**Uunet Kenya Limited v Telkom Kenya Limited and another**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 21 January 2004

**Case Number:** 811/03

**Before:** Njagi J

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Arbitration – Injunction –* Ex parte *– Party applying for injunction under Arbitration Act and obtaining orders* ex parte *– Whether* ex parte *injunction may be granted under Arbitration Act – Section*

*7 – Arbitration Act – Rules 2 and 11 – Arbitration Rules.*

*[2] Civil procedure – Injunction – Interim injunction granted –* Ex parte *without court recording reasons for finding application urgent – Effect of failure to record reasons – Whether failure renders orders obtained null and of no effect – Order XXXIX rule 3(1) – Civil Procedure Rules.*

*[3] Civil procedure – Preliminary objection – Preliminary objection to be canvassed on pure points of law.*

**Editor’s Summary**

The Plaintiff made an application to court seeking temporary injunction to restrain the Defendants from transferring or using certain EI circuit lines pending hearing of the application *inter partes,* a temporary injunction to restrain the Defendants from using the said EI circuit lines pending arbitration and a mandatory injunction compelling the First Defendant to re-transfer the said EI circuit lines to the

Plaintiff.

The matter was heard *ex parte* in the first instance whereupon a temporary injunction was given pending the hearing of the application. The Court did not record its reasons for certifying the matter as urgent to warrant issue of an *ex parte* order.

When the matter came up for hearing *inter partes*, the two Defendants raised preliminary objections to the application. It was their contention that the Plaintiff had no proprietary interests in the EI circuit lines and therefore the orders sought could not be granted; that a judge must record reasons for allowing the application to be made *ex parte* and since no reasons were recorded in this case, this was a breach of

Order XXXIX and vitiated any orders made thereby; and that under rules 2 and 11 of the Arbitration

Rules a judge had no jurisdiction to issue an order *ex parte*. The First Defendant contended that the dispute before the Court was principally between the Plaintiff and Second Defendant and thus the First

Defendant had wrongfully been made a party and adverse orders made against it.

The Plaintiff’s reply was that under 7(1) of the Arbitration Act a measure of interim protection could be granted and that the section did not say that such a measure ought to be sought *inter partes*; and that even though the dispute was principally between the Plaintiff and Second Defendant, the First Defendant was the provider of all lines and the only party who could effect a transfer of the line hence was a necessary party to the suit. The Plaintiff also argued that the many points raised by the Defendants were not a demurrer as they could be canvassed in the main application.

**Held** – Unless the rules of procedure expressly provided for an application to be heard *ex parte*, all applications should be heard *inter partes* and not the not the other way round. It would be contrary to public policy and natural justice if any litigant were to be entitled to obtain any orders at will, and without giving prior notice to those that they maybe adversely affected by such orders (*Uhuru Highway Development Limited v Central Bank of Kenya* [1995] LLR 2177 (CAK) followed).

In the absence of an express provision to the contrary, the Court lacked jurisdiction to grant *ex parte* orders under section 7 of the Arbitration Act.

Under Order XXXIX, rule 3(1) of the Civil Procedure Rules, before the Court can proceed *ex parte* to hear an application for an injunction, it is a condition precedent that not only should it be satisfied that any delay would defeat the object of granting the injunction, but is should also record the reasons for being so satisfied. Failure to comply with these conditions vitiates any orders so obtained and renders the same of no effect (*Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation and* *others* [1993] LLR 2525 (CAK) applied).

Grounds relating to damages in lieu of an injunction, proprietary interest in the lines and transfer of the lines advanced under the cloak of preliminary objection did not properly constitute grounds of preliminary objection as they did not constitute a pure point of law which if successfully taken would have the effect of disposing the suit or application entirely (*Garden Square Limited v Kogo and another* [2002] LLR 1695 (CCK); *Mukisa Biscuit Manufacturing Limited v West End Distributors Limited* [1969] EA 696 followed).

Interim *ex parte* orders discharged. Application to be canvassed *inter partes*.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Garden Square Limited v Kogo and another* [2002] LLR 1695 (CCK) – **F**

*Makokha and others v Sagini and others* [1994] LLR 339 (CAK)

*Mukisa Biscuit Manufacturing Limited v West End Distributors Limited* [1969] EA 696 – **F**

*Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation and others* [1993] LLR

2525 (CAK) – **AP**

*Shanzu Villa Limited v Guardian Bank Limited and another* civil case number 642 of 2003

*Uhuru Highway Development Limited v Central Bank of Kenya* [1995] LLR 2177 (CAK) – **F**