REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 33 OF 2015

IN THE MATTER OF: ARTICLES 22, 23 AND 165(3) OF THE CONSTITUTION

AND

IN THE MATTER OF: CONTRAVENTION OF ARTICLES 27(1), 40, 47 & 50(1) OF THE CONSTITUTION

BETWEEN

FIRMBRIDGE LIMITED...……...PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA….RESPONDENT

RULING

1. The sole question raised by the Notice of Motion dated 5th June, 2015 and filed on 8th June, 2015 is whether the court should grant and extend the interlocutory orders granted ex parte on 8th July, 2015 to restrain the Respondent from removing and carting away the Petitioner's Bill Board structure at Bobs Bar on Malindi Road and on Plot No. 157 XVI, Saba Saba along Kenyatta Avenue Mombasa/ and/or any other media that may be exhibited thereon and/or obstructing the Petitioner's agents from accessing, placing, replacing content thereon, cleaning, carrying out repairs and maintaining its billboard structure.

2. The application was supported by the grounds in the Petition, the Affidavit of one Michael Kigathi, sworn on 5th June, 2015, and the Supplemental Affidavit of the said Michael Kigathi sworn on 12th August, 2015 in reply to the Replying Affidavit of Jimmy Waliaula, the Respondent's Director of Legal Services, sworn on 16th July, 2015, opposing the Application in particular, and the Petition in general. The Applicant's counsel also relied upon his written submissions dated 4th September, 2015 and filed on 7th September, 2015; and the authorities cited or referred to in the submissions.

3. The Petitioner's case is simply that they have property rights in the Bill Boards and that having paid for, and obtained licences from the Respondent to erect the Bill Boards at the designated locations in accordance with the terms of the licences, it was a breach of their constitutional rights to property for the Respondent to demolish and take them away without any prior notice to them (the Petitioners). The Petitioner/Applicant is therefore apprehensive that unless restrained, demolition of their Bill Boards and their right to property will continue, to be violated.

4. Counsel relied on the decisions of the court in **AKON PRINT MEDIA COMPANY LIMITED VS. KENYA NATIONAL HIGHWAY AUTHORITY & 2 OTHERS [2014]eKLR**, and **KIERAN HOLDINGS LIMITED VS. ATTORNEY-GENERAL & 2 OTHERS [2012]eKLR** and **REPUBLIC VS. KENYA NATIONAL HIGHWAY AUTHORITY & 2 OTHERS, ex parte AMICA BUSINESS SOLUTIONS [2013] eKLR**, in all of which cases, the courts granted interim or conservatory orders pending the determination of the main applications-Petitions.

5. The application was however opposed through the Replying Affidavit of Jimmy Waliaula, sworn on 16th July, 2015 and the Further Affidavit of the said Waliaula, sworn on 18th August, 2015 and filed on 19th August, 2015. The Respondent's case is that it indeed granted the Applicant a licence or permit to put up three (3) Advertisement Boards and/or Directional Signs at different locations within the County of Mombasa, but that Permit did not encompass other classes of permits, namely –

(a) Directional Sign;

(b) Signage on Canopy;

(c) Billboards;

(d) Wall Wraps;

(e) Sky Signage;

(f) Signage on Rooftop;

(g) Adjustable Banner Signage.

6. In particular the Applicant's Permit covered Directional Signs at Plot No. 53 along Malindi Road, at Bobs Bar along the said Malindi Road, and at Benzime House opposite Coast Bus Office along Kenyatta Avenue.

7. The Respondent's Director of Legal Services depones that the Permits were issued subject to compliance with the Respondent's Physical Planning laws and regulations. The Respondents also accuse the Petitioner/Applicants with lack of candour and material misrepresentation, and non-disclosure of facts material to the fair determination of the Application in particular and the Petition in general. The Respondent also faults the Petitioner for referring to payment of various sums not related to the issue in the Petition or the Application; and cannot claim to have paid all the fees for the permits to erect the Bill Boards.

8. The Respondent therefore contended that the Petitioner had failed to establish a **prima facie** case under the **Giella vs. Cassman Brown Company Limited [1973] 358** or that it would suffer substantial loss in the event interim relief orders were denied, or that the balance of convenience lies with the Applicant. For those reasons, the Respondents urged the court to dismiss the application with costs.

DETERMINATION

9. The true test for granting an injunction or a conservatory order is not whether the applicant has established a **prima facie** case, or whether the applicant will suffer substantial loss for which damages would not compensate the applicant adequately. To determine both of these tests, the court needs to consider the affidavit evidence before it, and no more. There is for instance no evidence as to the actual loss if at all, the applicant would suffer. No consideration is made of the loss or potential loss which the Respondent might or may equally suffer. There is no evidence of the means of either the Applicant or Respondent to compensate the other. There has to be another and better basis for granting an interlocutory injunction (in ordinary civil litigation) or conservatory order, [in Constitutional Petitions].

10. In the English case of **AMERICAN CYANAMID VS. ETHICON [1975], ALL ER 504**, the

English Supreme Court (House Lords) held inter alia that –

"(1) the grant of interlocutory injunctions for infringement of patents was governed by the same principles as those in other actions. There was not rule of law that the court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the Plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action. All that was necessary was that the court should be satisfied that the claim was not frivolous, or vexatious, i.e. that there was a serious question to be tried."

11. Lord Diplock explained at page 509 of the decision the rationale for departing from reliance upon **"the prima facie"** or **"probability"** of success principle and adequacy of compensatory damages He said–

"…when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the Plaintiff during the period before the uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction, but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction, if it should be held at the trial that the Plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do.

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated and or the plaintiff's undertaking in damages if the uncertainty was resolved in the defendant's favour at the trial. The court must weigh the need against another and determine where the balance of convenience lies." (underlining added).

12. And at page 510, paragraph (a) – (d) the learned Judge urged his colleagues to declare that there is no such rule –

"…the use of such expressions as a "probability", a "prima facie", or a "strong prima facie" in the context of the exercise of discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by the form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried."

13. This approach and the decision herein was applied in **RE LORD CABLE, (Deceased), [1976]3ALL E.R. 417, MEADE VS. LB HARINGEY [1979] 2 ALL ER 106**, and **BBC VS. HEARN [1978] 1 ALL ER 111**.

14. The question raised in the application then becomes whether the Applicant's claim is either frivolous or vexatious? It is apparently not. The Respondent admits that it granted the Applicant permission to put up or erect **"SKYSIGN AND BILLBOARD at CITC Nyali Bridge, Malindi Road at Mombasa Secondary School for the Physically Handicapped, along Nyali Road at Kalair Centre opposite Nyali Cinemax and along Kenyatta Avenue at Benzime House opposite Coast Bus Office…"**

15. It is also not contested that the Applicant paid requisite fees before erecting the Bill Boards at the three locations Plot No. 53, (i.e. Buxton), along Malindi Road, next to Nyali Bridge, at Bobs Bar on Malindi Road, and on Plot No. 157/XVI/Saba-Saba along Kenyatta Avenue, Mombasa.

16. The Respondents agents however on 5th June, 2015 destroyed the Applicants Billboard on Plot No. 53 (i.e. Buxton) along Malindi Road, next to Nyali Bridge, without any notice to the Applicants. The Respondents contend that the approval of the erection of the Bill boards was subject to observance by the Applicants of the Respondents other laws and regulations on town or physical planning. However the Respondent cannot destroy any person's property however humble, without reference to that person.

17. In **IKON PRINT MEDIA COMPANY LIMITED VS. KENYA NATIONAL HIGHWAY AUTHORTIY & 2 OTHERS** Majanja J emphasized the right to notice –

"the right to receive a written notice is a statutory right. It is a condition precedent to the exercise of the right to remove unauthorized structures. Thus, even where there is a breach of the conditions of approval, a written notice cannot be wished away."

18. On the issues of encroachment of other persons' properties, the same learned Judge said –

"where an encroachment notice is issued, it is proper that the particular properties that encroach on the road reserve be specifically identified as it is the Road Authority that has the full information on the properties encroaching on the road reserve. This would accord with the requirements of Article 47 that require fair administrative action. Kieran Holdings Limited vs. Attorney-General & Ministry of Roads and Kenya Urban Roads Authority (supra)."

19. The Respondent however say that there was notice carried **firstly** in the Daily Nation of 29th May, 2013, and **secondly** another notice described as a Final Notice carried out in the Standard Newspaper of 8th October, 2013. The Respondent therefore contends that the Applicants cannot claim that there was no notice.

20. The question is whether the "Public Notice" of 29th May, 2013 and the "Public Notice" (Final Notice) of 8th October, 2013 was a proper notice to the Applicants. The Notice is entitled – **"REMOVAL AND REORGANIZATION OF ADVERTISEMENT SIGNACES/STRUCTURES/DEVICES WITHIN MOMBASA COUNTY ROAD RESERVES."**

21. Though the Notices were described as "Signaces/Structures/Devices" they were not addressed to the Applicants. In my view where there is a written contract between the Respondent and an advertising agency, the Applicants, or the media, any notice regarding such signaces/structures/devices, subject of the advertising contract, the notices must not only be in writing, but must also be directed to those advertising agencies. A public notice, whether "first" or "final" is not a notice to the contracting advertising agency, but to the Public.

22. Consequently as the court held in **IKON MEDIA COMPANY LIMITED VS. KENYA NATIONAL HIGHWAY AUTHORITY & 2 OTHERS** (supra), there must be notice in writing to the contracting agency, more so because the equipment or property to be demolished and removed does not belong to the world at large – the public is the property of the advertising agency. Such agency is entitled to proper notice.

23. On the principles of American Cyanamid vs. Ethicon (supra) and the cases cited above as to the requirements of notice, before destroying a person's property, (and the Applicants have property rights capable of enforcement), the Applicant's case can neither be said to be frivolous nor vexatious, and the balance of convenience clearly lies in allowing the Notice of Motion dated 5th June, 2015 and filed on 8th June, 2015 in terms of paragraphs 4 thereof.

24. I direct that the costs herein shall abide the determination of the Petition.

25. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 17th day of November, 2015

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Sifuna for Petitioner/Applicant

Miss Kimori for Respondent

Mr. Silas Kaunda Court Assistant