



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 994 OF 2013

ALLIANCE MEDIA (KENYA) LTD.....1ST PLAINTIFF

ONE STOP MEDIA LIMITED2ND PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

Magnate Ventures Ltd vide a Notice of Motion application dated 11th September 2013 apply to be enjoined in this suit as the 2nd Defendant (hereinafter referred to as “**proposed 2nd Defendant**”). The plaintiffs in their suit filed against the Defendant, **the County Government of Nairobi** contend that by virtue of the provisions of the Kenya Roads Act, section 49 it is the Kenya National Highways Authority who are empowered to approve any developments erected on a road reserve and that the defendant’s powers over road reserves is now limited to collecting fees for advertisements erected on the billboards and not granting approval to erect bill boards on road reserves.

The proposed 2nd Defendant premises its application for joinder on the grounds that appear on the face of the application and inter alia contend that:-

- (a) The power of control of outdoor advertising in the County Government of Nairobi is vested in it, by schedule four part 2 (3) of the constitution and not in the Kenya National Highways Authority.
- (b) The plaintiff’s billboards were erected and are maintained without any development permission from the County Government of Nairobi, a requirement that applies to all out door advertisers, including Magnate Ventures Limited.
- (c) Magnate Ventures Limited is a key player in the outdoor advertising industry and is keen on ensuring compliance with the constitution and statutes governing outdoor advertising.
- (d) Magnate Ventures Limited is therefore, a party whose presence is necessary before the court and ought to be enjoined as the 2nd Defendant in this suit.

The application is further supported on the grounds contained in the annexed supporting affidavit sworn by **LAURA KENYANI** Legal Manager Magnate Ventures Ltd, on 11th September 2013. **Mr. John Muswa** the Operations Manager of the 1st Plaintiff/Respondent to the proposed 2nd Defendants

application has sworn a replying affidavit dated 30th September 2013 in opposition to the application.

The 1st Plaintiff avers in the replying affidavit that **H.C JR. NO. 246 OF 2012** where both the 1st Plaintiff and the proposed 2nd Defendant were parties upheld the agreements by Kenya National Highways Authority approving the 1st Plaintiff's right to advertise on the bill boards that the Authority had approved to be erected. Although the court had ruled that the Kenya National Highways Authority ought to have awarded the advertisement sites through competitive tendering the court in the Judicial Review application did not annul the sites that had already been approved and allocated. The 1st plaintiff in the present suit seeks to have its agreements with the Kenya National Highways Authority implemented and given effect to and its suit against the Defendant, the County Government of Nairobi is towards achieving this end.

The 1st plaintiff through the replying affidavit paragraph 8 basically sets out the basis for its objection to the proposed 2nd Defendant being enjoined to this suit as such. Paragraph 8 of the replying affidavit is in the following terms:-

- (a) The proposed 2nd Defendant has not put any material on record to sufficiently show that it is a necessary party to the proceedings.**
- (b) Any issues the proposed 2nd Defendant has raised or proposes to raise have already been raised by the Defendant and are up for determination by the court,**
- (c) There is no remedy sought by the plaintiffs that is capable of being enforced against the proposed 2nd Defendant and indeed the plaintiffs have not laid any claims against it at all,**
- (d) It would be unreasonable for the court to force a Defendant upon the plaintiffs when the plaintiffs are clear of the remedies they seek and against which party by law such remedies are available,**
- (e) If the only reason the proposed 2nd Defendant proposes to join the proceedings is to ensure that its billboards are not obstructed, such claim clearly arises once obstruction has occurred and the remedies will be against the plaintiffs herein. That eventually has not occurred yet.**

On the directions of the court the parties filed written submissions in which they articulated their respective positions and referred the court to various authorities in support of their positions. The proposed 2nd Defendant submitted that under order 1 Rule 10 (2) of the Civil Procedure Rules 2010 the key considerations the court should make in deciding whether or not to make an order for enjoinder of a party to the proceedings is “**----the necessity of the party to help the court to effectually and completely adjudicate on the matter**”.

The proposed 2nd Defendant submitted that in the **H.C JR NO. 246 of 2012** the dispute concerned the use and erection of billboards within the Nairobi County and that the decision of the J.R. Court (**H.C. JR NO.246 of 2012**) has since been appealed to the court of appeal. Both the plaintiffs and the proposed 2nd Defendant it is submitted are engaged in the advertising industry and the use of billboards erected on the road reserves provide a major fora for this advertisement. It is my understanding that the decision in **HC JR NO. 246 of 2012** upheld agreements approving the erection of billboards by the plaintiffs as awarded to them by the Kenya National Highways Authority and that decision is the subject of appeal to the Court of Appeal. Until that decision is reviewed and/or varied by the court that issued it and/or the same is set aside or overturned by the court of Appeal this court cannot properly seek to interrogate or review the decision as it lacks the jurisdiction to do so.

The plaintiffs filed written submissions and like those of the proposed 2nd Defendant identify the issue for determination to be as to “**whether the proposed 2nd Defendant is a party who ought to have been**

joined or whose presence before the court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit”.

The plaintiffs have submitted that the proposed 2nd Defendant is not a necessary party to these proceedings and their application for joinder should be denied. The plaintiffs submit that order 1 Rule 10 (2) provides for joinder of parties and sets the criteria for who can be joined.

Order 1 Rule 10 (2) provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

Order 1 rule 3 provides on who should be joined as a defendant and provides thus:-

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common questions of law or fact would arise.

The issue for the court to consider in the present matter therefore would be:-

- (i) Whether the 2nd proposed Defendant ought to have been joined as a Defendant,**
- (ii) Whether the 2nd proposed Defendant would be a necessary party to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.**

I agree with the plaintiff’s submissions that the issues for determination in a suit arise only out of the pleadings of the parties and other evidential material as may be presented to the court. In the present case the plaint filed by the plaintiffs clearly seeks a determination whether the Defendant, **County Government of Nairobi** has jurisdiction in the exercise of its statutory functions pursuant to the Physical Planning Act to regulate the erection of billboards and gantries on road reserves which are owned by Kenya National Highways authority save for the power to levy fees for advertisements mounted within the County of Nairobi.

The reliefs that the plaintiffs seek are against the County Government of Nairobi and no relief is sought against the proposed 2nd Defendant and neither is there any suggestion that the acts giving rise to the suit were part of any transaction or series of transactions to which the proposed 2nd Defendant was a participant. True, the 2nd proposed Defendant is in the same business as the plaintiffs but the plaintiffs complaint is only as regards the erection of billboards that have already been approved and awarded to them and belong to them and it is difficult to appreciate how the proposed 2nd Defendant can get involved.

The plaintiffs are not making any claim against the proposed 2nd Defendant in this suit. The 2nd Defendant may feel that the Kenya National Highways Authority erred in approving the billboard that they did in favour of the plaintiffs without competitive bidding but then the Judicial Review Court has dealt with that and the 2nd proposed Defendant has appealed that decision in the court of Appeal. This court does not see how the decision of the JR Court has a bearing to the present suit as the plaintiffs merely seek to have their agreements with Kenya National Highways Authority implemented and the issue is whether the Defendant County Government has any role and/or basis for interference with the erection of billboards on road reserves. In my view the 2nd proposed Defendant has not established it is a

party who ought to have been joined as a party to the suit. The reliefs the plaintiffs seek in this suit are specific to the Defendant and the court is satisfied joinder of the 2nd proposed Defendant would not be appropriate.

As to whether the 2nd proposed Defendant is a necessary party to the suit to enable the court to effectually and completely adjudicate all questions involved in the suit, I answer in the negative. As stated above this suit involves the plaintiffs and the County Government of Nairobi and the reliefs that the plaintiffs seek are directed against the Defendant solely. The court imagines that apart from the plaintiffs and the 2nd proposed Defendant there must be many other players in the advertising industry who carry on their business within the Nairobi County and the court does not see how different the interest of the proposed 2nd Defendant would be from the other players. My view is in that the matter before the court, the court will adjudicate whether or not the Defendant, the County Government of Nairobi, has any role to play as regards the erection of bill boards that the Kenya National Highways Authority has approved and authorized to the plaintiff and the court will determine that issue as it affects the plaintiffs who are the aggrieved party in as far as the actions by the Defendant are concerned. The 2nd proposed Defendant does not stand to be affected directly by any decision that the court makes in the suit before the court.

The proposed 2nd Defendant in my view has not demonstrated and/or established that they are a necessary party whose presence is necessarily to enable the court to make full adjudication of this suit. I hold that they are not a necessary party and I accordingly dismiss the proposed 2nd Defendant's Notice of Motion dated 11th September 2013 with costs to the plaintiffs.

Orders accordingly.

Ruling dated signed and delivered at Nairobi this 27th day of March 2014.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the Defendant