



**Adsite Limited v Sports Kenya (Environment & Land Case
277 of 2018) [2023] KEELC 18470 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 18470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 277 OF 2018
LC KOMINGOI, J
MARCH 16, 2023**

BETWEEN

ADSITE LIMITED PLAINTIFF

AND

SPORTS KENYA DEFENDANT

JUDGMENT

1. By a plaint dated June 12, 2018, the Plaintiff prays for judgment against the Defendant for;
 - a) An order for specific performance that the Defendant do perform its obligations under the lease agreement dated December 2, 2016.
 - b) A permanent injunction restraining the Plaintiff or its servants, agents, employees or any other person whatsoever from leasing, assigning, allocating and or granting permission to erect any advertising structures at the 3 subject billboard locations on LR No 209/6347(Nyayo Stadium) being the locations on the said land at the corners facing (i) Lusaka road roundabout, (ii)Bunyala Road roundabout and (iii) Kenol Petrol Station on Lang'ata road towards Madaraka round about to any person whatsoever other than the Plaintiff.
 - c) General damages.
 - d) Costs of the suit.
 - e) Such further or other orders as this Honourable Court may deem fit and just to grant.



2. The Plaintiff averred that vide a lease agreement dated December 2, 2016, it leased three billboard/ advertising locations from the Defendant within Nyayo stadium on LR No No 209/6347 for a renewable term of 5 years at an annual rent of ksh 1, 050,000/= with an increment of 5 % every 2 years.
3. It further contended that the Defendant has refused and or declined to perform its obligations thereof including giving the Plaintiff possession of the billboard locations and access to erect advertising structures thereon.
4. The Plaintiff averred that it learnt that the Defendant has allocated the same billboard locations to its competitor causing the Plaintiff to suffer loss and to be deprived of income as each of the billboard structures cost ksh 10 million to fabricate and they would have generated an income of ksh 1.5 million in advertisement every month.
5. The Defendant failed to enter appearance and or participate in the suit despite being served.
6. On April 27, 2021, the matter proceeded for formal proof. PW1, Samir Ramesh Shah, the Plaintiff's Chief Executive Officer testified. His witness statement dated December 2, 2018 was adopted as part of his evidence. The Plaintiff's bundle of documents dated December 2, 2018 were also produced as exhibits in this case. He stated that the Plaintiff does outdoor advertising. He produced a letter dated June 6, 2016 addressed by the Plaintiff to the Defendant seeking a lease of three billboard locations within Nyayo stadium. He also produced a letter dated June 30, 2016 which is a response from the Defendant confirming that the Plaintiff's request for three billboard locations had been approved.
7. He told the court that they drew a lease which was signed by both parties in respect of three billboard locations on LR 209/6347 situated at Nyayo stadium. It was his testimony that after executing the lease, the Defendant failed to grant the Plaintiff access to the suit property and no explanation was given. He produced photographs showing the Defendant installed its own billboards. He further stated that the Plaintiff lost about ksh 4.8 million per month as well as business infrastructure of their billboards.
8. The Plaintiff filed written submissions dated July 26, 2022.They raised the following issues for determination:-
 - a) Whether the Plaintiff and the Defendant have a binding enforceable contract, and if so, whether the Defendant breached the terms of the agreement.
 - b) Whether the Defendant should be ordered to perform its contractual obligations.
 - c) Whether the Plaintiff is entitled to damages as a result of the breach.
9. It was submitted that the Plaintiff has established that the lease between it and the Defendant was binding and enforceable since it meets the basic elements of a contract which are offer, acceptance, consideration, and the intention to create legal obligations. It relied on the cases of *Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd* [2020] eKLR, *William Muthce Muthami v Bank Of Baroda* (2014 eKLR and the case of *Caleb Onyango Adongo v Bernard Ouma Ogur* [2020] eKLR.
10. The Plaintiff also submitted that from the written correspondences between the parties herein, the letter dated June 30, 2016 amounted to an offer to the Plaintiff herein. It was further submitted that according to clause 13 of the lease agreement, the parties agreed that the Plaintiff would be allowed possession of the premises upon "delivery of a duly executed lease and upon compliance with the requirements herein..." .It was further submitted that the Plaintiff was also required to pay annual rent



- of Kshs 1,050,000/= thus the promise of possession of the suit premises in exchange for annual rent amounts to consideration, which became available after the contract was signed.
11. The Plaintiff relied on the case of *William Muthbe Muthami v Bank Of Baroda* [2014] eKLR to submit that the contract was not repudiated because there is no proof of noncompliance or non-performance on the part of the Plaintiff but the Defendant without due regard and lawful justification breached the lease agreement.
 12. The Plaintiff also relied on the case of *Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka and Others* [2016] eKLR, and *Gichinga Kibutha v Caroline Nduku* (2018) eKLR, to submit that it has proved its case despite the defendant's failure to file a defence.
 13. Relying on the case of *Amina Abdul Kadir Hawa v Rabinder Nath Anand & Another* [2021] eKLR, *Ole Meikoki v Ole Sirere* [1981] KLR 593 and *Consolata Anyango Ouma v South Nyanza Sugar Co Ltd* [2015] eKLR, the Plaintiff submitted that it is entitled to specific performance orders as damages alone may not be a sufficient remedy.
 14. It also submitted that once it made a disbursement of Kshs 100,000/- in accordance with the Defendant's instructions which payment was intended to reimburse the legal fees incurred by the firm of Ms Arusei and Company Advocates in drawing the lease agreement it begun the process of fabricating the three billboards with the purpose of mounting them following the execution of the contract. It added that it spent Kshs 30,000,000/- on the fabrication of the billboards, not considering labour and material expenditures and expected to make around Kshs 1,500,000/=in advertising revenue each month.
 15. It was also submitted that the Plaintiff applied for development permission and licenses to erect billboards in accordance with the provisions of *Physical Planning Act* Cap 286 Laws of Kenya.
 16. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed by the Plaintiff and the authorities cited. The issues for determination are:-
 - (i) Is the Plaintiff entitled to the prayers in the plaint?
 - (ii) Who should bear costs of this suit?
 17. From the evidence presented, the Plaintiff applied for advertising space within Nyayo National stadium premises vide its letter dated June 6, 2016. That application was considered by the Defendant who approved it *vide* its letter dated June 30, 2016. The Defendant also informed the Plaintiff that its appointed Advocates Arusei & Co Advocates would prepare the lease between the parties.
 18. There is on record a lease dated December 2, 2016 between the Plaintiff and the Defendant drawn by M/S Arusei and Company Advocates and executed by the parties herein. Vide the lease, the Defendant granted the Plaintiff three advertising slots on LR No 209/6347 Lusaka Road Roundabout for a period of three (3) years commencing on December 1, 2016.
 19. There is in evidence a cheque of kshs 100, 000/= paid to M/S Arusei & company Advocates by the Plaintiff. The Plaintiff averred that the said money was legal fees paid to said Advocates for drawing the lease herein.
 20. I note that at clause 13 of the lease agreement dated 2nd December 2016, possession of the suit premises would be given to the plaintiff upon compliance of the terms of the said lease. Clause 7 of the lease provided that rent payable would be ksh 1, 050,000/= per annum for the first one year of the term. There is no evidence that the said consideration was paid.



21. In *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR, the court stated; “Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well settled principles. The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”
22. Further, in *Gurder Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti* [1997] eKLR the court held; “When the Appellants came to Court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable of grant the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”.
23. The contract herein suffers for want of consideration. Therefore, an order of specific performance is not available to the Plaintiff who is in breach for failing to pay the rent due.
24. In conclusion, I find that the Plaintiff has failed also to prove its case as against the Defendant. Whoever asserts must prove.
25. I find that the Plaintiff has failed to prove that it complied with all its obligations in the said contract and that the Defendant is in breach. Section 107 of the *Evidence Act* has not been satisfied.
26. The upshot of the matter is that the Plaintiff has failed to prove its case as against the defendant on a balance of probabilities. I hereby dismiss the suit with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUARLLY AT KAJIADO THIS DAY 16TH OF MARCH 2023.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Wachira for the Plaintiff

No appearance for the Defendant

Mutisya- Court Assistant

