REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 1640 of 2004

IN THE MATTER OF: AN APPLICATION BY ECONET WIRELESS KENYA LIMITED FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE KENYA COMMUNICATIONS ACT NO. 2 OF 1998

AND

IN THE MATTER OF: ECONET WIRELESS KENYA LIMITED

BETWEEN

REPUBLIC ……..…….....…….
APPLICANT

AND

THE MINISTER FOR INFORMATION AND COMMUNICATIONS …....……. 1ST RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA …….....…… 2ND RESPONDENT

KENYA TELECOMMUNICATIONS INVESTMENT GROUP LIMITED …..... 1ST INTERESTED PARTY

KENYA NATIONAL FEDERATION OF CO-OPERATIVES LIMITED …….. 2ND INTERESTED PARTY

RAPSEL LIMITED ……..….....……..…. 3RD INTERESTED PARTY

CORPORATE AFRICAN LIMITED …….....…..…… 4TH INTERESTED PARTY

EX-PARTE

ECONET WIRELESS KENYA LIMITED

RULING

On the 20th November, 2004 this Court granted leave to the Applicant, Econet Wireless Kenya Limited under the provisions of inter alia, Order LIII, Rule 1 of the Civil Procedure Rules to file an application for judicial review orders of Certiorari, Mandamus and Prohibition against the decision of the First Respondent, the Minister for Information and Communication allegedly nullifying the issuance of the License for the third global system for Mobile Communication (GSM) Operator to the Applicant.

As it is the terms of the said orders which are under challenge in the present application by the second Respondent, the Communications Commission of Kenya, it is pertinent, that the entire Order and terms therein be set out here, so that its exact meaning and tenor is understood. The Order read as follows:-

"***1. THAT this application be and is hereby certified urgent and that the same be heard immediately in view of its urgency, the grounds whereof are set out in the Certificate of Urgency filed herewith.***

2. THAT in view of the urgency of this Application on the grounds more specifically set out in the Certificate of Urgency filed herewith, the failure to notify the Registrar as provided for under Order LIII, Rule 1 (3) be excused and is hereby dispensed with.

3. THAT the Applicant be and is hereby granted leave to apply for:-

(a) An order of Certiorari removing to this Honourable Court for the purposes of being quashed the decisions of the Minister for Information and Communication ("the 1st Respondent") made by way of a Press Statement dated 27th November, 2004 purportedly nullifying the issuance of the License for the third global system for Mobile Communication (GSM) Operator to the Applicant.

(b) An order of Certiorari removing to this Honourable Court, for the purposes of being quashed the decisions of the 1st Respondent contained in the said press statement dated 27th November, 2004 purportedly directing that the licensing procedure for the third GSM Operator will have to start a fresh and further directing the Director General of the 2nd Respondent to take the necessary action in this regard.

(c) An order of Mandamus compelling the 1st Respondent to reverse in their entirety the purported decision contained in the aforesaid Press Statement dated 27th November, 2004.

(d) An order of Mandamus compelling the 2nd Respondent to abide by, honour and perform the arrangements made between itself and the application in relation to the outstanding issues in respect of the balance of the License Fee.

(e) An order of Prohibition restraining the 1st Respondent by himself, his agents, representatives, employees, servants, officers or otherwise howsoever from interfering in any way whatsoever with any matters of whatever nature relating to the third GSM License which has been duly granted to the Applicant by the 2nd Respondent.

(f) An order of Prohibition restraining the 2nd Respondent by itself, its Agents, representatives, employees, servants, officers or otherwise howsoever from purporting to implement or carry out any of the direction given by the 1st Respondent and in any event from interfering in any way whatsoever with any matters of whatever nature relating to the third GSM License which has been duly granted to the Applicant.

4. THAT the grant of leave herein to operate as stay of the decisions made by the 1st Respondent as contained in the said press statement dated 27th November, 2004 pending the hearing and

determination of the substantive Application for Judicial Review.

5. THAT the grant of leave herein to operate as a <u>Prohibition</u> restraining the 1st and 2nd Respondents jointly and severally by themselves, their agents, employees, servants, officers or otherwise however from pending, withdrawing, revoking, canceling or in any manner whatsoever interfering with the Applicant's license even after the deadline given of 6th December, 2004 given by the 2nd Respondent for the payment of the balance of US $12 million pending further orders in Miscellaneous Civil Application No. 1621 of 2004 instituted by the 2nd Interested Party, Kenya National Federation of Co-operatives Limited.

6. THAT the cost shall be in the main Application.

7. THAT the Applicant shall file the application within the next 21 days …"

The 2nd Respondent being aggrieved by these orders and in particular, Order No 5 thereof filed this application by way of Notice of Motion seeking to set aside and discharge Order No 5 of the ex parte order, made on 30th November, 2005 on the following grounds that:-

(a) The aforesaid Order No. 5 of the said ex parte Orders made on 30th November, 2005, namely, the Order directing that "the Grant of leave herein do operate as a Prohibition restraining the 1st and 2nd Respondents jointly and severally by themselves, their agents, employees, servants, officers or otherwise however from pending (sic - suspending?), withdrawing, revoking or interfering with any manner whatsoever with the Applicant, license even after the deadline given of 6th December, 2004 given by the 2nd Respondent for the payment of the balance of US $12 million pending further orders in Miscellaneous Civil Application No. 1621 instituted by the 2nd Interested Party herein, Kenya National Federation of Co-operatives Limited was made in excess of the limited jurisdiction of this Honourable Court under Order LIII, Rule 1 (4) of the Civil Procedure Rules.

(b) The effect of the said Order No 5 of the ex parte orders issued herein on 30th November, 2004 is that the 2nd Respondent against whom no allegations whatsoever of any illegality, procedural impropriety or Wednesbury irrationality have been made by the Applicant, has been restrained ex parte, by an order of this Honourable Court from carrying out its statutory duties and regulatory functions under the Kenya Communications Act, 1998 and the subsidiary legislation made thereunder and the Applicant has been granted an immunity, from the regulatory process and the supervision of the 2nd Respondent.

(c) The Applicant has wrongfully sought to exploit the full said Order No 5 of the ex parte Orders issued herein on 30th November, 2004 by threatening contempt proceedings against the 2nd Respondent for failure to comply with its peremptory demands.

(d) It is just and equitable to grant relief.

The hearing of this application took a very long time as the parties through their Counsels made fairly lengthy and elaborate submissions. It was heavily contested demonstrating the importance of the subject matter and issues herein. It involved not less than 5 Counsel, many of them Senior Counsel who were assisted by their instructing Counsel or assistants. Their contributions and input were of great usefulness and assistance to the Court. I am truly grateful to all of them.

Upon considering the application and Counsel's submissions, I find that the only substantive question is whether Order 5 of the Court order made on 30th November, 2005 was in excess of this Court's jurisdiction under the provisions of Section 8 (2) and 9, Law Reform Act, Cap 21 and Order LIII, Rule 1 (4) of the Civil Procedure Rules. In this regard, I think that it is necessary that I revisit the decision of the 1st Respondent which is sought by the Applicant to have quashed by an order of Certiorari. It is from this

decision and initial prayer that all consequential and/or intended prayers flow. On 27th November, 2005, the Minister of Information and Communications then, the Hon. Raphael Tuju made a Press Statement in the following terms:-

" ***PRESS STATEMENT***

GOVERNMENT OF KENYA CANCELS THIRD MOBILE LECENCE AWARD TO ECONET – LAUNCHES THE PROCESS AFRESH.

The government has today nullified the issuance of the license for the third mobile operator to Econet Wireless Kenya Limited. All the money so far paid towards this license will be refunded immediately.

After having studied the file and following the paper trail on the matter of licensing, it has become apparent that the local partners are not able to raise the money that will enable them to hold shares that conform with the shareholding requirements as per the Government's policy for the sector.

The consortium partners have not been able to resolve their differences and the matter has now ended up in Court. The shareholding structure and information that had been furnished by the consortium have materially changed or were false in the first instance.

Besides, Econet Wireless Kenya Ltd has been unable to make payment, according to set deadlines. All discretionary extensions that may have been accorded to them are hereby rescinded.

The Government is concerned that if the matter is going to drag on in court on manners of shareholding before the licensee has even started business, then the agenda of liberation and introduction of competition in the sector will be unduly delayed. It has, therefore, been decided that the licensing procedure will have to start afresh.

The Director General CCK has been instructed to take necessary action.

Hon. Raphael Tuju

Minister for Information and Communication".

Prayer 1 of the Application sought to have the application certified as urgent. Prayer 2 sought the dispensation of the Notice to the Registrar under Order LIII Rule 1 (3) to be effected due to the said urgency. Prayer 3 sought the first main and requisite order for leave for the Applicant to file the application for judicial review orders. The orders intended to be filed were for Certiorari, Mandamus and Prohibition in respect of the aforesaid decision of the Minister. Prayer 4 was for the grant of leave to operate as a stay of the decision by the 1st Respondent contained in the Press Statement. I granted all the 4 prayers upon considering the application. It is noted that in most judicial review applications for leave the orders usually sought would have stopped there: Prayers for costs always are incidental.

It is trite law, that there can be no order of stay (that the grant of leave operate as a stay) without leave being granted in the first place. It is my view that the Court must consider the prayers for leave first on its merits. Upon consideration on merit and exercising its discretion, the court may grant or deny leave to an applicant. If the court decides to grant leave for the filing of the application, then if there is a prayer that, the leave operate as a stay, it would consider the same again on merit and taking into account all the circumstances. Just like the grant of leave, the grant of stay is a matter of judicial discretion.

In the present case, the Court granted both leave and stay. Should that have been the end of the matter? Was this Court entitled to consider Prayer No 5? Did this Court have jurisdiction to consider Prayer No 5 after, in essence, having granted leave and stay? And if the Court had jurisdiction to consider Order No 5 after grant of leave and stay, did it have jurisdiction to grant the Orders in the terms that it did?

Order LIII, Rule 1 (4) provides as follows:-

"***(4) The grant of leave under this rule to apply for an order of Prohibition or an order of Certiorari shall, if the Judge so directs operate as a stay of the proceedings in question until the determination of the application or until the judge orders otherwise".***

After I granted leave, I directed that the said grant herein operate as a stay of the decisions made by the 1st Respondent as contained in the Press Statement dated 27th November, 2004 pending the hearing and determination of the substantive Application for Judicial Review. Upon consideration of the application herein, and submissions by Counsel, I am now of the view that the application had been spent and the court ought to have stopped there. This is because the Court had granted all possible and available reliefs/orders available at this stage under the provisions of our order 53 of the Civil Procedure Rules. Under Order No 4, I had already granted an order of stay of the decision of the Minister, the 1st Respondent. The effect of the said order of stay was that the nullification (indeed if this was the effect of the decision) of the Applicant's License had been suspended, or held in abeyance and the same was in law to remain alive and in force. The question of compliance with the said order of stay and/or enforcement could only come up subsequently after the order was served on the Respondents.

Order 53 of the Civil Procedure Rules does not strictly provide for any leave that can operate as a Prohibition or as any other of the substantive judicial review orders, certiorari and mandamus. I say so, in case, the word "Prohibition" in Order No 5 was intended to refer to a judicial review order or relief of "Prohibition" as contemplated by the Law Reform Act and Rule 1 (1) of Order 53 of the Civil Procedure Rules. If this is the case, then clearly in the absence of such a provision, this court lacks the jurisdiction to direct that the grant of leave operates as such in any manner whatsoever.

On the other hand, if the term "Prohibition" was only used as an English word which ought to be given its ordinary and natural meaning as intended and used grammatically and in its ordinary usage in the English language, then we come to the next question, what is the nature and effect of Order No 5? Did this Court have jurisdiction to grant it?

I have carefully perused and examined the content, terms, meaning, tenor and effect of Order No 5. I have come to the conclusion and find that it is an order of a restraining nature that goes well beyond the orders of stay granted in Order No 4 herein. The said order has the effect of restraining the 1st and 2nd Respondents jointly and severally by themselves, their agents, employees, servant, officer or otherwise from pending, withdrawing, revoking, canceling or in any manner whatsoever interfering with the Applicant's license even after the deadline given of 6ht December, 2004 given to the 2nd Respondent for the payment of the balance of US $12 million pending further orders in ***Miscellaneous Civil Application No. 1621 of 2004*** instituted by the 2nd Interested Party herein, Kenya National Federation of Co-operative Limited. A careful reading and interpretation of the said order makes me come to the inevitable conclusion that Order No 5 in its terms amounts to an injunction against the 1st and 2nd Respondents. It is not and cannot be a mere stay of the decision of the Minister. Its terms are positive, explicit and extremely wide. It contains the words "restraining" and goes to list the acts or matters to be restrained against. The Order No 5 speaks for itself. It can be nothing else than a wide, extensive and sweeping injunction.

Having found that Order No 5 is indeed an injunction, I am of the view that the Law Reform Act and Order 53 of the Civil Procedure Rules of Kenya do not provide for the grant of Injunctions, whether of a temporary or final nature. In England, before the legislation, the Supreme Court Act, 1981, the English judiciary through judicial interpretation and innovation many a times found ways of granting orders of injunction against public bodies and even Government Minister in judicial review proceedings. It was not without judicial controversy. This lead to the enactment of the aforesaid legislation which expressly introduced the remedies of injunctions, declarations and damages in judicial review proceedings in England – See **M vs Home Office & Another (1993) 3 AII E R 537**.

In Kenya, today, we do not have such a legislation and this court therefore does not have any jurisdiction

conferred on it expressly to grant injunctions in judicial review proceedings. The Applicant argued that the Civil Procedure Rules, is not exhaustive and the Legislature is incapable of contemplating all situation that may arise. The court was invited to invoke Section 3 (a) and apply its inherent jurisdiction. That I have to navigate and deal with situations depending on their peculiar circumstances. In this case, is this Court ready to be judicially ingenious and innovative to grant an injunction in judicial review proceedings where the situation requires judicial intervention as suggested by the Applicant's Counsel? I do not know because the Applicant denied this Court the opportunity to consider whether this was an appropriate case for such judicial activism. The Applicant was not candid enough or bold enough to expressly and openly declare that it sought injunctive orders. Instead it hid behind euphemisms like "stay" and "prohibition" when constructing the terms of Order No 5. Even when challenged, through this application, it subtly changed its position that Order No 5 was not an injunction right at the end when it said that it did not matter what the order was called provided it met the desired result and needs. This Court will not on its own go on a voyage of exploration or risk the danger of departing from long established principles by this Court and possibly by higher precedent, without being openly and courageously invited or challenged to venture into such untrodden frontiers. In such event, this being an adversarial system of law, the Court must be moved directly and given all the necessary justifications to take a new course in our jurisprudence. In this application the prayer for the injunction was "hidden" in a different clothing and innocuously tucked away as a consequential order and made to appear as an integral and necessary part of the order for leave and stay in the mind of the Court at the delicate ex parte stage of judicial review application when the Certificate of Urgency is many a times treated by the Court, with perhaps, a little more sacredness and solemnity than it would otherwise deserve. I do not see how I can invoke the Court's inherent jurisdiction in such circumstances.

Lastly, apart from the nature of Order No 5, there is the question of its extent and effect. Order No 5 is intended to be in force:-

"… ***pending further orders in Miscellaneous Civil Application No. 1621 of 2004 instituted by the 2nd Interested Party herein, Kenya National Federation of Co-operatives Limited".***

This means that Order No 5 cannot ever be discharged in these proceedings! If the order were to remain in force then until the hearing of these proceedings, it cannot be discharged until orders to the contrary are made in ***Miscellaneous Application No 1621 of 2004***. It is not known when such or any orders will be made in ***1621 of 2004***. It is not known when the said case shall be heard or determined. The 1st Respondent is not party in 1621 of 2004 and in any case, it is not his decision which is under challenge therein. On the other side of the coin, the 2nd Respondent did not make the decision being contested in the present application and there are no allegations of illegality, impropriety or irrationality which are made against it in this application yet it has been restrained and injuncted in respect of some alleged deadline of payment of US $12 million which, from the face of the Minister's Press Statement is not an issue evident therefrom.

Upon consideration, I am of the view that in effect, the Order No 5 to all intents and purposes is an ex parte ***quia timet injunction*** disguised as "an order of leave operating as a prohibition". This Court has no jurisdiction to grant such an order in judicial review proceedings and if it had, it has been granted improperly and in breach of the principles of natural justice as there is no returnable date for an inter partes hearing between the parties. It is a permanent injunctive order which was given in violation of all the cardinal principles of natural justice. To allow it to continue to be in force for a minute longer would amount to a total miscarriage of justice. This Court of course, cannot allow this to happen. This court is supposed to be a harbinger and fountain of justice and not a perpetrator of injustice. This Court can correct its errors or wrongs and hence the reason, inter alia, Legislature conferred on it, its inherent jurisdiction in Section 3 (A) of the Civil Procedure Rules and in the Constitution. It is also implied in any situation where it had jurisdiction to deal with any proceedings or matter. This Court is willing to do that with all humility.

For the foregoing reasons and without any hesitation, I do hereby set aside and discharge Order No 5 of the ex parte orders that I made on 30th November, 2004. The ex parte Applicant shall pay the costs of

and occasioned by this application to the Respondents, 1st Interested Party, Kenya Telecommunications Investment Group and any other interested party who was served with the present application and/or the application for contempt and who participated in the hearing of the former.

Dated and delivered at Nairobi this 13th day of April, 2006.

M K IBRAHIM

JUDGE