasons I strike out the plaintiff's application dated the 8th January, 2000 with costs and dismiss the plaintiff's applications dated the 27th January, 2000 and 3rd February, 2000 with costs.

Delivered and dated this 29th day of February, 2000

KASANGA MULWA

JUDGE