**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.*

**RULING**

**Njagi J:** The application before the Court is dated 17 December 2003. It was filed in court on the same day and is brought by chamber summons under sections 3 and 3A of the Civil Procedure Act; Order

XXXIX rules 1, 2, 3, 7 and 9 of the Civil Procedure Rules, section 7 of the Arbitration Act, 1995, rules 2,

8 and 11 of the Arbitration Rules, 1997 and all enabling provisions of the law.

The substantive orders which the application seeks are that this Court be pleased to issue an order of temporary injunction restraining the Defendants by themselves, their employees, agents, servants or in any other manner howsoever from transferring, applying and/or in any way using the EI circuit lines under number 69055 pending the hearing and determination of this application.

Secondly, the application seeks an order that this Court be pleased to issue an order of temporary injunction restraining the Defendants by themselves, their employees, agents, servants or in any other manner howsoever from transferring, applying and/or in any way using the EI circuit lines number 69055 pending arbitration.

Thirdly, the application further seeks an order of temporary injunction compelling the First Defendant to re-transfer the EI circuit lines under number 69055 back to the Plaintiff pending arbitration. The application seeks that the costs thereof be provided for.

The application is based on the grounds that a dispute has arisen as regards the termination of a network agreement between the Plaintiff and the Second Defendant and the dispute must be referred to arbitration, and that the Second Respondent has threatened to interfere in the Applicant’s business through the transfer of circuit lines from the Plaintiff to a third party competitor using the First Defendant. The Applicant also contends that unless the orders sought are granted, there is real danger that the

Respondents will hinder the operations of the Applicant as a consequence whereof the Applicant will suffer irreparable loss and damage. Furthermore, the Respondent might use the period between service of this application and the hearing thereof to interfere in the Applicant’s business and thereby render the outcome of this application nugatory.

The Applicant also states that the First Defendant has illegally purported to transfer the subject lines to the Plaintiff’s competitor in breach of the Plaintiff’s agreement with the Second Defendant, and that the First Defendant has no justifiable authority to transfer the subject lines from the Plaintiff to a third party contrary to the Plaintiff’s agreement with the Second Defendant.

Finally, the Applicant says that the subject lines were transferred on instructions of the Second

Defendant whereas the lines were owned by the Plaintiff. The First Defendant, the Applicant says, has a monopoly in the provision of the subject lines and the Applicant stands to suffer irreparable loss which cannot be remedied in monetary terms. In the circumstances, the Applicant has a *prima facie* case with high chances of success and the balance of convenience is in favour of the Applicant. The application is also supported by the annexed affidavit of Henry Njoroge, the Plaintiff’s managing director.

When this matter came before Honourable Lady Justice Kasongo under a certificate of urgency on 17

December 2003, the Learned Judge certified the application as urgent and granted the Plaintiff/Applicant orders 1 and 2 of the chamber summons dated 17 December 2003, and ordered the application to be heard *inter partes* on 22 December 2003. Before the application could be heard on the appointed day, both the First Defendant and Second Defendant filed notices of preliminary objection.

In its notice of preliminary objections dated and filed in court on 22 December 2003, the First

Defendant states that it is not privy to the Network Service Agreement dated 29 August 2002 stated to have been entered between the Plaintiff and the Second Defendant, and is further a stranger to the dealings between the Plaintiff and the Second Defendant with regard thereto.

Secondly, the First Defendant objects on the ground that the application is misconceived, mischievous and an abuse of the process of the court, and thirdly on the ground that the Plaintiff has no proprietary right or interest in the E1 circuit lines under number 69055. It is also the First Defendant’s position that there was no emergency in the application and the Plaintiff deliberately misinformed the court on the propriety of prosecuting the application under a certificate of urgency and during the court vacation.

Finally, the First Defendant objects on the ground that the equitable remedies sought in the application are not available to the Plaintiff in the circumstances disclosed in the pleadings. The First Defendant will, in the circumstances, apply that the *ex parte* orders obtained by the Plaintiff be discharged forthwith and the application be dismissed *in limine.* On its part, the Second Defendant gave notice that is would raise objection on the grounds that the Plaintiff has not proprietary right or interest in EI circuit lines under number 69055; that there was no real urgency and/or true impossibility to effect service that would justify issuance of *ex parte* orders; that these were sought to advance a mischief; that no reasons were recorded to justify an *ex parte* hearing; and that the orders sought cannot be issued in law.

The Second Defendant would therefore apply that the *ex parte* orders be discharged and the chamber summons be dismissed *in limine*.

It is noteworthy that some four grounds of preliminary objection are common to both notices. These are:

“(a) The Plaintiff applicant has no proprietary right or interest in EI circuit lines under number 69055.

(b) There was no urgency in the Plaintiff’s applicant to warrant the issuance of the *ex parte* orders.

(c) The equitable remedies are sought to advance a mischief and therefore the application is misconceived, mischievous and an abuse of process”.

Leading Ms *Njeri* for the Second Defendant and after giving a short background to the application before the Court, Mr *Ngatia* referred to the filing of the suit and the summons dated 17 December 2003. At the hearing of that application, Mr *Munyu* appeared *ex parte* and made various submissions and the Judge rendered a ruling. She thereupon certified the application as urgent without advancing reasons therefor.

Mr *Ngatia* also referred to an earlier statement by Mr *Munyu* to the effect that this application does not fall within the purview of the Civil Procedure Rules but the Arbitration Act and the Rules made thereunder. He then said that the first issue is whether the court can issue an order *ex parte* under the

Arbitration Act and Rules and immediately answered in the negative. Referring to rules 2 and 11 of these

Rules, he argued that none of them give a judge the power to issue an order *ex parte*, but that some rules under the Civil Procedure Rules do give a judge such latitude. He submitted that *ex parte* orders are an exception to the rule, and that to make such orders a judge must have jurisdiction to do so. In the instant application, the summons under rule 2 should have been served on the Defendant, and the order should not have been made *ex parte.* A judge is in such circumstances entitled to set aside orders granted in *ex* *parte* proceedings. If there is no power under the Arbitration Act to make an order *ex parte*, then the order must collapse*.*

However, Mr Ngatia argued further that the Plaintiff may have a fall-back position and say that the order was made under Order XXXIX of the Civil Procedure Rules which empowers a judge to issue an *ex parte* injunction. But the judge must first record reasons for allowing the application to be made *ex parte.* Mr *Ngatia* then cited several authorities to demonstrate that where the court allows a party to proceed *ex parte*, without recording reasons for doing so, this is breach of Order XXXIX and vitiates any orders made thereby and any further proceedings on such an order will be a nullity.

Finally, Mr *Ngatia* said that this Court has jurisdiction to hear and determine this matter and in doing so is not sitting on appeal from itself.

Mr *Gitau* for the First Defendant argued that the Plaintiff’s claim is discoverable in several aragraphs in the plaint and referred specifically to paragraphs 4, 6, 7, 8 and 10 which he said allege breaches of an agreement with the Second Defendant. In the grounds in support of the application, it is alleged that the Second Defendant has threatened to interfere with the business of the Plaintiff while at the same time it is alleged that there is a dispute between those two parties.

However, nowhere in the pleadings is it alleged that there is a dispute between the Plaintiff and the

First Defendant except in paragraph 9 of the plaint where it is alleged that the First Defendant acted wrongly on the instructions of the Second Defendant who did not own the lines. Mr *Gitau* further said that these pleadings are supported by the grounds stated in paragraphs (e), (f ) and (g) of the chamber summons which suggest that the First Defendant acted on instructions of the Second Defendant in effecting a transfer in breach of the agreement between the Plaintiff and the Second Defendant.

Mr *Gitau* also submitted that in his submission before Justice Kasango, Mr *Munyu* did not indicate what default the First Defendant had made to warrant an adverse order against it. Whereas all the documents refer to a dispute between the Plaintiff and the Second Defendant, there is none between it and the First Defendant. Even though the application refers to EI circuit, the Plaintiff knows that this circuit carries thousands of customers, and the Plaintiff knows only too well that thousands of the First Defendant’s customers will be shut out, and yet the court has no jurisdiction to issue orders against parties who are not in court, and even those in court who are not interested in the dispute. When the dispute finally goes to arbitration, the First Defendant will not be able to go there as it is not a party to the agreement for reference of disputes to arbitration. Therefore the application is mischievous as far as it relates to the First Defendant, and any relief against the First Defendant should not be available *ex parte.*

Counsel then referred to section 7 of the Arbitration Act which empowers the High Court to grant an interim measure of protection and submitted that any orders under the Arbitration Act cannot be sought or given *ex parte.* Referring to the remedies sought, Mr *Gitau* said that an injunction should not be granted if the reward can only lie in an award for damages as in this case. Even if it is found that the First Defendant is breaching the Plaintiff’s rights, in cases of breach of contract, damages are an appropriate relief, and where damages are available, then equitable reliefs are not available. He referred the Court to the case of *Makokha and others v Sagini and others* [1994] LLR 339 (CAK). He also argued that the Court had no jurisdiction to order that the application herein be heard on 22 December 2003 as such an order was not supported by an application made by chamber summons. Therefore the order was a nullity.

He concluded his submission by stating that the application was made with intent to abuse the process of this Court, and therefore it should be struck out with costs.

In response to these submissions, Mr *Munyu* for the Plaintiff/Applicant said that the Plaintiff came to court under section 7(1) of the Arbitration Act, seeking a measure of interim protection. The section does not say that such a measure should be sought *inter partes.*

Rule 2 of the Arbitration Rules 1997, states that applications should be by summons in chambers but does not say that these should be served on the other party. Counsel argued that the Second Defendant had not shown any provision barring the Court from granting an *ex parte* order, and that the fact that the provision is silent does not mean that the other side must be served. He referred the Court to *Shanzu Villa Limited v Guardian Bank Limited and another* civil case number 642 of 2003, and submitted that there is nothing in law or rules of practice to bar the Court from hearing matters *ex parte* under section 7.

Referring to Order XXXIX, rule 3 of the Civil Procedure Rules, Mr *Munyu* argued that the rule does not require that the reasons for hearing a matter *ex parte* must be recorded in the ruling. It only states “for reasons to be recorded”. His reasons as to why the matter should be heard *ex parte* were recorded on some four pages. Hence, as stated in *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation and others* [1993] LLR 2525 (CAK), the case of the Plaintiff herein does not fall within the cluster of those in which no reasons were recorded.

In response to Mr *Gitau*’s submissions, Mr *Munyu* argued that even though the dispute in this matter is essentially between the Plaintiff and the Second Defendant, the First Defendant is the provider of all the lines. The injunction sought is against the transfer of a circuit or line pending arbitration, and the only party who can effect the transfer is the First Defendant. If they don’t transfer, then a dispute would not occur.

Responding to Mr *Gitau*’s argument that the Plaintiff has no proprietary right to the subject matter lines, Mr *Munyu* stated that the lines are registered in the name of the Plaintiff; the Plaintiff is also the renter and the person paying. As for Mr *Gitau*’s contention that an injunction cannot issue where damages are adequate, Mr *Munyu* responded by arguing that an injunction can issue for breach of contract.

Finally, Mr *Munyu* argued that many points raised here were not a demurrer as they could be canvassed in the main application. Even though it has been alleged that the Plaintiff’s application would affect thousands of customers, the Plaintiff’s only interest relates to EI circuit lines under number 69055 only.

In reply, Mr *Ngatia* said that all applications must be heard *inter partes,* except where the Rules specifically allow the Court to grant *ex parte* orders. Unless a judge is empowered to hear a matter *ex parte*, he must hear it *inter partes.* As for the place for the reasons for hearing an application *ex parte*,these must be distinguished from advocates’ submissions.

On his part, Mr *Gitau* said it was incorrect for Mr *Munyu* to allege that his client had an uncontroverted interest in all lines, especially those that have already been transferred.

Having heard the rival submissions of all the counsel, this Court is of the view that there are two main issues that cry for determination. Firstly, whether *ex parte* orders can be granted under section 7 of the

Arbitration Act, 1995 and, secondly, whether reasons for hearing an injunction application *ex parte* need necessarily be recorded in the court’s ruling. Other issues which also call for determination include such matters as to whether an injunction can lie where damages are an adequate remedy; the transfer of internet lines; and the proprietary interests in the same. A word will be said shortly about the second cluster.

The application before the Court was brought mainly under sections 3 and 3A of the Civil Procedure

Act, Order XXXIX, rules 1, 2, 3, 7 and 9 of the Civil Procedure Rules, section 7 of the Arbitration Act herein above referred to, and rules 2, 8 and 11 of the Arbitration Rules, 1997. Counsel for the

Plaintiff/Applicant was very clear that the Applicant had come to court seeking an interim measure of protection under section 7(1) of the Arbitration Act. Rule 2 of the Arbitration Rules, 1997, reads:

“Applications under sections 6 and 7 shall be made by summons in the suit”. In the course of the hearing of this application, each of the counsel gave the Court a generous dose of authorities, and even though the Court has read them all, it will not refer to all of them for the purpose of this ruling especially as many of them emphasise the same points.

Going back to rule 2 herein above referred to, it merely provides for applications under sections 6 and

7 to be made by summons. Rule 11 provides that: “So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these rules”. The Civil Procedure Rules are replete with references to summons. Most of the Orders in these Rules conclude by prescribing the mode in which applications thereunder are to be made. The vast majority of these applications are required to be made by summons.

Even without these Rules calling for it, the applications are invariably heard *inter partes*. In the few instances where a party can be heard *ex parte,* this is always provided for. It is not inordinate to draw a general conclusion, therefore, that unless the rules of procedure expressly provide for an application to be heard *ex parte*, all applications should be heard *inter partes* and 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 may be adversely affected by such orders. This would create a sure recipe for chaos in the society. The hearing of applications *inter partes* is the rule; the hearing *ex* *parte* the exception.

This point is well demonstrated by the ruling of Omolo JA in *Uhuru Highway Development Limited v*

*Central Bank of Kenya* [1995] LLR 2177 (CAK). Referring to this aspect of procedure, the Learned

Judge said:

“The basis for this requirement is obvious; it is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties and opportunity to be heard. *Ex parte* orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it”.

By reason of the foregoing, it goes without saying that in the absence of an express provision to the contrary, the Court lacks the jurisdiction to grant *ex parte* orders, either under section 7 of the Arbitration

Act or otherwise.

If any more evidence were required to the effect that *ex parte* orders are the exception rather than the rule, one need look no further than Order XXXIX, rule 3 of the Civil Procedure Rules, to which I shall revert shortly. The granting of any *ex parte* injunctions under that limb of the law is surrounded by certain safeguards – the Court must give reasons for hearing the application *ex parte*; such an *ex parte* injunction may be granted only once for not more than 14 days and should not be extended thereafter; and the applicant must serve the order on the party to be restrained within three days of the date thereof.

These restrictions ably demonstrate the straitjacket within which *ex parte* injunctions must be confined, because they are the exception, rather than the rule. With respect, the argument that one could obtain an *ex parte* injunction under section 7(1) of the Arbitration Act is untenable.

The alternative route by which the Plaintiff could have accessed an *ex parte* injunction is via Order

XXXIX, rule 3(1) of the Civil Procedure Rules alluded to herein above.

The rule states: “Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay it may hear the application *ex parte*”. Under this rule, 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 it 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. There is a preponderance of authorities on this point, and it will suffice to refer to one or two.

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

LLR 2525 (CAK), the Court of Appeal considered the full import of Order XXXIX, rule 3(1). Referring to this rule, Gicheru JA as he then was said:

“Clearly, from the foregoing provisions, the hearing of an application for injunction *ex parte* can only be legitimate where the court is satisfied that the object of granting the injunction would be defeated by delay and that satisfaction must be manifested by the recorded reasons of the court.

Generally, an injunction will be granted *ex parte* only in cases of emergency or in cases or urgency and there is no way of knowing of the existence of these two factors unless the same is apparent on the record of the court. A matter may be one of urgency either because the matter is too urgent to await a hearing notice for instance where the property is in danger of being lost or destroyed or because the very fact of giving notice may precipitate the action which the action is designed to prevent…hence the need to show that there are strong grounds to justify the application being made *ex parte*”.

The Learned Judge concluded his remarks by stating: “Indeed, where proceedings are taken by a plaintiff in the absence of the defendant, it is most important that there should be at every stage of the proceedings strict compliance with the rules”. I need not belabour the point. The wording of Order XXXIX, rule 3(1) is very clear and the authorities on it are equally clear. It is mandatory for the judge to record the reasons for electing to hear an application for an injunction *ex parte*. Where the reasons are not recorded as required, then any ensuing orders are invalid and are of no legal effect.

It was suggested that the judge’s reasons for opting to proceed *ex parte* need not necessarily be recorded in the ruling. With respect, that suggestion cannot stand. It is in the ruling that the court ever gives any reasons justifying its perception of an issue. It cannot be anywhere else.

Upon reflection and with hindsight, this Court shares the concerns of Mr *Munyu* at the beginning of the hearing of this application. He said that the grounds preferred by the Defendants as grounds of preliminary objection were not grounds of preliminary objection at all. In his ruling in *Garden Square*

*Limited v Kogo and another* [2002] LLR 1695 (CCK), Justice Ringera said that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application entirely. This ties up with the decision of the then Court of Appeal for East Africa in *Mukisa Biscuit Manufacturing Limited v West End Distributors Limited* [1969] EA 696, in which Sir Charles Newbold, the President of that Court, referred to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection.

The Learned Judge said:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

In the instant application, some of the arguments advanced under the cloak of preliminary objection do not properly constitute grounds of preliminary objection.

Instead, they are matters that are fit and proper for argument in the substantive application. Without fear of contradiction, I can say that preliminary objection to the *ex parte* orders is well founded.

However, I cannot say the same for the other grounds of preliminary objection. Grounds relating to damages in lieu of an injunction, proprietary interest in the lines, the transfer of lines, are all grounds which, I think, should be heard in the main application.

For this and other reasons earlier on alluded to, this Court is inclined to discharge the interim *ex parte* orders granted herein on 17 December 2003. However, the court declines to dismiss the application *in*

*limine* as requested. Let the orders therein prayed for be canvassed *inter partes.* It is so ordered. Costs will be in the cause.

For the First Defendant:

*Gitau*

For the Second Defendant:

*Njeri*

For the Plaintiff:

*Munyu*