



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 33 OF 2012

MAGNATE VENTURES LIMITED.....PLAINTIFF

-V E R S U S-

1. ALLIANCE MEDIA (K) LTD.....1ST DEFENDANT

2. MUNICIPAL COUNCIL OF MOMBASA.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff and 1st Defendant are companies involved in outdoor media advertisement. The 2nd Defendant is sued as the body/institution that approves or controls the advertising devices in streets and other public places.

PLAINTIFF'S CASE

2. Plaintiff by its plaint averred that it is a leading advertising company in the East African region where it is in its ordinary course of business, retained to provide outdoor advertising services to its various clients. That it has since 2002 erected various Bill Boards at Mombasa County which include-

- a. **Makupa Causeway entering, Mombasa Island**
- b. **Kenyatta Avenue, at Makupa roundabout**
- c. **Malindi Road – Nyali Bridge Road at Buxton junction**
- d. **Malindi Road at Nakumatt Nyali**
- e. **South Coast exit from Likoni Ferry**
- f. **Kenyatta Avenue/Ronald Ngala**
- g. **Airport Road**
- h. **Changamwe Roundabout**

That for the purpose of erecting the Bill Boards the Plaintiff has always informed the 2nd Defendant who in turn has licenced the same.

3. That between the years 2008 and 2010 1st Defendant obtained approval from 2nd Defendant to install arches and gantries at Changamwe, Makupa Causeway, Makupa round about and Nyali bridge in Mombasa County. That although those approvals were however revoked by 2nd Defendant on 17th December 2010, on the ground that 1st Defendant's arches and gantries were causing obstruction to the other outdoor advertisements, in/existence there before, that 1st Defendant however proceeded to carry

out the erection of those advertisement media at Makupa Causeway entering Mombasa Island; Changamwe roundabout; Airport road; Nyali bridge and at Nakumatt Nyali on Malindi road (hereinafter called “**the Sites**”). That the said arches/gantries were infringing on the Plaintiff’s Bill Boards and would block the full view of Plaintiff’s advertisements once those arches/gantries are mounted with advertisements. Plaintiff pleaded that the said construction by 1st Defendant were illegal, contrary to Law and to the Constitution.

4. Plaintiff pleaded as consequence of that potential obstruction Plaintiff’s clients had raised grave concern and had threatened to cancel their existing contracts with the Plaintiff which could result in immensurable loss of business to the Plaintiff.

5. In its final prayers Plaintiff prayed for a declaration that the 1st Defendant’s erection of arches/gantries were illegal null and void in view of revocation of licence by 2nd Defendant; prayed for prohibitive injunction to restrain both Defendants on the erection of arches/gantries or mounting advertisements on the sites; mandatory injunction to compel both Defendants to pull down arches/gantries erected in those sites.

6. Stanley Ngethe Kinyanjui a Director and Chief Executive Officer of the Plaintiff Company relied on his written witness statement, which essentially repeated the matters pleaded in the plaint. In that statement he also stated that it was in December 2011 while he with other officers of Plaintiff’s company were on a routine check of their various sites that he noticed large arches/gantries that were being erected at the sites. That the said structures were in front and in close proximity of the Plaintiff’s existing Bill Boards and that once the advertisements were put on those structures the Plaintiff’s client’s advertisements would be blocked, in view of their size, from full view of the citizenry and the public at large.

7. The witness further stated that Plaintiff Company started doing business with 2nd Defendant in 2002. That it is the 2nd Defendant who issues development or advertising permits. That for one to get that permit one needs to make an application. He referred to the Plaintiff’s advertisements application dated 22nd September 2008 for Mombasa/Malindi Road at Bob compound and the permit issued by 2nd Defendant dated 3rd September 2008; application dated 5th December 2008 for Makupa near Shimanzi turn off and the permit issued by 2nd Defendant on 9th December 2008; application dated 5th December 2008 for Makupa near Makande and the permit issued by 2nd Defendant on 9th December 2008; and permits issued by 2nd Defendant for Malindi road dated 10th February 2006 for Changamwe round about dated 10th February 2006, and for Airport Road dated 9th December 2008.

8. The witness stated that the criteria for selecting a site to set up bill board is the high visibility it would have. He referred to contracts Plaintiff company had entered into with its client for advertisements. Safaricom, Plaintiff’s client, had contracted for the site at Makupa Causeway and Changamwe round about. Imperial Bank had contracted for a site at Nyali. Aga Khan Health Services had contracted for Makupa Causeway and Nyali. Zawadi apartment had contracted for beach site.

9. The witness stated that Plaintiff’s complaint was that 1st Defendant had erected structures within close proximity to Plaintiff’s client’s advertisements. He testified that a letter was therefore written by the Outdoor Advertising Association of Kenya dated 9th December 2010. It is important to consider the content of that letter which is as follows-

“9th December 2010

The Town Clerk

Mombasa Municipal Council

Mombasa

Dear Sir,

RE: COMPLAINT ON PROPOSED GANTRY BY ALLIANCE MEDIA

The outdoor advertising industry is alarmed by the three proposed gantries by Alliance Media Ltd at Makande, Buxton and Nyali Bridge.

The proposed gantries if allowed will block advertising media of our member companies. These gantries are new media and should not be accorded any special considerations to the detriment of existing media of our member companies.

Our Association promotes highest level of business ethics within our members. The proposal by Alliance Media negates this level of relationship within the industry.

We will therefore appreciate your confirmation in writing that the construction is revoked.

We are willing as members to have a meeting with yourself and the offending party (Alliance Media) to discuss and resolve this issue amicably.

We look forward to your kind and urgent confirmation.

Yours sincerely,

STANLEY KINYANJUI

SECRETARY

Cc: All members – Outdoor Advertising Association of Kenya.”

In response to that letter there were two letters written by 2nd to 1st Defendant dated 17th December 2010 and 6th September 2011 respectively-

“17th December, 2010

Alliance Media Kenya Ltd

Posperity House 1st Floor

P.O. Box 25508-00603

NAIROBI

**RE : REVOCATION OF APPROVALS FOR THE INSTALLATION OF GANTRIES
WITHIN THE MUNICIPALITY**

Please refer to our previous letters Ref. TP/II/LPA/121 of 26th August, 2008 and TP/II/A/PA/2010 of 22nd November, 2010.

The Council wishes to inform you that all approvals granted to your Company to erect the above named gantries in various sites that includes Changamwe, Makande and Nyali Bridge have been revoked due to obstruction to other outdoor advertisements, which are already in existence.

This letter does not stop you from selecting other sites which have no dispute but you must consult the undersigned.

Please comply.

Tubmun Otieno

TOWN CLERK

Date: Tuesday, 6th September 2011

The Managing Director

Alliance Media (K) Ltd

Prosperity House, 1st Floor

P.O. Box 25503-00603

NAIROBI

Attention: John Muswa

RE: REMOVAL OF ILLEGALLY CONSTRUCTED ROAD GANTRIES

Further to our letter Ref. GP.1/3/47 dated 17th December 2010, it has come to my attention that you illegally proceeded to construct the Gantries at Nyali Bridge near Engene Petrol Station in the night of 5th September 2011 without the Council Authority.

You are therefore, required with immediate effect, to remove the Gantry and all other foundation bases constructed in various sites within Mombasa Municipality's jurisdiction.

Failure to which the Council shall enforce its By-laws and Physical Act, Cap 286 by removing the said structure(s) without further reference to you and at your cost.

Tubmun Otieno

TOWN CLERK

Copy to: Director Town Planning & Architecture Dept. Director Inspectorate."

10. Plaintiff's witness Mr. Kinyanjui on being asked about the distance approved by the Outdoor Advertising Association between the different advertising medias retorted that the approved distance is 150 metres.

11. The witness concluded his evidence in chief by stating that Plaintiff's claim is the right of first identification of the sites before the 1st Defendant erected its structures.

12. On being cross examined the witness stated that the 1st Defendant's structure on Airport road was less than 50 metres away from Plaintiff's advertisements. He estimated that the distance between 1st Defendant's structure and Plaintiff's advertisement at Makupa was "about 80 metres." He also estimated the same distance between Plaintiff's advertisement and 1st Defendant's structure on Nyali bridge. The witness conceded that the 2nd Defendant has no documented policy on the distance that should be there between different advertisers. He also conceded that on 2nd Defendant granting a permit for one to advertise did not give such one a right to property. He also conceded the distance of 150 metres between advertisement is what had been adopted in practice by those in the advertising industry.

13. PW1 Peter Odoyo, the Chairperson of the Outdoor Advertising association said that the Association had a wide membership which included Plaintiff. That the objective of the Association is to advocate and defend the interests of its membership and to advance the growth of the sector. That the Association was in part formed to promote harmony amongst commercial interest in the industry, by enabling grievances to be ironed out amongst its members and thereby it was self regulating. That the Association has been working with other authorities to achieve that harmony and as an example an Outdoor Advertising and Signage Policy was formulated with the Nairobi City Council in 2009 which policy would guide new advertisement which he set out as-

“1. That the new sign will not be detrimental to the environment or to the amenity of the neighbourhood by reason of size intensity of illumination quality of design or materials or for any other reason.

2. That the new sign will not obliterate any other signs.

3. Regard will also be had to the size and location of a proposed advertising sign and its alignment in relation to any existing advertising sign ...”

That policy guideline was not produced in evidence.

14. The witness further stated that the association received numerous complaints from its members in December 2010 regarding 1st Defendant’s structures and as a consequence the Association wrote the letter dated 9th December 2010 reproduced above, addressed to 2nd Defendant.

15. He concluded in his written statement by stating-

- **The Association has made great strides in harmonizing relations within the industry and upholding good and fair business practices amongst its membership but has fallen short with respect to non member players in the industry whose actions are beyond its control. The association has always pursued dialogue and consultation with the sector regulators and even non member competitors and is always willing to resolve these matters amicably.**
- **I verily believe that the advertising structures erected by the 1st Defendant are injurious to the Plaintiff and other outdoor players and the Association therefore fully supports the suit herein and beseeches this Honourable Court to grant the Plaintiffs prayers as per the plaint.**

16. On being cross examined this witness stated that the by-laws require the then Municipal Council, to approve the actual location of advertising. That once approval is given one can put up their Bill Boards and advertisements then pay the Council later. The witness did not produce the by-laws in evidence.

17. That the Regulation in Kenya Road Board Act, provides that the distance between different Bill Boards should be 100 metres. That Nairobi City Council by-laws also provide the distance should be 100 metres. He then clarified this statement on the issue of the distance between the bill boards by saying-

“It depends on the facing of the building and the distance in that case [it] can be as low as 50 metres ... The key is interference. There is no clear Rule but the guiding light is interference of the other Bill Board or other visual ...”

1ST DEFENDANT’S CASE

18. 1st Defendant denied Plaintiff’s claim. 1st Defendant’s witness John Wambua Muswa by his evidence stated that 1st Defendant which had its head office in South Africa, is a reputable and established outdoor advertising company which has presence in major East African cities.

19. That the 1st Defendant obtained approval from 2nd Defendant, Ministry of Public Works and Ministry

of Roads to “install more modern attractive and capital intensive advertisement media in Mombasa.” He stated that in respect to the 1st Defendant the drawings of the gantries were approved by both Ministries and that the reason the 1st Defendant required that approval was because gantries were a new media. He described a gantry as a media that goes across the road as opposed to a Bill Board which is on one side of the road. It was after the aforesaid approval and before the gantries were erected that the 2nd Defendant by letter dated 17th December 2010, reproduced above, cancelled 1st Defendant’s approvals. 1st Defendant by its defence pleaded thus in respect to that cancellation-

- **With regard to the contents of Paragraph 9 of the Plaint the 1st Defendant states that the revocation of the approval for the 1st Defendant to install arches within the Mombasa Municipality was at the instance and instigation of the Plaintiff with a calculated intention to forestall the 1st Defendant’s installation of arches at the most strategic sites within Mombasa Municipality and in a move maliciously intended to stifle competition posed by such attractive and more modern advertisement media.**
- **The 1st Defendant states that immediately subsequent to the revocation of the approval granted for its installation of arches at specific sites within the Mombasa Municipality the Plaintiff rapidly embarked on the installation and placement of Bill Boards on strategic sites along the Makupa Causeway and Nyali Bridge with a view of stealing a match on the 1st Defendant in the event of cancellation or review of the aforesaid decision on the revocation for the installation of arches on the part of the 1st Defendant by the 2nd Defendant.**

20. In evidence the witness stated the revocation of the 1st Defendant’s approval by 2nd Defendant was at the instigation of the Outdoor Advertising Association whose Secretary General (PW1, Stanley Ngethe Kinyanjui) is the main competitor of 1st Defendant. That the cancellation was communicated even before 1st Defendant had put the foundation of the gantries. Further that prior to the cancellation the Association did not communicate with 1st Defendant on their complaint.

21. That the 2nd Defendant gave approval after reviewing 1st Defendant’s re-application by its letter dated 2nd December 2011. That it was after that approval that 1st Defendant embarked on putting up the arches/gantries. Those were erected at 6 sites, at Likoni, Makupa, Changamwe, Airport Road, Makande and Nyali Bridge. The witness said that the General Rule of the industry was that each media had to leave a distance of 100 metres from the other media but that sometimes that distance could be less than 100 metres.

22. That 1st Defendant had incurred a big financial loss following this Court’s injunction stopping it mounting advertisements on its arches/gantries. The witness concluded his evidence in chief by stating that 1st Defendant did not intend to put Plaintiff out of business by introducing gantries and further that there had not been any other complaint other than that of the Plaintiff.

23. 2nd Defendant did not call any evidence.

ANALYSIS

24. The Plaintiff by a Notice of Motion dated 17th January 2012 sought interlocutory injunction to restrain the 1st Defendant from-

“Permitting the erection of any Bill Boards in front of and/or in close proximity to and/or that will result in blockage to all of the Plaintiff’s Bill Boards in Mombasa and in particular at Makupa Causeway entering Mombasa Island, Changamwe roundabout, Airport road, Nyali Bridge and at Nakumatt Nyali on Malindi Road pending the hearing and determination of the suit herein.”

That injunction was first granted on 18th January 2012 *ex parte* and was extended from time to time until 15th June 2012 when the interlocutory injunction was granted pending the determination of the suit. The effect of that injunction was that the 1st Defendant was restrained from trading with the arches/gantries erected on the site to date.

25. Before considering the issues requiring this Court's determination it is important to discuss the pleadings and the parties evidence as presented in this case.

26. Although the Plaintiff pleaded that when 1st Defendant began to construct the gantries it came to the attention of its advertising client and because of the possible blockage of those advertisement some Clients "threatened to cancel their existing contract with the Plaintiff and to sue the Plaintiff;" there was no documentary evidence produced in evidence to prove the same. The only evidence was oral statement before Court by the Plaintiff's Chief Executive Officer and Director Stanley Ngethe Kinyanjui which evidence was uncorroborated. One would expect that if there was any such threat by Plaintiff's clients the same would have been put in writing and would have been produced in evidence.

27. The 1st Defendant in its defence and by oral evidence of its witness stated that when its application to 2nd Defendant to be allowed to mount up arches/gantries was successful and even before 1st Defendant put foundation of those structures the Outdoor Advertising Association complained that the structures would block other advertisement. 1st Defendant's case is that at that time Plaintiff did not have Bill Boards at the sites and Plaintiff in attempting to steal a march took the opportunity of erecting Bill Boards at the sites while 1st Defendant's authority to erect its structures had been revoked. That testimony was not controverted by Plaintiff and 1st Defendant was not cross examined on that evidence. It is material to note the letter although written on the letter head of the Out Door Advertising Association was written by Plaintiff's Chief Executive Officer Stanley Ngethe Kinyanjui.

28. In the Plaintiff's plaint and Notice of Motion dated 17th January 2012 the Plaintiff included Nyali Nakumatt as one of the sites it sought to injunct 1st Defendant from putting up its advertisements, yet on the site visit conducted by the Court on 18th September 2013 Plaintiff did not wish the Court to visit the Nyali Nakumatt area and that site was not represented by the photographs Plaintiff relied upon at interlocutory stage and in the full hearing of this case. Plaintiff in essence therefore obtained an injunction against 1st Defendant in respect of Nyali Nakumatt when it now seems it was not entitled to such an injunction.

ISSUES IDENTIFIED BY THE COURT ON 15TH JUNE 2012

29. This Court when it Ruled on Plaintiff's injunction application on 15th June 2012 identified issues that should be considered by the trial Court after the full trial. I am not the one who identified those issues and I will therefore be forgiven if I fail to fully capture what the Learned Judge who identified them intended in my consideration of the same. Further having received the parties evidence and having considered also the exhibits the parties relied upon but more importantly having been the Judge who conducted the site visit of all the sites the Court is called upon to adjudicate upon, I am of the humble view that this case does not call upon the Court to consider in detail the issues identified by the Court. I am of the view that the pleadings and the evidence call upon the Court to determine very specific issues which I shall in due course consider.

30. At first as best as I can I will consider those issues identified by the Court on 15th June 2012 and in as much depth as I think I need to.

WHAT ARE THE PRINCIPLES BEYOND THE PURELY TECHNICAL REQUIREMENT FOR CONSENTS BY PUBLIC AUTHORITIES AND PUBLIC AGENCIES WHICH UNDERGIRD THE ISSUANCE OF PUBLIC "SPACE" TO COMPETING ADVERTISERS?

31. I will begin by stating that 2nd Defendant in issuing permits to any party wishing to carry out outdoor advertising should have been guided by Section 162(L) of The Local Government Act Cap 265 (now repealed) viz-

“To prohibit or control the display of advertisements and advertising devices in or in view of any street or other public place or in such places or in such manner or by such means as would, in the opinion of the local authority, be likely to affect injuriously the amenities of or to disfigure any neighbourhood; and to prohibit and control the use and passage of advertising vans, sandwich boards, lanterns, flags, screens or other moveable advertising devices, and the distribution of handbills in or along any street or other public place.”

It is clear that by that Section the Local Government is given wide discretion but discretion which should be exercised with a point of view of the provisions of the Constitution. To that end 2nd Defendant was bound by the National values in Article 10 of the Constitution of Kenya. Those values include Good Governance, Integrity, Transparency, Non-discrimination and Accountability.

32. Does the Public Procurement and Disposal Act Cap 412A apply to permits for advertisements? In my view the answer to that is in the negative. I wholly agree with the submissions of the 1st Defendant Learned Counsel in that regard that Section 3 of Cap 412A shows that the Act does not apply to the issuance of such permits. That Section defines disposal as-

“The divestiture of public assets, including intellectual and proprietary rights and goodwill and other rights of a procuring entity by any means including sale, rental, lease, franchise, auction or any combination however classified, other than those regulated by any other written law.”

The granting of permit to advertise in open space just as the granting of Licences etc for running something as mundane as a kiosk, is not in my view divestiture of public asset, nor sale, rental or lease requiring compliance with Cap 412A. The 2nd Defendant rightly stated in its submissions that 2nd Defendant was not bound by Cap 412A because it was merely approached by Plaintiff and 1st Defendant to lease out an open space. It is because I am of the above view that I find the authorities relied upon by the Plaintiff in respect of this issue are not of any assistance to this Court.

WHAT CONSIDERATION, INCLUDING THOSE OF A POLICY NATURE, MUST BE TAKEN INTO ACCOUNT IN DETERMINING THE LOCALE AND SITUS OF EACH COMPETING ADVERTISEMENT?

33. All parties were in agreement that it was essential that Outdoor Advertisement do have clear visibility and one which is not interfered with. What the parties did not agree upon was what is the correct distance that should be allowed between different advertisements. Plaintiff through its witness who is its Director was adamant that the distance should be 100 metres. Plaintiff’s second witness who is the Chairman of the Outdoor Advertising Association said the distance was between 100 to 50 metres depending on interference. The 1st Defendant through its witness said the distance is not regulated but the practice has been between 100 to 50 metres.

34. I believe this issue was well handled by Learned Counsel for the 2nd Defendant in his written submissions when he stated that since there is no rule or regulation or by-Law governing Outdoor Advertising there is need for the public entity, and here I believe he was referring to the County Government, to introduce efficient outdoor advertising monitoring framework. The Learned Counsel submitted that such framework should introduce efficient enforcement mechanism and instruments of regulations.

35. In my view what is submitted on behalf of 2nd Defendant is the way to go. This is because it is the County Government who is more suited to make such regulations in view of its proximity, to the grass root, the local community.

36. Further in my humble view since the people of this country have elected representatives in both National and County Government, those representatives are more suited, more than the Courts which implements the Laws, to formulate policy to be taken into account when a County Government is considering *locale* and *situ* of competing advertisement.

ARE THERE THIRD PARTY CONSIDERATIONS THAT SHOULD BE TAKEN INTO ACCOUNT? IF SO WHAT ARE THEY.

37. I believe that if the National or Local Government legislated in respect of the framework that should guide entities in permitting outdoor advertising, this issue would adequately be catered for in such legislation.

38. In regard to this issue I am also in agreement with 1st Defendant's submissions that the Plaintiff did not adduce evidence to show that lack of public participation in 2nd Defendant granting 1st Defendant permit was injurious to it. Plaintiff did not specify what Constitutional provisions were breached in that regard or at all.

IS A PUBLIC ENTITY ENTITLED TO GRANT OR APPROVE THE HIRE AND USE OF PUBLIC "SPACE" UNDER ITS CONTROL WITHOUT GRANTING AN OPPORTUNITY FOR INTERESTED PARTIES TO PARTICIPATE, GIVE THEIR VIEWS OR OBJECT AND HAVE THIRD PARTY VIEWS TAKEN INTO ACCOUNT?

39. I believe my comment in respect to the preceding issue on legislation which is in line with the Constitutional provisions would go along way to respond to this issue. Moreover I am of the humble view that it may be onerous to require County Government to ensure that there is full participation in the granting of licences or permits. Such a requirement may require that a County Government, to carry out advertisement for space being offered for out door advertisement. Now, in my view such a requirement may go towards depleting the meager funds allocated to the County Government intended for development projects of the community. That is why I say it would be onerous to ensure interested parties participate in awarding outdoor advertising.

40. I will conclude in regard to those issues identified by the Court bym saying that where a party is able to show contravention of the Constitution or the Law such a party should be entitled to take its grievance to a Court of Law.

41. There are two issues that were identified by the 1st Defendants Learned Counsel which will in my view enable this Court to deal with the issues presented in the pleadings and evidence.

42. Those issues are-

- a. **Were the road arches/gantries installed at various sites within the Mombasa Municipality by the 1st Defendant constructed in contravention of any statutory requirement and/or by-laws governing such installations of advertising media;**
- b. **Were the road arches/gantries installed at various sites within the Mombasa Municipality by the 1st Defendant constructed in close proximity to the billboard and/or in such a manner as to potentially cause a blockage to the advertisement media placed on the Plaintiff's billboards; and**
- c. **Is the Plaintiff entitled to the Orders sought in the Plaint?**

43. On the first issue the Plaintiff's pleading was to the effect that 1st Defendant's permission to erect arches/gantries was revoked and that accordingly the construction that 1st Defendant undertook was unlawful. As it will be recalled 1st Defendant produced before Court a letter dated 2nd December 2011 which showed 2nd Defendant reviewed 1st Defendant's application and granted it permit to construct its

structures. The 2nd Defendant indeed did not show to the contrary. In my view Plaintiff failed to prove this issue, that is failed to show that the construction by 1st Defendant of its structures contravened any Law. The finding of the Court on that issue therefore is in the negative.

44. In respect to the second issue the Court visited the sites at Airport road, Changamwe round about, Makupa Cause way, Makupa round about and Nyali Bridge. In that visit I was able to observe the distance between Plaintiff's and 1st Defendant's advertisements. In terms of distance between them I could not see any difference between those advertisements and others which are not the subject of this case. The only difference is that the 1st Defendant's advertisements are on a gantry, very much like a 'fly-over' which goes across the road while Plaintiffs are on a Bill Board. In terms of interference of 1st Defendant's structures with Plaintiff's Bill Board I respond in the negative. In my view, since no party was able to show what is the accepted distance that should be between adverts I find the 1st Defendant did not interfere with the sight of Plaintiff's advertisement. It is true that for a fraction of a moment as one drives along Airport road, Changamwe round about and Nyali bridge, that the 1st Defendant's gantry slightly, and I repeat slightly, covers Plaintiff's advertisement but as one drives or walks along, the Plaintiff's advertisement is not in any way blocked. I might add that, and this is in particular to Nyali bridge, other Bill Boards of the same height as the Plaintiff's Bill Board, do also, as one drives along the bridge, obliterate Plaintiff's advertisement to the same extent as 1st Defendant's gantry but as one drives or walks along that blockage dissipates.

45. Having visited all the sites and having had the benefit of receiving the parties evidence I do find that this case is a case hyped up by the Plaintiff and in my view it was sensationalized by Plaintiff's reliance on photographs which were contained in Plaintiff's list of documents dated 17th January 2012, which may have misled the Court, particularly when hearing the interlocutory Notice of Motion for injunction, to believe that 1st Defendant's gantry completely blocks Plaintiff's advertisements.

46. I am tempted to say and I do hereby find that Plaintiff in approaching this Court with this case and in obtaining an injunction was involved in unfair business practice which, in my view, was intended for the purpose of eliminating or substantially damaging 1st Defendant who is its competitor. This unconscionable conduct of Plaintiff was obvious from the moment 1st Defendant attempted to enter into outdoor advertising in Mombasa. Even before it set up its structures, barely only having had its permit from 2nd Defendant to put up its structures the Plaintiff's C.E.O Stanley Ngethe Kinyanjui under the title of Secretary to the Outdoor Advertising Association, wrote to 2nd Defendant complaining that 1st Defendant's gantry would block other advertisers. It is as a result of that complaint that 1st Defendant's permit was revoked before being reinstated later. The period before it was reinstated, according to 1st Defendant, and it was not challenged, was used by Plaintiff to put up its Bill Board at the sites which the Plaintiff now claims are blocked by 1st Defendant's gantries.

47. Further Plaintiff's unconscionable conduct is seen by Plaintiff claiming that 1st Defendant was blocking its adverts in Makupa round about and Nyali Nakumatt which in the case of Makupa round about, on Court's visit, I did not see Plaintiff's advertisement at all and in regard to Nyali Nakumatt the Plaintiff's CEO did not wish, due to his own reason, for the Court to visit it. The interlocutory injunction issued first ex parte on 18th January 2012 and finally confirmed after inter partes hearing on 15th June 2012 was granted on the ground that the sites at Makupa round about and Nyali Nakumatt were some of the sites the 1st Defendant's gantries were blocking Plaintiff's advertisement.

48. 1st Defendant undoubtedly, and it was so stated by its witness, has upto today suffered enormous financial loss, which however was not quantified, as a result of an injunction which has now lasted 2 years and 7 months and which in my view was unjustified in view of what I state herein above. The Plaintiff also denied the public the enjoyment of a healthy competition by eliminating 1st Defendant's gantries for that period.

49. In view of my findings I do find that on the last issue the Plaintiff is not entitled to the prayers sought

in the plaint.

CONCLUSION

50. In the end the following are the orders of this Court-

- a. **This suit is hereby dismissed with costs to both Defendants.**
- b. **The Plaintiff shall also pay both Defendants costs of the Notice of Motion dated 17th January, 2012.**

DATED and delivered at MOMBASA this 28TH day of AUGUST, 2014.

MARY KASANGO

JUDGE