



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 10 OF 2015**

**GOTV KENYA LIMITED.....PLAINTIFF**

**VERSUS**

- 1. ROYAL MEDIA SERVICES LIMITED**
- 2. NATION MEDIA GROUP LIMITED**
- 3. STANDARD GROUP LIMITED.....DEFENDANTS**

**RULING**

1. This is a ruling on six (6) applications. These are, the Plaintiff’s Notice of Motion dated 19<sup>th</sup> January, 2015 seeking injunctive orders against the Defendants to restrain them from airing certain advertisements. The second is a Motion by the Defendants dated 30<sup>th</sup> January, 2015 seeking the discharge of the exparte orders made on 20<sup>th</sup> January, 2015 in favour of the Plaintiffs and for the dismissal of the Plaintiff’s application dated 19/01/2015. The third application is a Motion on Notice by the Defendants to strike out the suit for disclosing no reasonable cause of action and for being an abuse of the court process. It is also dated 30<sup>th</sup> January, 2015.

2. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> applications are dated 20<sup>th</sup> January, 2015 and 30<sup>th</sup> January, 2015, respectively filed in **HCCC No. 15 of 2015 Star times Media Kenya Ltd Vs Royal Media Services Ltd & 2 others** seeking similar orders as the first three Motions in this suit. The applications were heard together and it was ordered on 16<sup>th</sup> March, 2015 that one ruling be written in respect of all of them as they are all based on the same facts and seek similar reliefs. The Defendants in both suits are the same. While the Plaintiffs are different. This then is the ruling.

3. In their Plaints, the Plaintiffs claimed that they are Pay TV Channels who are properly licenced under the relevant laws in Kenya. That from 16<sup>th</sup> January, 2015 the Defendants falsely and maliciously published a certain advertisement on their television stations namely Citizen TV, NTV, QTV and KTN of and concerning the Plaintiffs the following words:-

*“Citizen TV, NTV, KTN and QTV wish to advise viewers that Star Times and GOtv are broadcasting their content without their consent. The four stations are taking the necessary steps to stop this infringement on copyright. This is to caution our esteemed viewers not to be duped into purchasing GOtv and Star Times pay TV set-top boxes as a means to access and watch Citizen TV, NTV, QTV an KTN..... The four stations will soon launch their own set –top boxes to distribute their free to air television signals to consumers.”*  
*(hereinafter “the impugned advert”)*

4. The Plaintiffs claimed that the said words were false and malicious and were defamatory to the Plaintiffs. It was contended that the Defendants having been parties to **SC Petition No. 14A, 14B and 14C of 2014 CCK and others Vs Royal Media Services Ltd** (hereinafter “the Supreme Court case”), they knew that the said words were false. That the Plaintiffs’ reputations had been injured and they had as a result suffered damages and had been brought into hatred, ridicule and contempt. They further contended that their six (6) year business good will and reputation in Kenya had suffered as a result of that advert. They prayed for a permanent injunction to restrain the Defendants from continuing with the publication of the said advertisement, a declaration that the aforesaid publication was abuse of the Defendants’ dominant position in the television broadcasting industry and for general and aggravated damages. Simultaneous with the filing of the Plaintiffs, the Plaintiffs filed applications for temporary orders of injunction against the Defendants. Those applications were dated 19<sup>th</sup> and 20<sup>th</sup> January, 2015, respectively.

5. I will start with the applications dated 30<sup>th</sup> January, 2015 seeking the striking out of the Motions dated 19<sup>th</sup> and 20<sup>th</sup> January, 2015, respectively and the suits generally. The applications were expressed to have been brought under Order 2 Rule 15(1) (a) (b) (c) and (d) of the Civil Procedure Rules. The Defendants contended that the suits disclosed no reasonable cause of action against them and they were predicated on a misrepresentation of facts; that the Plaintiffs were required by the Communications Authority of Kenya to obtain the Defendants’ consent before airing the latter’s content; that the matters complained of were true; that there had been lack of full and frank disclosure by the Plaintiffs at the exparte stage; that the Plaintiffs had misrepresented the Supreme Court’s decision on the “Must Carry Rule” and that the suits were otherwise an abuse of the process of the court. The applications were expressed to be supported by the Replying Affidavits of Samuel Kamau Macharia that were on record.

6. It was submitted on behalf of the Defendants that the suits were seeking to perpetuate an illegality which is against public policy and that the suits were but frivolous and vexatious. The cases of **Priscilla Nyambura Vs Marathon Corporation of Kenya Ltd & Others (2008) eKLR** and **Trust Bank Ltd Vs Amin Co. Ltd & Anor (2000) KLR 164** were relied on in support of those submissions. The Defendants’ urged that the applications and suits be struck out.

7. On behalf of the Plaintiffs, it was submitted that the applications did not meet the threshold for striking out pleadings; that the suits raised serious issues that require determination through trial. It was further submitted that the applications were defective on account of having sought to rely upon evidence contrary to the provisions of Order 2 Rule 15

(2) of the Civil Procedure Rules. In the alternative, it was submitted that a cause of action in defamation had been disclosed in the suits. The cases of **D.T Dobie Vs Muchina 1982 KLR 1, Nancy Mwangi T/A Worthlin Marketers Vs Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 others 2014 eKLR** and **Dev Surinder Kumar Bij Vs Agility Logistics Ltd 2014 eKLR** were cited in support of those submissions. The Plaintiffs urged that the applications be dismissed.

8. At the body of the subject Motions, the Defendants stated:-

***“In so far as the application is brought under Order 2 Rule 15(1) (a) (b) (c) and (d), it is also supported by the Replying Affidavit of SAMUEL KAMAU MACHARIA filed herein, the nature of the case and other reasons to be adduced at the hearing.”***

On record, there was no separate Replying Affidavit sworn by the said Samuel Kamau Macharia. The only Affidavits by the said Samuel Kamau Macharia were the ones sworn on 30<sup>th</sup> January, 2015. A careful reading of the said Affidavits will show that the grounds set out in the applications to strike out the suits are sworn to in those Affidavits. Accordingly, I hold that the Replying Affidavits referred to in the said applications are the Supporting Affidavits of Samuel Kamau Macharia sworn on 30<sup>th</sup> January, 2015.

9. One of the grounds seeking the striking out the applications and suits is that they disclose no reasonable cause of action. Under Order 2 Rule 15(2), no evidence whatsoever is permitted for an application to strike out a pleading for disclosing no reasonable cause of action or defence under Order 2 Rule 15(1) (a). That provision is in mandatory terms. Acting contrary to that stipulation of the law is to disobey the law and the court cannot countenance such a conduct.

10. I am alive to the fact that apart from the ground for non-disclosure of a reasonable cause of action, the Defendants’ applications were also based on the other grounds under Order 2 Rule 15(1), that is (b) (c) and (d) which allow the adduction of evidence. I have always held the view that once, an Applicant invokes the court’s jurisdiction under Order 2 Rule 15 (1) (a) to strike out a pleading, he cannot be allowed to adduce evidence even if the other grounds in the application require the adduction of evidence. This is so because of the likelihood of there being prejudice by the court having to refer to the evidence adduced which might tend to show lack of non disclosure of a cause of action or pleading, thereby prejudicing the Respondent to such an application.

11. In the case of **Kyanzavi Farmers Society Vs Habib Bank Ltd NBI HCCC No. 388 of 2011 (UR)** the court had an opportunity to consider a similar scenario and held:-

***“In the case of OLYMPIC ESCORT INTERNATIONAL CO. LTD & 2 OTHERS –VS- PERMINDER SINGH SANDHU & ANOTHER (2009) ECLR the Court of Appeal when considering an application made under our former Order VI Rule 13(a) held that:-***

***‘We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 Rule 13 (1) (a) was in contravention of Sub rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score.’***

***I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15(1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).”***

12. I am of the same disposition and conviction. In so far as the Defendants invoked Order 2 Rule 15(1) (a) of the Civil Procedure Rules and sought to rely on the Affidavits of Samuel Kamau Macharia aforesaid, they run foul with the law and the applications are therefore incompetent, bad in law and incurably defective. They are for dismissal of which they are hereby.

13. I now turn to the other four (4) applications. These are two (2) for injunction and two (2) for discharge of the exparte orders made herein on 20<sup>th</sup> and 21<sup>st</sup> January, 2015 and dismissal of the injunction applications respectively. I will treat the Defendants applications for discharge of the aforesaid orders as the opposition to the injunction applications.

14. In the Supporting Affidavits of Lucky Waindi Kulecho and David Eyasi, the Plaintiffs contended that the Defendants are operators of the Free-to-Air Television stations, namely Citizen TV, NTV, QTV and KTN (hereinafter “the said Channels”) with a control of 85% television broadcast market in Kenya; that the said channels had published the impugned advert maliciously well knowing the same to be untrue. It was further contended that the Plaintiffs were carrying the Defendants content pursuant to “Must Carry” obligations under Regulation 14(2) (b) of the Kenya Information and Communications (Broadcasting) Regulations 2009 (hereinafter “the Regulations”).

15. It was the Plaintiff’s case that they were licenced Broadcasting subscription management service providers by the Communications Authority of Kenya (hereinafter “CAK”) that the Plaintiff’s services are accessed through digital Set Top Boxes (“STB’s”) sold throughout Kenya; that all users of the Plaintiffs’ STB’s are able to access the free-to-air broadcasts from amongst others, the Defendants in an unadulterated and unedited format. That the Plaintiffs had been directed by the CAK to carry the Defendants’ content under the must carry rule in public interest under Section 25(3) (2) of the Kenya Information and Communications Act Cap (411A).

16. The Plaintiffs contended that in the Supreme Court Case, it had been held that the broadcasting of the Free- to -Air broadcasting content by the Plaintiffs was not an infringement of the Defendant’s copyright. That in view of the holding in the Supreme Court case, the impugned advert was false, malicious and defamatory of the Plaintiffs. That in view of the dominant position of the Defendants in the television broadcast market, the Plaintiffs stood to suffer greatly as the advert was being published widely. They concluded that the Defendants’ actions amounted to economic sabotage; that the informartials were negative in nature and it was imperative that the injunctions sought be granted.

17. Mr. Njogu and Mr. Imende appeared for the Plaintiffs. Learned Counsel submitted that the Plaintiffs had satisfied the principles in the **Giella Vs Cassman Brown case (1973) EA 358** for the grant of the orders sought. That an injunction should be granted as there was malicious falsehood in the publication of the impugned advert – see **Gatley on Libel and Slander 12<sup>th</sup> Edn**; that the advert imputed copyright infringement and fraudulent scheme on the Plaintiff’s part; that the Plaintiff’s actions in rebroadcasting the Defendant’s content was within the Must Carry Rule under **Regulation 14(2) (b) of the Regulations**; that the Supreme Court case had settled the position of Must Carry Rule based on which the Plaintiffs had not infringed any of the Defendant’s copyright; that under Article 163 of the Constitution of Kenya the holding of the Supreme Court could not be varied by guidelines including those of the CAK. Learned Counsel cited the case of **Cheserem Vs Immediate Media Services (2000) 2 EA 371** for the proposition that the freedom of expression is not absolute.

18. In hi-lighting their written submissions, Learned counsels submitted that the Plaintiffs’ case was that they did not need any consent of the Defendants to broadcast the latter’s content based on Regulation 14 (2) (b) of the Regulations; that the Must Carry Rule is meant to buttress and enhance Kenyan’s rights under Articles 10,11,35 and 46 of the constitution. It was further submitted that there was no evidence that the Plaintiffs were cheating the public into buying their STB’s; that by virtue of the demand letter dated 22/01/2015 produced as “LWK3”, the Defendants were aware of the meaning and tenor of the holding in the Supreme Court case; that the CAK had held that the impugned advert was misleading; that the court should consider this to be two competing private commercial interests as opposed to the public interest of the right to know. On irreparable damage, it was submitted that the ability

to pay damages is a non-issue and the cases of **Brigadier Arthur Ndonj Owour Vs Standard Ltd 2011 eKLR** and **Nation Media Group & 2 others Vs John Joseph Kamotho & 3 others (2010) eKLR** were cited in support of those submissions. Counsels urged the court to uphold the injunctions in force.

19. The applications were opposed vide the applications dated 30/01/2015 seeking to discharge the interim orders and were supported by the Affidavits of Samuel Kamau Macharia sworn on the even date. In those applications; the Defendant's contended that the Plaintiffs had failed to make material disclosures in their applications for injunction; that the Plaintiffs had failed to disclose to the Court that CAK had vide its letters dated 14/11/14 and 3/12/14 clarified that the consent of the owners of the Free-to-Air channels (hereinafter "FTA channels") was required before rebroadcasting their contents by the Plaintiffs and other pay T.V stations; that by a letter dated 19/8/13 the Communication Commission of Kenya "CCK" had required all pay T.V operators to rebroadcast at least six F.T.A channels under the must carry rule; that this was the directive that was challenged by the Defendant's culminating in the Supreme Court case and decision.

20. The Defendants conceded that the Supreme Court case decided that the Must Carry Rule was consistent with Articles 7 and 10 of the Constitution and was not in violation of the intellectual property rights of the Defendants. That it is on this basis that the letters of 19/08/2013 and 15/11/13 were found to have been valid. That subsequently, the CAK issued fresh guidelines vide a letter dated 12/11/14 in terms of Rule 29 of the Regulations which required that the pay TV Operators now required the consent of the FTA channels under the Must Carry Rule to rebroadcast the latter's content; that vide a letter dated 3/12/14 the CAK clarified that the must carry channels were KBC and any other five (5) FTA channels; that on 31/12/2014 the Defendants made a demand on the Plaintiffs to stop carrying their FTA channels without their consent. That all these letters were not disclosed to the court when the Plaintiffs came to court ex parte and obtained the orders of injunction; that the requirement for consent was only withdrawn by CAK in its letter of 26/01/2015 which was after the suits had been filed and orders obtained.

21. Mr. Kimani Kiragu and Mr. Issa appearing for the Defendants submitted that the contents of the impugned advert is factual as no consent of the Defendants had been obtained. In hi-lighting their submissions learned counsels submitted that the Supreme Court decision should be determined on the basis of the issues before it; that the issue of copyright was never before the Supreme Court; that Regulation 29 was never before the Supreme Court. That the Must Carry Rule changes from time to time. Counsels urged the court to grant the orders sought in the Defendants' applications dated 30<sup>th</sup> January, 2015.

22. I have carefully considered the Affidavits and written submissions on record. I have also considered the oral hi-lights of learned counsel and the authorities relied on. These are injunction applications and applications to discharge ex parte orders of injunction. Order 40 rule 7 of the Civil Procedure Rules provides:-

***"7. Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."***

23. In the case of **WEA Records Ltd Vs Visions Channel 4 Ltd and others (1983) 2 All ER – 589**, Sir Donaldson MR held at page 593 that:-

*“As I have said, ex- parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this – He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.”*

24. Later on, in the case of **Tate Access Floor Vs Boswell (1990) 3 All ER 303**, the court held at page 316 thus:-

*“No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court’s discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge the exparte order and may mark its displeasure, refuse the Plaintiff further inter-partes relief even though the circumstances would otherwise justify the grant of such relief.” (Emphasis added)*

25. From the foregoing, it is clear that under our Civil Procedure Rules, an exparte order can be discharged. The court has a wide discretion in a proper case to discharge its orders made exparte. Such discretion cannot however be exercised in a draconian manner. It has to be so exercised judiciously and in terms of the known legal principals. The two English cases cited above show that, such a jurisdiction is not unique to Kenya. It is also exercised elsewhere.

26. One of the known grounds for discharging an ex parte order is concealment of material facts or material non-disclosure. In the case of **The King Vs The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: Exparte Princess Edmond De Pligac (1917) 1 KB 486**, Warrington LJ stated at page 509 that:-

*“It is perfectly well settled that a person who makes an exparte application to the Court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that*

*fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it.”*

At pages 513 to 514, Scrutton L.J emphasized that:-

*“Now the rule giving a day to the Commissioners to show cause was obtained upon an ex parte application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement.”*  
(Emphasis added)

27. Later, in the case of **Brinks-MAT Ltd Vs Elcombe (1988) 3 All ER 188**, the Court set out what the court has to consider to be material non-disclosure as follows:-

*“In considering whether there has been relevant non disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) The nature of the case which the applicant is making when he makes the application. (b) The order for which application is made and the probable effect of the order on the defendant, and (c) The degree of legitimate urgency and the time available for the making of inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a Plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.... see *Bank Mellat v Nikpour at (91)**

*per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not for every omission that the injunction will be automatically discharged.*

*A locus poenitentiae (chance of repentance) may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.*

*.....when the whole of the facts, including that of the original non-disclosure, are before it, (the court) may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.”*

28. How do the foregoing principles apply in the present case" On 20<sup>th</sup> and 21<sup>st</sup> January, 2015, the Plaintiffs came to court ex parte and told the court that, the Defendants had published the impugned advert that was defamatory of the Plaintiffs. They told the court that the impugned advert was false and malicious and the same was completely at variance with the holding of the Supreme Court case. That the Plaintiffs did not require any consent from the Defendants to re-broadcast the television content of the Defendants in the Plaintiffs broadcasting which are pay TV owners. The impugned advert is set out at the beginning of this ruling.

29. At the exparte stage, the Plaintiffs referred the court to the decision of the Supreme Court in **Communications Commission of Kenya & 5 others Vs Royal Media Services Ltd & 5 others (2014) eKLR** and in particular paragraphs 247 through 253 of that decision. In those paragraphs, the Supreme Court of Kenya discussed and delivered itself substantively on the spirit and tenor of the “must carry rule” contained in Regulation 14(2) (b) of the Regulations. Of course that Court’s pronouncements are binding on all courts and institutions in this country. The findings in those paragraphs were that the “must carry rule” was in consonance with the objectives of the public interest and was a copyright exception. On that basis the exparte orders were made.

30. The Supreme Court’s findings aforesaid was based on a particular set of facts on which it had made findings. In paragraphs 224 and 225, of the judgment, that Court set the basis of its findings in paragraphs 248 through 253 as follows:-

**“224. Having determined, from the various agreements and letters between the parties, that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had given the 4<sup>th</sup> and 5<sup>th</sup> Appellants (Signet and PANG) consent to transmit their content, the next question is whether a “must carry rule infringes upon the intellectual property rights of a content-producer.**

**225. The genesis and basis of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contention is a letter dated 19<sup>th</sup> August, 2013. In that letter, CCK wrote to Wanachi Group informing them that under the provisions of Regulation 14(2) (b) they were required to provide local FTA channels from their platform, .....**”

31. From the foregoing, it is clear that the basis of the Supreme Court’s holding aforesaid on the must carry rule as at the date of that decision, 29<sup>th</sup> September, 2014, was the position declared by the regulator (CAK) (formerly CCK) and as obtaining then. That position was as contained in the letters dated 13/08/13 and 15/11/13 by CCK and produced by the Defendants as “SKM1” in the Supporting Affidavit of S.K Macharia.

32. Subsequent to the decision of the Supreme Court aforesaid, the Regulator (CAK) wrote two letters to, among others, the Plaintiffs dated 12/11/14 and 03/12/2014 which are crucial. In the letter of 12/11/14, the CAK wrote, inter alia, that:-

**“Dear Richard,**

**SUBJECT: CLARIFICATION OF MUST CARRY REQUIREMENT FOR PAY TV OPERATORS.**

**We refer to our letter dated 15<sup>th</sup> November, 2013 on the above subject matter and clarify that the must carry requirement shall be subject to the following additional conditions:-**

.....

.....

**That you shall obtain consent from the content producers for Must Carry Channels included in the pay bouquet, .....**”

33. The regulator in its own wisdom had decided, subsequent to the decision of the Supreme Court aforesaid that the Pay T.V broadcasters required the consent of the FTA channels to rebroadcast the latter’s content. These two letters, although in the possession of the Plaintiffs were not brought to the attention of the court. It must be borne in mind that the impugned advert starts with the issue of consent as follows:-

**“Citizen TV, NTV, KTN and QTV wish to advise viewers that Star Times and Gotv are broadcasting their content without their consent.....”**

34. From the material on record, it is clear that CAK had imposed a requirement of consent from the FTA channels in the application of the must carry rule that the Supreme Court had ruled on. That requirement was only withdrawn by another letter by CAK dated 26/1/2015. The acts complained of and which are the subject of the suit and applications for injunction occurred between 16<sup>th</sup> and 22<sup>nd</sup> January, 2015. The ex-parte orders were made in ignorance of the requirement of consent by CAK as aforesaid. To my mind, the two letters were too crucial at the ex-parte stage that the failure by the Plaintiff to disclose the same is fatal to the ex-parte orders. A party who comes to equity seeking an equitable remedy on an ex-parte stage MUST lay bare before the court each and every fact within its knowledge which in one way or the other might influence the court either negatively or positively in granting the orders sought ex parte.

35. To my mind, it is not for a party or its legal advisors to decide which matter is material and which is not. It is for the court to make that decision. If it were that it is the litigants or their legal advisers who are to determine materiality, they should as well grant themselves the orders without recourse to court. In the instant case, clutching on the Supreme court case aforesaid, the Plaintiffs clearly misled the court into granting the orders of 20<sup>th</sup> and 21<sup>st</sup> January, 2015. They concealed the fact that the Regulator CAK, had subsequent to that decision imposed additional conditions including the requirement of the consent of the FTA channels before rebroadcasting. It does not matter that the said condition was contrary to what the Supreme Court had held. It was, in my view, incumbent upon the Plaintiffs to disclose to the court those letters but argue that they did not represent the correct position of the law. As at the time the Plaintiffs came to court, those directions from the Regulator were in force and had not been set aside, leave alone challenged.

36. On that alone, even if it was the Plaintiff's contention that the new requirements by CAK were not binding on them as they went contrary to the Supreme Court decision, which I do not think is the case, the Plaintiffs were still duty bound to disclose the existence of the said requirements and put their contention forward. In any event, it is curious that both the Plaintiffs, although separately represented, having the knowledge of the existence of the said letters, both coincidentally failed either to produce them or make any reference to those letters. I hold that the court was misled into granting the orders of 20<sup>th</sup> and 21<sup>st</sup> January, 2015 by concealment of material facts. The Plaintiffs are not entitled to the said orders and the same are discharged forthwith and the Plaintiffs applications dismissed.

37. Even if I was to consider the Plaintiff's applications on merit, I still would not have allowed them. The Plaintiffs have not established a prima facie case with a probability of success in terms of **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) 1KLR 125**. As a general rule, courts are very cautious to grant injunctions in the interim in defamation cases. The caution is exercised due to the competing interests between private interest to reputation and the public interest to free speech and the right to know. It is for this reason that where there is a likelihood of a defence at the trial, the court will refuse to grant an injunction.

38. In **Cheserem Vs Intermediate media Services (2000) 2 EA 371 at page 371** the court held that:-

*“Here injunction is not treated in the way it is treated in other cases.....though the conditions applicable in granting an injunction as set out in the Giella Vs Cassman Brown & co. (1973) EA 358 generally apply; in defamation cases those conditions operate in special circumstances. Those conditions have to be applied together with the special law relating to the grant of injunctions in defamation cases where the court’s jurisdiction is exercised with the greatest caution so that an injunction is granted in the clearest possible cases.”*

39. In my view, where justification is pleaded, an injunction cannot issue unless the court strongly feels that it is unlikely that the defence may be sustained at the trial after the evidence has been tendered, tested and evaluated. In my opinion, the court will restrain itself from granting an injunction unless there is a strong prima facie evidence that the statement complained of is untrue.

40. In the instant case, the court has to concern itself with the circumstances prevailing between the 12<sup>th</sup> November, 2014 and the 20<sup>th</sup> January, 2015 when the Plaintiffs came to court. The basis of the Plaintiff’s case is that the impugned advert was untrue. I have already found that the first statement in the advert was true. The latter part of the advert talks of the Defendants making arrangements to provide their own Set Top Boxes for the general public to digitally access the Defendant’s contents. Of course the issue of whether there was infringement of copyright or not in the circumstances of the case, is a contentious matter. It is trite that where a matter is so contentious an injunction cannot issue.

41. In my view, without making any firm findings, I am satisfied that the Plaintiffs have not established a prima facie case with any probability of success. They have not shown on a prima facie basis the falsity of the impugned advert. They cannot prove that the Defendants would not be supplying their own STB’s in the near future. Being of that view, I need not consider the other principles in the **Giella case** as to damages and balance of convenience. In any event, the balance of convenience lies in favour of the Defendants informing their viewers when and how they intend to emerge from the quagmire of the digital migration monster which they find themselves in and supply their own STBs to be able to reach their viewers. In my view that is more of a public interest issue of the right to know than prohibiting the dissemination thereof to the benefit of the Plaintiffs’ private interests.

42. Accordingly, I make the following orders:-

- a. The Defendants’ applications to strike out the suits are hereby dismissed with costs.
- b. The Defendants applications for the discharge of the orders made on 20<sup>th</sup> and 21<sup>st</sup> January, 2015 are allowed with costs.
- c. Consequently, the Plaintiff’s applications dated 19<sup>th</sup> and 20<sup>th</sup> January, 2014 are hereby dismissed with costs to the Defendants.

This ruling also applies to **HCCC No. 15 of 2015 Star Times Media Kenya Ltd Vs Royal Media Services Ltd & 2 others.**

It is so ordered.

DATED and DELIVERED at Nairobi this 05<sup>th</sup> day of June, 2015.

.....

**A. MABEYA**

**JUDGE**



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