



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 960 OF 2013

OUTPOST ADVERTISING LTD..... PLAINTIFF

-VERSUS-

SOROYA INVESTMENTS LIMITED.....1ST DEFENDANT

MUBARSHAR KHURSHUD.....2ND DEFENDANT

RULING

The Plaintiff has moved the court by way of a Notice of Motion dated 2nd August 2013, brought under Section 1A and 1B of the Civil Procedure Act and Order 40 Rule 2, 4(1) and (2) of the Civil Procedure Rules. The Plaintiff is seeking the following substantive orders:-

1. That the 1st Defendant whether by themselves, her agents, servants or otherwise howsoever be restrained from interfering with the Plaintiff's and/or its agents access to the premises for purposes of erecting/affixing the billboard structures, placing, replacing content media thereon, cleaning, carrying out repairs and/or management or maintenance of the billboard structure pending the determination of the dispute herein.
2. The 1st Defendant be restrained whether by herself, her agents, servants, representatives or otherwise howsoever from granting, assigning and/or otherwise conferring the rights otherwise granted to the Plaintiff in respect of the property known as LR No. 290/4874 to any other person pending the determination of the dispute herein.

The application is supported by an affidavit sworn on 2nd August 2013 by **Joseph Sidede** who has deponed that he is a director of the Plaintiff Company. The Plaintiff's case is that he entered into an agreement dated 23rd May 2013 with the 1st Defendant wherein she was granted rights to enter and erect, fix and maintain a billboard on the 1st Defendant's property known as LR No. 290/4874. A copy of an agreement dated 23rd May 2013 entered between the Plaintiff and the 1st Defendant has been annexed as evidence.

It is the Plaintiff's case that she paid to the 1st Defendant the agreed annual rent of Kshs 750,000/- which was acknowledged by the 1st Defendant and a receipt number 0031 dated 25th May 2013 has been exhibited. The Plaintiff has contended that the 1st Defendant issued her with a consent letter dated 23rd

May 2013 to enable her process the requisite approvals from the City Council of Nairobi for the erection of the billboard structure on the premises and a copy of the said letter has been annexed as evidence.

The Plaintiff has averred that on the strength of the consent letter dated 23rd May 2013, she sought and was granted permission by the City Council of Nairobi to erect the billboard on the suit premises. A copy of a notification of approval of development permission dated 4th June 2013 has been exhibited and the Plaintiff contends that subsequently, when she tried to access the premises through her servants/agents in order to erect the billboard, the 1st Defendant's agent blocked her claiming that the 2nd Defendant who had received money on her behalf had disappeared with the money.

It is the Plaintiff's contention that the 2nd Defendant who is purported to have disappeared with the annual rent paid was and is the finance manager of the 1st Defendant. According to the Plaintiff, even if the 2nd Defendant disappeared with the amounts paid as annual rent, it is the 1st Defendant's responsibility to pursue the 2nd Defendant as this is an employer/employee issue which has nothing to do with the Plaintiff. The Plaintiff maintains that having authorized the 2nd Defendant to manage her property on her behalf, the 1st Defendant is bound by the actions of its servant/agent/employee.

The Plaintiff has averred that the nature of the agreement being a licence only, it did not dispose of or confer any interest in the suit property and therefore, that the 1st Defendant cannot disown the agreement on the basis of any alleged want of proper execution. The Plaintiff has annexed as evidence a copy of a letter dated 30th July 2013 from the 1st Defendant's advocates disowning the licence agreement.

It is the Plaintiff's case that on the strength of the licence agreement, she incurred substantial expenditure towards preparation for erection of the billboard in purchase of material and a copy of a purchase receipt dated 8th June 2013 as well as an invoice dated 30th May 2013 have been exhibited. The Plaintiff has stated that she is apprehensive since there is a high likelihood that the 1st Defendant will enter into another agreement with a third party and confer the rights otherwise exercisable by the Plaintiff thereby causing irreparable loss.

In a supplementary affidavit sworn by **Joseph Sidede** on 15th November 2013, the Plaintiff has reiterated that the relationship between her and the 1st Defendant is that of a licensor and licensee which entitles the Plaintiff to erect and maintain billboard wall wraps on the 1st Defendant's property at an agreed license fee. It is the Plaintiff's averment that a mere licence does not create, dispose or transfer any right or interest in the property and therefore, that this was not a transaction relating to land which must be under seal as claimed by the 1st Defendant.

The Plaintiff has contended that being an outsider who was dealing in good faith with the 2nd Defendant as an officer of the 1st Defendant, she could not and was not expected to insist on disclosure of the 1st Defendant's as to whether the 2nd Defendant has authority to act on behalf of the 2nd Defendant in the manner he did. Lastly, the Plaintiff has contended that the 1st Defendant cannot deny the 1st Defendant's authority to act since she employed and permitted the 2nd Defendant to manage its business and commercial properties on her behalf.

The 1st Defendant opposed the application through grounds of opposition dated 8th November 2013 as well as a replying affidavit sworn on the same date by Naveed Soroya. The 1st Defendant has averred that she is a stranger to the agreement or licence between the Plaintiff and persons purporting to act on her behalf. It is the 1st Defendant's case that the 2nd Defendant is not and was not at the material time a director of the 1st Defendant.

According to the 1st Defendant, there was no meeting and resolution giving any authority to the 2nd Defendant or any person, other than the directors of the 1st Defendant, authority to act on behalf of the 1st

Defendant. It is the 1st Defendant's contention that the purported agreement was illegal and unauthorized and that the Plaintiff failed to exercise due diligence before entering into the agreement and therefore, that the 1st Defendant cannot be liable for any loss of transaction that she was not party to.

The application was canvassed by way of written submissions and the Plaintiff in submissions dated 24th February, 2014 argued that she has demonstrated to the required standard that there exists a relationship of licensee and licensor between herself and the 1st Defendant. Counsel for the Plaintiff submitted that a license agreement was executed by the 2nd Defendant who was then employed as the 1st Defendant's finance manager and further, that the 1st Defendant has not denied that the 2nd Defendant was her employee. It is the Plaintiff's submission that she has demonstrated that she paid monies on account of licence fee and further, that she was granted access to the premises where she erected advertising structures under supervision by Defendants.

In further submission, the Plaintiff argued that there exist real danger of the 1st Defendant leasing, assigning or conferring the rights otherwise granted to the Plaintiff in respect to the property to another party to the detriment of the Plaintiff. While submitting that the nature of the agreement between the parties was such as to create a licence only, Counsel argued that there was no disposition or transfer of an interest in the premises.

It was argued for the Plaintiff that the agreement being only a licence, did not create or transfer any interest in the property so as to be an agreement within the meaning of section 3(3) of the Law of Contract Act. Counsel referred the court to the decision in **Clear Channel UK Ltd -vs- Manchester City Council (2005) EWCA Civ 1304** for the proposition that a contract granting the right to erect and maintain advertising hoardings created a licence only and not a tenancy. Reliance was also placed on the treatise, **Halsbury's Laws of England Fourth edition, 2006 Reissue volume 27(1) at page 25**. The court was also referred to the case of **Errington -vs- Errington and anor(1952)1All ER** for the submission that the difference between a tenancy and a licence is that in a tenancy, an interest passes in the land whereas in a licence, it does not. It is the Plaintiff's submission that there was no requirement in law that the agreement dated 21st May 2013 bears the seal of the 1st Defendant to have effect and the court was referred to sections 2 of the Land Act which defines a licence to mean a permission to do some act in relation to land which would otherwise be a trespass.

In respect to the 1st Defendant's assertion that the 2nd Defendant had no authority to bind her since he was not a director of the 1st Defendant, it was submitted that this was a proper case for the application of the principle propounded in **Royal British Bank -vs- Turquand(1856)119ER 886** which is that a third party dealing with a company is entitled to assume that the company has complied with its internal rules and procedures.

Reliance was also placed on the case of **Morjaria -vs- Kenya Batteries (1981)Ltd & 2 others(2002)1KLR 406** and the Plaintiff contended that she couldnot have suspected any impropriety in her dealings with the 2nd Defendant who was employed as the 1st Defendant's finance manager.

While submitting that the Plaintiff would suffer irreparable damage if the injunction was not granted, Counsel argued that since the Plaintiff is in the business of outdoor advertising, each site is unique in terms of its visibility and impact and that that no two site locations are the same. It was argued that competition for lucrative sites in the Nairobi Central Business District is fierce and therefore, that if the injunction is not granted and the 1st Defendant assigns or transfers the rights granted to the Plaintiff to a third party, the Plaintiff will never be able to find other premises uniquely similar to fit outdoor advertising within the same locale.

In respect to where the balance of convenience tilts, it was submitted that it was in favour of the Plaintiff since the 1st Defendant received payment on account of license fee for the current period of the agreement yet the Plaintiff was being denied the benefit of the license agreement.

The 1st Defendant filed submissions dated 7th March 2014 where she argued that since the Plaintiff had submitted that the licence agreement does not confer any interests on the grantee, that this matter was not properly before this court and further, that the proper court to handle this matter would be the resident magistrate's court. Counsel argued that this matter does not fall under the scope of Article 162(2) (b) of the Constitution and section 13(a) of the Environment and Land Court Act as it did not involve land title and/or tenure but that it was a civil claim under the law of contract and not a land dispute.

In further submission, Counsel for the 1st Defendant argued that the 2nd Respondent was not duly authorized to authenticate the agreement as a director or secretary of the company and reliance was placed on sections 34(1) of the Companies Act. While stating that equity favours the vigilant, the 1st Defendant contended that her seal was not affixed to the agreement. It was also argued that since the receipt signed by the 2nd Defendant while purporting to receive money on behalf of the 1st Defendant was from the Mombasa Office and not from the head office, the 2nd Defendant committed serious offences of fraud. It is the 1st Defendant's submission that equity will not allow a statute to be used as a cloak of fraud.

The 1st Defendant averred that she never entered into any licence agreement with the Plaintiff and therefore, that the agreement between the 2nd Defendant and the Plaintiff does not raise a cause of action against her as it was not under a company seal as required by common law and further, that the 2nd Respondent had no authority to act as her agent in any contracts or transactions. Counsel relied on the treatise **Cheshire, Fifoot and Furmston's Law of Contract 15th Ed pg 628** for the submission that if a man acts as an agent without any authority whatsoever or exceeds his authority, the principal is not liable at all in the first instance and in the 2nd instance, is not liable for the excess.

As to whether the principles for the grant of injunction have been satisfied as laid out in the case **of Giella -vs- Cassman Brown(1973) EA 358**, it was argued that no rights were conferred by the 1st Defendant to the Plaintiff with regard to the suit property. Counsel for the 1st Defendant contended that the Plaintiff's claim should be determined at full trial since the probability of success is not that obvious. Further, it was submitted that it is the 1st Defendant who stands to suffer irreparable damages should the injunction be granted since she was not party to the agreement entered into by the parties and should not be stopped from exercising any rights over its property otherwise an injustice will be caused. Lastly, it was argued that there is an equal balance of convenience since both the Plaintiff and the 1st Defendant have been aggrieved by the actions of the 2nd Defendant.

Determination

The issue for determination is whether a temporary injunction should issue to restrain the 1st Defendant from interfering with the Plaintiff's access to the premises as well as to restrain the 1st Defendant from conferring the rights otherwise granted to the Plaintiff to any other person pending the determination of the dispute herein.

The Plaintiff has contended that she entered into the licence agreement and paid the licence fee to the 2nd Defendant who was employed as a finance manager by the 1st Defendant. On her part, the 1st Defendant has denied liability stating that the 2nd Defendant had no authority to act on her behalf. In my view, the issue whether the 2nd Defendant had authority to transact on behalf of the 2nd Defendant can only be determined at the hearing. It is only after hearing evidence that the court can determine whether the Plaintiff's contention that she moved to the suit premises and erected the billboard structures with full knowledge and supervision of the Defendants constitutes ratification by a principal of a contract made on his behalf without authority for which liability can arise. At this stage, the issue whether the 1st Defendant is bound by the agreement allegedly signed on her behalf by the 2nd Defendant is highly contested. The 1st defendant in her response at paragraph 3 of her replying affidavit states :-

3."That the 2nd Defendant is not and was not at the material time a director of the 1st defendant and neither was he an authorized person with authority to act on behalf of the 1st Defendant".

So did the 2nd defendant have authority to commit the 1st defendant? That determination cannot be definitively made at this interlocutory stage and will require the parties to adduce evidence and be cross-examined to enable the court to make a determination. In the premises I would not hold that the plaintiff has demonstrated a prima facie case with a probability of success.

On the issue of irreparable damages, the Plaintiff has annexed receipts and invoices evidencing the monies that have been expended towards installation of the advertising structures. The Plaintiff's claim is quantifiable and an order for injunction may not be appropriate in light of the court of appeal finding in the case of Kirkdale Ltd -vs- Mount Agencies Ltd & 3 Others Nairobi CA no. 42 & 45 of 2008(consolidated) where it was stated:-

"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 present case the plaintiff/Applicant has indeed in the alternative prayer in the plaint under (d) clearly quantified the damages in the sum of **Kshs.1,172,000/-** as pleaded in the body of the plaint. In my view this is an acknowledgement that damages would in fact be an adequate remedy and I thus find and hold that the plaintiff would not in the circumstances of this case suffer irreparable harm that would not be compensated in damages.

As I have held that the plaintiff has not established the first two conditions necessary for the grant of an interlocutory injunction as enunciated in **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** I need not consider the third condition regarding the balance of convenience. I thus find and hold that the plaintiff's Notice of Motion dated 2nd August 2013 lacks any merit and the same is hereby ordered dismissed with costs to the 1st Defendant.

Ruling dated signed and delivered at Nairobi this 30th day of June 2014.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the plaintiff

..... For the Defendant