



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ENVIRONMENT AND LAND COURT
ELC CIVIL SUIT NO. 1140 OF 2014

PERMINUS KARANJA NGUGI.....PLAINTIFF

VERSUS

JULIE NJERI RAMDAS.....DEFENDANT

RULING

The application before the Court for consideration is the Notice of Motion dated **21st August 2012**, brought under **Order 40 Rule 2 4(1) and Order 51 of the Civil Procedure Rules** seeking for Orders that:-

1. *The Honourable Court be pleased to issue a temporary injunction against the defendant restraining the Defendant whether by herself or through her servants, employees and/or agents from interfering with the plaintiff's and/or its agents access to the premises for purposes of erecting/affixing the plaintiff's /applicants media flexes on the billboard structures, replacing content media thereon, cleaning ,carrying out repairs and/or management or maintenance of the billboard structure pending the determination of the suit.*
2. *That the defendant be restrained whether by herself, agent's servants and representatives or otherwise howsoever from granting, assigning and or otherwise granted to the plaintiff to anybody else in respect of the property known as **LR No 209/347/12** situate at Swiss Cottages Estate, Kileleshwa where the plaintiff has erected his bill Board structures until the expiry of the lease contract.*
3. *A mandatory temporary injunction do issue in favour of the plaintiff against the Defendant compelling the Defendant to allow the access to erect media flexes on his billboards at the Swiss Cottage Estate, Kileleshwa site **LR No 209/347/12**.*
4. *An order of specific performance do issue in favour of the plaintiff against the Defendant compelling the defendant to allow the plaintiff access to affix his media flexes pending the hearing and determination of this suit.*

This application is premised on the grounds stated on the face of the application and the Plaintiff's supporting affidavit in which he averred that he is in the business of selling outdoor advertising space on billboards and had erected billboards in various locations within the City of Nairobi and elsewhere within

the Republic of Kenya since March 2012. He also stated that on **31st October 2013**, the applicant and the Defendant herein signed an agreement allowing the Plaintiff to erect and exhibit two billboards on her premises known as **LR No 209/347/12**, situated along Ring Road, Swiss Cottages Estate Kileleshwa Nairobi. He stated that he paid the defendant **Ksh 1,000,000/=** as the consideration being **Ksh500, 000/=** at the time of signing the contract for the year 2014 and **Ksh 500,000/=** vide a postdated cheque for the year 2015 as provided in the agreement. He later got Scan group limited who advertised on one of the billboards during the month of August 2014 up to October 2014 and he was paid **Ksh 268,303.22**. Further that on 6th July 2014, the Plaintiff entered into a contract with Sleek Sourcing Limited wherein he was awarded a year contract for the second billboard which was set to commence on **2nd August 2014**, to the **12th July 2015** and he was paid rent of **Ksh.280,000/=**. That when he went to confirm the condition of the billboards and to mount the Scan group limited advertiser's media flex on the billboard structure he was denied access. In a letter dated 1st August 2014 he was informed that he could not access the billboards on the grounds that it was causing disturbances, commotion and a security concerns and that he had a case with one **Grace Wahito**, a strategic investor who was not privy to the contract herein. It is the deponent's averment that he tried to amicably settle the matter with the defendant but she had ignored his letter dated **8th August 2014**. That following that denial to access his billboards, Sleek Sourcing Limited terminated their contract causing him great loss and injury to his business reputation and that the defendant's action are borne out of sheer malice and bad faith and was bound to cause him irreparable harm if unchecked as the defendant's actions are likely to open a claim of damages against him for breach of contract. He further highlighted his losses from Scan group as **Ksh 12,878,554.56/=**, Sleek Sourcing Limited as **Ksh 13,440,000/=** and Structural costs at **Ksh 3,667,100** with tallied to **Ksh 29,985,654.56** he therefore sought for the prayers stated in the application.

This application is opposed. The defendant filed her replying affidavit on **8th October 2014**, wherein she stated that the suit property is a residential user with tenants but also ideal for billboard advertisements because of its strategic position and because of this they entered into a lease agreement with the defendant on **14th November 2012**, granting the plaintiff access and space to set up and install two billboards at the property. However the plaintiff had financial difficulty in putting up the billboards and got a partner and subsequently signed another lease agreement. After the signing of the agreement the billboards were erected in **December 2013**. However in July 2014, the two partners stated clashing on who had authority over the management of the billboards which caused a nuisance to her tenants. She explained **that Ms Wahito**, together with her agents flexed advertisement panels on the billboards, the next day the Plaintiff with his agents removed M/s Wahito's flexed adverts and put up his own and the following day they both met at the scene and caused nuisance to a point that the Police arrested them and took them to **Kileleshwa Police Station** for causing nuisance. That with a view to protecting her tenants, she compelled the plaintiff and **Ms Wahito** to put their house in order before granting them access to the premises. She defended her actions stating that she needed to safeguard her tenants by guaranteeing them peaceful enjoyment of their tenancies. She therefore prays that the application be dismissed with costs.

The application was canvassed by way of written submissions. The plaintiff in his submissions stated that he had established a prima facie case with a probability of success by stating that the terms of the agreement had been violated by the defendant who admitted denying the plaintiff access to the said site. He stated that he will suffer irreparable injury because he sourced and obtained service contracts with advertisers who had paid him to exhibit their products on the said billboards and that the pre paid for the advertising space are disappointed that their adverts were not being displayed and that the defendant's unlawful; and malicious actions were hurting the plaintiff and in this case he will suffer loss of good will and damage to his professionalism and business reputation which cannot be compensated by an award of damages. He stated that the balance of convenience tilted in his favour.

On Mandatory Injunction he submitted that it will always be awarded where special circumstances exist and relied on the **Locabail International Finance Ltd -vs- Agro expo & Others (1986) AllER 901**. On specific performance he stated that the parties have a valid lease contract and the Plaintiff seeks an equitable remedy of specific performance in regard to the property adding that he had a valid enforcement contract.

The defendant in her submissions filed on **8th December 2014**, stated that the plaintiff was guilty of material non disclosure which included the existence of **CMCC No 4153 of 2014**, a suit filed by the plaintiff against Rose Wahito which suit involved the issues herein. On the issue of irreparable damages, the defendant submitted that the plaintiff failed to demonstrate what irreparable damages they may suffer that cannot be compensated by way of damages if the injunction sought herein is not granted. She further submitted that the Plaintiff was guilty of material non disclosure for having not disclosed the existence of **CMCC No. 4153 of 2014** where he had sued Ms Wahito and relied on the case of **The Owners of the Motor Vessel "Lilian S –vs.- Caltex Oil (Kenya) Limited C.A No No 50 of 1989**, where in the court

“held that a person making an application in court is obliged to make the fullest possible disclosure of all material facts within his knowledge and if he fails to do so he cannot obtain any advantage from the proceedings”

I have considered the Affidavits on record; the written submissions and the authorities relied on. This is an injunction application and the principles applicable were well settled in the **Giella –Vs - Cassman Brown**; that the Applicant must establish a prima facie case with a probability of success, that the applicant must demonstrate that damages will not be an adequate remedy and that if the court is in doubt on the foregoing, it determine the matter on a balance of convenience.

Prima facie case was defined by the Court of Appeal in the case of **Mrao Vs - First American Bank (K) Ltd to mean a situation where the** applicant establishes that his legal right has been infringed by a Defendant thereby calling for a rebuttal by the latter.

In the present case, has the Plaintiff established a prima facie case with a probability of success?

The plaintiff has stated that he entered into a lease agreement with the defendant to erect two billboards on the defendant’s premises and paid a consideration of **Ksh. 1,000,000/=** to the defendant. He further stated that he got into two contracts from two firms to flex adverts on their behalf and was paid for the said work. However he was unable to flex the adverts as he was denied access to the defendant’s premises with the claim from the defendant that the plaintiff was causing nuisance and disturbance to the defendant’s tenants.

The defendant on the other hand alleged that she could not allow the plaintiff flex his adverts for the reasons that the plaintiff who was in a partnership with her (defendant) sister had disagreements on who between the two had authority over the billboards. She further stated that the plaintiff and one **Ms Wahito** breached peace on the defendant’s premises where she had tenants and in a bid to protect her tenants, she told the plaintiff to agree on who controls the billboards. She further stated that there was a pending suit between the plaintiff and the said **Ms Wahito** on the dispute of ownership of the billboards.

The plaintiff has not denied these allegations by the defendant. There is therefore a third party whom the plaintiff has not disclosed in his pleadings and a proper determination cannot be made at this interlocutory stage as the parties will be required to adduce evidence and be cross-examined to enable the court to make a proper finding on the plaintiff’s case. Therefore I find that the plaintiff has not demonstrated a prima facie case with a probability of success.

On the issue of irreparable damages, the Plaintiff has annexed contracts and invoices evidencing the monies that have been expended towards installation of the advertising structures amounting to **Ksh 29,985,654.56/=**. Therefore the Plaintiff's claim can be quantified and in this, an order for injunction may not be suitable. In the case of **Kirkdale Ltd -vs. - Mount Agencies Ltd & 3 Others Nairobi CA no. 42 & 45 of 2008(consolidated)** the **Court of Appeal held that,**

"As to whether the 1st respondent will suffer irreparable harm if an order for injunction sought herein is not granted, this is a straight forward case where any damages suffered by it can be quantified and sought and/or paid in form of damages. In fact, this is why the 1st Respondent sought general and punitive damages for breach of contract in prayer (d) of the prayers. Given all these considerations, the case before the superior court was not a suitable one for the grant of an order of a

temporary injunction."

In the Plaintiff's Plaint dated **21st August 2014** at paragraph (d) of his prayers he seeks **Ksh 29,985,654.56** pleaded as special damages. That prayer clearly quantifies his damages and therefore it is my view that the Plaintiff has acknowledged that he can be remedied if the court finds that the defendant breached the agreement they had entered into.

Having now considered the pleadings generally and the written submissions, the Court finds that the plaintiff has not satisfied the first two necessary conditions stated in **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**. The upshot therefore of this application is that this Court finds that the Plaintiff's application dated **21st August 2014** has no merit and the same is hereby dismissed with costs to the Defendant/Respondent.

It is so ordered.

Dated, Signed and delivered this **23rd day of March, 2015**

L. GACHERU

JUDGE

In the Presence of:-

M/s Kamau for the Plaintiffs/Applicants

Mr Ngugi for Mr Maloba for the Defendant/Respondent

Hilda: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling Read in open Court in the presence of the above counsels.

L. GACHERU

JUDGE

23/3/2015