

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 77 OF 2009

SMART GLOBAL LIMITED.....PLAINTIFF/APPLICANT

TANZANIA COMMUNICATIONS

REGULATORY AUTHORITY.....DEFENDANT/RESPONDENT

R U L I N G

MRUMA, J

The Plaintiff smart Global Limited has instituted this suit against the Defendants Tanzania Communication Regulatory Authority (TCRA) seeking for a declaration that it is a legal and valid holder of an application service license for operating the allocated frequency spectrum between 2573 – 2613 in band 2.5 GHz with a total band width of 40 MHz and 10238 – 10252 MHz/10588 – 10602 MHz and 10252 – 10266/10602 – 10616 MHz in the band 10.5 GHz with a total band width of 56 MHz or in the alternative the Defendant's action purporting to withdraw the said licence is a breach of the contractual agreement and is illegal.

Secondly for the order that the Defendant specifically perform its contractual obligations and honour the license issued to the Plaintiff for the above spectrum and for an order that the Defendant pay the Plaintiff general damages to be assessed by the court.

Together with the plaint the Plaintiff filed a chamber summons under certificate of urgency for an interim order restraining the Defendant/Respondent from allocating/or allowing any other operator to use the frequency in the said spectrum. The chamber summons which is supported by the affidavit of one Shabir Shamshudin Abji was taken at the instance of FB Attorneys, the Plaintiff's/Applicant's Counsel.

On 19/10/2009, the Respondent/Defendant filed a notice of preliminary objection contending that;

1. Both the Applicant's affidavit and reply to counter affidavit affirmed by one Shabir Shamshudin Abji is incurably defective for offending the mandatory provision of Order XIX rule 3 of the Civil Procedure Code 1966 (Cap 33 R.E. 2002).
2. That the honourable court is improperly moved to grant an interlocutory order compellay the Respondent to produce in court documents pertaining the frequency spectrum 2573 - 2613 MHz in the band 2.5 GHz with a total band width of 40 MHz and 10238 - 10252 MHZ/10588 - 10602 MHz and

102252 – 10266/10602 – 10616 in the band 10.5 GAZ with a total band width of 56 MHz.

Accordingly the Respondent's Counsel is requesting this court to strike out the application with costs. Following the expunge of prayer No. 3 from the chamber summons this court is now requested to do the following:-

1. To make a finding that there exists a good cause for granting interim temporary injunctive Orders against the Respondent not to allocate and/or allow any operator other than the Applicant use of frequency in the spectrum between 2573 – 2613 MHz in the band 2.5 GHz with a total band width of 40 MHz and 10238 – 10252 MHz/10588 – 10602 MHz and 10252 – 10266/10602 – 10616 MHz in the band 10.5 MHz with a total width of 56 MHz, whose application for use of the same was submitted for consideration after 24th April 2007 and/or to whom allocation in part or full or by implication for the frequency was made after 24th April 2007 pending the hearing and final determination of this application.
2. To grant a temporary injunction restraining the Respondent from allocating and/or allowing any operator other than the Applicant use of any frequency in spectrum between 2573 – 2613 MHz in the band 2.5 GHz with a total band width of 40

MHz and 10238 – 10252 MHz/10588 – 10602 MHz and 10252 – 10266/10602 – 10616 MHz in the band 10.5 GHz with a total band width of 56 MHz, whose application for use of the same was submitted for consideration after 24th April 2007 and/or whom allocation in part or full or by implication for the frequency was made after 24th April 2007 pending the hearing and final determination of the main suit.

3. Provide costs of this application and

4. Give any other order(s) as it may deem fit and just to grant.

As stated earlier, the application is supported by an affidavit deposed by one Shabir Shamshudin Abji, the Plaintiff's Managing Director. The deponent therein avers that on 7th August 2006, the Applicant applied to the Respondent to be issued with an Application Services Licence for spectrum allocation in 2.5 GHz (40 MHz minimum though 120 MHz preferred), and in 10.5 GHz (14 MHz minimum though 28 preferred) for operation throughout Tanzania. The Plaintiff/Applicant paid an application fee of Tshs.65,000.00 (annexture FB1). The Respondent/Defendant invited the Plaintiff to make a brief presentation (on 27th September 2006) of its technical and business plan of service to be rendered the presentation was done on 26th October 2006. On 6th November 2006, and upon requirement the applicant applied for a Numbering License. The application was duly approved by

the Respondent and an invoice No. INV 0000152 of 10th November 2006 for allocation fee for VIOIP numbering resources for the amount of USD.2000 was issued. The Applicant was advised by Mr. Kebacha an officer of the Respondent dealing with the matter to make the said payment only upon the Application Service License being used.

On 24th April 2007, the Respondent communicated formal approval for issuance of Application Service License and enclosed the draft license for duly completion and return after completing (annexture FB5).

On 23rd August 2007 the Applicant paid USD.1000 towards Application Service License fee for the year 2007/2008. Thereafter the Defendant informed the Plaintiff that frequency band between 2573 – 2613 MHz has been ear marked for the Plaintiff. The Plaintiff paid USD.25,000 as fees thereof.

On 31st August 2007, the Defendant/Respondent informed the Plaintiff/Applicant that frequency band between 2573 – 2613 MHz in the band 2.5 GHz for wireless access and 10238 – 10252 MHz/10588 – 10602 MHz and 10252 – 10266/10602 – 10616 MHz have been earmarked for the Plaintiff. The Respondent/Defendant demanded a fee of USD.58,000.00 which included the USD.25,000 previously demanded and paid. In aggregate the Plaintiff paid USD.83,000.00 for the year 2007/8 as a result of which he overpaid USD.25,000.00 (annexture FB7).

By its letter dated 23rd January 2007 with reference No. TCRA/F.10/1/183 the Respondent/Defendant demanded USD.53,000 as fees for spectrum charges.

Upon the Plaintiff seeking clarifications on the issue, the Defendant confirmed receipt of the payment for the year 2007/08 and verbally advised the Plaintiff to adjust the double payment of USD.25,000.00 towards the following year's fees. By a letter dated 4th June 2008 the Plaintiff duly paid the balance of USD.33,000.00 being fees for the year 2008/2009, (annexture FB9).

On account of all those payments the Plaintiff/Applicant is considering itself the legal and valid holder of an Application Services License for the frequency spectrum between 2573 – 2613 MHz in the band 2. GHz with a total band width of 40 MHz and 10238 – 10252 MHz/10588 – 10602 MHz and 10252 – 102616 MHz in the band 10.5 GHz with a total band width of 56 MHz.

On 21st August 2009, the Applicant was verbally informed that the Respondent has withdrawn its license given to the Applicant on the ground that the Applicant has not paid the license fee. Consequently the Applicant filed civil suit No. 77 of 2009 and this application.

The Respondent filed counter affidavit deposed by Denis Melchior Libena, its Company Acting Director of Information and Communications Technology. He states therein that:-

"4...despite being invoiced the applicant neglected and/or failed to pay the necessary fees within the prescribed period of thirty (30) days without an apparent reason hence disqualifying itself for allocation of said VOIP numbering range. The Respondent also avers that failure by the Applicant to pay for the said allocation fees for VOIP numbering resources was not due to the alleged advise of Mr. Johnson Safiel Kibacha but negligence on the part of the applicant which disqualified it from the allocation of the said VOIP numbering resources.

8. That the contents of paragraph 10 are admitted to the extent relates to the payment of a balance of USD.33,000.00 being frequency user license fee for 2008/9. However, I aver that this amount was paid beyond the period prescribed in the invoice of 23rd January 2008 and after the applicant's reminder and intention to withdraw the offer of licence for application service which set a deadline for payment to be 25th March 2008 having been communicated to the applicant (annexture TCRA 1).

12. with regard to the contents of paragraphs 14 and 15, I state that there was no any good reason for answering

similar questions asked by the applicant now and then after having officially communicated to him the respondent's decision to withdraw its intention to grant the application services license as well as allocation of frequency as long as 11th August 2008. However, when the applicant kept on insisting, on 23rd September, 2009 a letter was written again to the applicant insisting that the respondent had long withdrawn its intention to issue the National Application Service License as well as allocation of frequency. (annecture TCRA 2).

It that I state further that for one to be allocated frequency, payment of frequency spectrum user fee alone is not enough, as the applicant is required to manifest his seriousness in utilizing allocated frequency by investigating and starting rocking out promptly."

At the hearing the Applicant was represented by a team of Advocates lead by Mr. Chandoo. Others were Mr. Ishengoma and Mr. Fayaz learned Advocates. The Respondent was represented by Mr. Chaula learned Advocate who was accompanied by Mr. Marco Nsimba.

The law is that the granting of a temporary injunction is a judicial discretion which court must exercise judiciously upon considering the conditions below:

First whether the applicant has shown a prima facie case with a probability of success.

Secondly, that the applicant would suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt on any of the above two, it will decide the application on the balance of convenience. See Geilla Vrs. Cassman Brown & Co. Ltd [1975] E.A. 358.

The main purpose of a temporary injunction is to preserve the status quo pending the disposal of the main suit. See Noor Mohamed Jama Mohamed Vrs Kasamali Virji Nadhan [1953] 29 E.A. CA 8 and also Order XXX VII rule 1 of the Civil Procedure Code [Cap 33 R.E. 2002].

Therefore first and foremost, it is necessary to identify the status quo. In his affidavit, Shabir Shamshudin Abji avers that the Applicant applied for and was granted with an application of services license for spectrum allocation now in disputed (see paragraphs 2, 3 and 6 of the supporting affidavit). In its counter affidavit the Respondent admitted the contents of paragraph 2, 3 and 6 of the affidavit (see paragraph 3 and 6 of the counter affidavit). The Respondent does not say that the license was not granted to the Applicant as alleged. No evidence was adduced to counter what is alleged by the Applicant. In the circumstances I find that paragraph 2, 3 and 6 of the supporting affidavit have

not been controverted therefore what is averred therein is nothing but the truth. Thus by its letter with Ref. No. TCRA/C.110/67/18 dated 24th April 2007 the Defendant/Respondent communicated formal approval for issuance of application services license. I would hold this to be the status quo as of today. I disregard a statement from the bar that actually the frequency has been allocated to other operators. I disregard this statement because a submission from the bar is not evidence.

Regarding the 1st test whether the Applicant has a prima facie case with a probability of success. It is my considered view that the practice should be to consider whether the Applicant has raised a serious question to be tried. This is because to declare that the applicant has shown a prima facie case with a probability of success in the main suit before the practise are heard may amount to pre – judging issues. For now, I would hesitate to declare that before the hearing of the main suit commences. When that stage is reached, court will make an appropriate decision on the matter. As of now, I may say there are equal chances of success or failure by either party. A prima facie case has to be disclosed in the Applicants pleadings in the main suit.

In the plaint, the Applicant, inter alia claim that:

"4. ...the plaintiff applied to be issued with an Application Services License for spectrum

allocation....that the plaintiff paid an application fee of Tshs.65,000.00.

5. That the defendant invited the plaintiff to make a brief presentation of plaintiff's technical and business plan of services to be rendered.

6. That the plaintiff applied for numbering license which was duly granted.

8by letter ref. No. TCRA/C110/67/18 of 24th April 2007 the Defendant communicated formal approval for issuance of application services license and enclosed the draft license for due completion and return....."

10. fees towards application service license for year 2007/2008 was duly paid.....In aggregate the plaintiff paid USD.83,000.00 for the year 2007/2008.

Annexture FB – 1 to the plaint is a receipt No. 003858 dated 13/9/2006 issued by the Respondent to the Applicant for the sum of Tshs.65,000.00 being payment in respect of Application Services. FB 2 is correspondences between the Respondent and Applicant in to presentation of business and technical plans for application services license.

Annexture FB – 5 is a formal communication to the Applicant that the Minister has granted the Respondent authority to

approval to issue the Applicant an application service license. Considering all the above, I find that there are serious issues on the right of the parties to be investigated in the main suit.

The next issue is whether the Applicant would suffer irreparable injury which an award of damages cannot adequately atone if the injunction is not granted and later the Applicant turns out to be successful in the main suit. In this regard the Applicant must show that he has a claim in the main suit which even if he is awarded damages, that would not be adequate compensation for the loss he is to suffer if the injunction is refused.

In paragraph 18 of the supporting affidavit it is averred that:-

"18 that there are triable issues involved in the pending suit. I state further that on the Applicant stand to suffer a lot if this application is withheld than it will do on the part of the respondent if the application is granted. I state further that the applicant will suffer irreparable loss if these particular frequency spectrum are allocated or operated by a third party which cannot be atoned by monetary compensation."

It should noted here that the Applicant's interest is have the licence as specified in its application to the Respondent. The Respondent's main interest is to make sure that the operator pays necessary fees and all charges related to the licence. The Applicant's claim in the main suit cannot be easily atoned by

award of damages while from the pleadings the Respondent loss or injury can be atoned by award of monetary damages. In the light of all the above, I find that the Applicant has been able to show that it will suffer irreparable loss in the case the main suit is decided in its favour when the spectrum has already been allocated to a third party.

The last test is on a balance of convenience. Where there is doubt the court will decide an application on a balance of convenience. This test is resorted to when the court is in doubt on any of the first two issues. Without any doubt my findings on the first two tests have been in the Applicant's favour. That notwithstanding I find it convenient to decide the issue of balance of convenience. The Respondent's argument is that the balance of convenient tilts in their favour because the frequency has already been allocated to a third party and that in any event the Applicant can get monetary compensation. The impression I get here is that the Respondent feels that it has wide discretion to allocate the frequency to any person it wishes. That might be true, but I think it must be remembered that any judicial discretion must be exercised judiciously. Here the question (in the main suit) will be whether the Defendant exercised its discretion judiciously. Otherwise I do not see what the Respondent validly stand to lose in the event that the status quo is enforced by the court. They cannot be heard advocating for a third party whom they never mentioned in the counter affidavit

which is their only evidence before this court as far as this application is concerned. The application is concerned. The Applicant does not have to fold its hands and wait for monetary compensation for violation of its presumed rights simply because the Respondent has allocated it to a third party. The balance of convenience is therefore in favour of the temporary injunction being granted.

For reasons stated above, I would grant the remedy sought herein, and order restraint on the part of the Defendant from allocating and/or allowing any operator other than the Applicant use of any spectrum between 2573 – 2613 MHz in the band 2.5 GHz with a total band width of 40 MHz in and 10238 – 10252 MHz/10588 – 10602 MHz and 10252 – 10266/10602 – 10616 MHz in the band 10.5 GHz with a total band width of 56 MHz whose application for use was submitted for consideration after 24th April, 2007, and/or to whom allocation in part or in full or by implication for the frequency was made after the 24th April 2007 pending the hearing and determination of the main suit or as this court may decide for a just cause costs of this application will be in the cause.

A.R. MRUMA

JUDGE

3/11/2009

Date 3.11.2009

Coram: Hon. A.R.Mruma, Judge

For the Plaintiff – Mr. Fayazi for the Applicant.

For the Defendant – Mr. Chaula for respondent.

CC: R.Mtey.

COURT: Ruling delivered.

A.R. MRUMA

JUDGE

3/11/2009

Mr. Chaula:

There is other Preliminary Objection raised by us we are already to argue the same either by written submissions or viva voce.

Mr. Fayazi:

We suggest that the same be disposed by way of written submissions.

COURT: Let the Preliminary Objection against the main suit be argued by way of written submissions as follow.

Order: Mr. Chaula to file his submissions by 17th .Nov.2009 Mr. Fayazi to file his reply by 1st .12.2009. Reply (if, any) by 10th .12.2009 mention before Registrar on 11.12.2009 with the view of fixing it for ruling date which will be communicated to the Registrar.

A.R. MRUMA

JUDGE

3/11/2009

I Certify that this is a true and correct
of the original/order Judgment Rulling

Sign:

Registrar, Commercial Court. DSM.

Date: 26/01/100