



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 89 OF 2014

PINNACLE COMMUNICATIONS LTD.....PLAINTIFF

VERSUS

MENENGAI OIL REFINERIES.....1ST DEFENDANT

RULING

1. By its application dated 2nd December, 2014 and brought under **Order 40 Rule 1 and 2** of the **Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act**, the Plaintiff sought an order (among others)

That pending hearing and determination of this suit, the court be pleased to restrain the defendant by itself, its directors, agents, servants workers or any other persons acting under it from removing, dealing destroying or in any other manner whatsoever interfering with the plaintiffs advertisements mounted on street poles along the Nakuru- Eldoret Highway.

2. The applications is grounded on an affidavit sworn by one Nicholas Kibe, a director of the plaintiff and grounds appearing on the face of the application.

The application is opposed by a Replying Affidavit sworn on the 27th January 2015 and a further affidavit sworn on the 6th August 2015 by Jay Patel, head of Sales of the defendant company.

3. The gist of the dispute between the two parties, as can be discerned from the pleadings is over advertising rights on street lighting poles along the Nakuru-Eldoret Highway granted to the Plaintiff/Applicant during the period 2013 and 2014 by the County Government of Nakuru and to the Defendant by the said County Government on the 15th July 2014.

4. The applicant states that upon grant of authority rights by the County Government of Nakuru by various letters it complied with all the terms and has since mounted advertisements as follows:

- a) KFA roundabout upto total roundabout 10 poles
- b) Total round about to Eveready about 23 poles
- c) Eveready roundabout to Total round about 40 poles

The applicant states that on on about the 24th November 2014 while the said rights were subsisting and in force, the Respondent with an alleged authority, permit an approval from the Ministry of Roads and The County Government of Nakuru started interfering with the

advertisements put up by the plaintiff-applicant and has threatened to pull down the adverts thereon and put up theirs, while the applicants rights and approvals have not been terminated.

5. The applicant has submitted that if the Respondent is not restrained by an order of this court, it will proceed to actualise the threats and pull down the advertisements mounted by the applicant on behalf of its clients which will cause them to suffer economic loss by virtue of loss of business.

6. The applicant has urged the court to issue an order of injunction to restrain the Respondent from further pulling down or carrying out the threats by itself, its servants or agents pending the hearing of the suit.

To buttress its submissions, the applicant relied on the case **Giella -vs- Cassman Brown and Co. Ltd (1973) EA 360** and stated that it has demonstrated a *prima facie* case with probability of success. Relying on **Mrao Vs. First American Bank of Kenya Ltd(2003) KLR 125** it has demonstrated that its rights have been infringed by the Respondent and if not stopped, the Applicant and its clients will suffer irreparably as its poles and advertisements will be brought down.

7. On the other hand, the Respondent in opposing the application submitted that there is no contract between the County Government of Nakuru and the applicant and that the applicant never complied with terms of the offer as it made no payments to the County Government.

Having complied with terms set out by the County Government, it states that it has exclusive rights and permit over the street lighting advertisements over the designated area. It states that out of the 290 poles along the disputed streets, the applicant has failed to exhibit or show the 40 poles it states it has rights over, and that the failure to specify the same being deliberate and intentional, the court ought to decline to issue the orders of injunction as the applicant has not been able to show what damage it may suffer that cannot be compensated in damages – as stated in **Giella (Supra)** case. It has urged that the continued pendency of the interim orders of injunction will endanger lives of the public as no maintenance is being done to the poles for the last one year.

8. The court has considered the rival arguments for and in support of the application. Affidavit evidence has demonstrated that both parties have advertising rights upon approval by the Nakuru County Government.

For the applicant, such rights were given to it through various letters dating back to 2013 covering various areas, among them the disputed area.

There is no indication from either party that such rights were ever terminated. The Respondent came into the picture in November 2014 when it also laid claim upon the same areas with approval and permit by the same Nakuru County Government.

The Nakuru County Government being the donor of the authority, rights and approvals is not a party to these proceedings. It is the only party who can conclusively prove whether the rights given to the applicant are in force or have been terminated. The Respondent cannot purport to speak or represent the said County Government as it purports to say by stating that the applicant did not comply with the terms of the agreement with the County Government. It has not furnished to the court any order or authority from the County authorising it to remove or pull down of the street light poles or the advertisement posted by the applicant.

9. I have seen the application for advertisement made by the Respondent on the 9th July 2014 to the Nakuru County Government and its approval, on the 15th July 2015 from Everready roundabout to St. Mary's Pastoral Centre, a total of 299 poles. The letter and permit did not authorise removal of the Applicants advertisements or interference with them. It is silent on the fate of the permission and approvals given to the Applicant by its letters dated 26th February 2013 and

28th April 2014.

In my considered view, this is a matter of deliberate and intentional double allocation by the County Government. It has not been shown that the rights and approvals to the Applicant have been terminated.

Needless to state that the applicant had over a period since 2013, February invested economically in the advertisements with its clients who no doubt would suffer loss should their advertisements be removed and pulled down without due notice.

10. The court is satisfied that the applicant's claim is not frivolous or vexatious. There are evident issues that remain for determination by the trial court. What the court is called upon to determine, as stipulated in **Order 40 Rule 1 and 2 of the Civil Procedure Rules** is whether or not to order a temporary injunction to restrain and prevent further and/or threatened wastage.

11. Affidavit evidence and submissions by Learned Counsel coupled with the annexures to their affidavits for and against the application have demonstrated that there is indeed real danger and loss to the Applicant due to the threats by the Respondent and if such threats are not arrested by an order of the court, nothing will stop the Respondent from pulling down the street lighting pole advertisements mounted by the applicants and in my opinion, this will cause loss and damage – to not only the applicant but also to their clients. It will be necessary for the Nakuru County Government to be called upon to shed light on the dispute as it is the one that granted the advertising rights on the disputed areas to both the applicant and the Respondent. To preserve and restrain damage to the property in the advertisement rights, this court is of the view that an order of injunction will be appropriate. The applicant has demonstrated that it has a *prima facie* case with strong chances of success. I am persuaded that the applicant has satisfied conditions set out in the **Giella case (supra)** and the **Mrao Case (Supra)**.

The balance of convenience tilts in favour of granting the orders sought to the Applicant.

Accordingly, I grant the orders of injunction against the Respondent in terms of Prayer 3 in the Notice of Motion dated 2nd December 2014.

Costs of the application shall be in the cause.

Dated, signed and delivered in open court this 25th day of November 2015

JANET MULWA

JUDGE