



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ADMIRALTY AND COMMERCIAL DIVISION**  
**CIVIL SUIT NO 383 OF 2013**

**BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNCIL.....DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion application that was dated and filed on 13<sup>th</sup> June 2012 was brought pursuant to the provisions of Order 40 Rules 1,2 and 8 of the Civil Procedure Rules, Sections 1A & 1B, 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining prayers:-
  1. Spent
  2. Spent.
  3. **Pending the hearing and determination of this application, the Defendant be restrained from doing whether by its employees, servants or agents or any of them or otherwise howsoever the following acts or any of them that is to say to threatening or taking any action arising from the Defendant's claim for outdoor advertising bills, interfering with the Plaintiff's quiet possession in any of its premises in Nairobi, both inside and outside the premises, taking possession of any of the Plaintiff's moveable and immovable assets or in any way interfering with the business of the Plaintiff in any manner whatsoever.**
  4. Any further orders in the interest of justice.
  5. The costs of the application be the Plaintiff's in any event.

**PLAINTIFF'S CASE**

2. Its application was supported by the Affidavit of Albert Majiwa that was sworn on 13<sup>th</sup> June 2012. The facts of the Plaintiff's case were not clear from its pleadings. However, the court gathered that the Defendant had blocked the Plaintiff's Queensway Branch with garbage trucks with a view to denying the Plaintiff's customers access to the banking hall.
3. The Plaintiff said this was in contempt of a ruling that was delivered in **Judicial Review Application Number 77 of 2008 Republic vs Nairobi City Council & Others ex parte Barclays Bank of Kenya**. It also appeared that it entered into an agreement with M/S Blueprint Marketing Limited, a sister company of Mindshare Kenya Limited for outdoor advertisement on sites that were owned by Magnate Ventures Limited and that it had made all payments through Magnate Ventures Limited. It said that the Defendant had failed to adduce evidence to demonstrate what action it had taken against Magnate Ventures Limited who put up the

advertisements on their sites.

4. Its written submissions were dated and filed 11<sup>th</sup> April 2012.

### **THE DEFENDANT'S CASE**

5. In opposing the application, on 18<sup>th</sup> July 2013 the Defendant filed its Replying Affidavit sworn on even date. Its case was that since the year 2008-2012 (sic), the Plaintiff had been advertising on various sites within the city of Nairobi without paying requisite advertisement fees. It said that it was not privy to the contract between M/S Blueprint Marketing Limited and Mindshare Limited and that the Plaintiff could not hide under its contracts with third parties to avoid paying its advertising charges. It stated that it was rightly entitled to a claim of Kshs. 25,839,377/- of which the Plaintiff has partly paid Kshs. 2,055,600/- and Kshs. 3,310,860/- on 6<sup>th</sup> June 2012 and 11<sup>th</sup> June 2012 respectively.
6. Its written submissions were dated and filed on 24<sup>th</sup> April 2013.

### **LEGAL ANALYSIS**

7. The Plaintiff relied upon the case of **Giella v Cassman Brown [1973] E.A 383, Suleiman v Amboseli Resort Ltd [2004] eKLR** and **Russell Co. Ltd v Commercial Bank of Africa & Another [1986] KLR 633** to buttress its argument that it had established a *prima facie* case with a probability of success and that damages would not be adequate recompense in the instant if the injunction was not granted.
8. It submitted that the Defendant had delayed in making its claim for advertisement charges which it had, in any event, paid to Magnate Ventures Limited and the Defendant was thus seeking settlement of a fictitious debt. It argued that the Defendant had breached the rules of natural justice in that its charges were malicious and intended to make as most money as possible. It also stated that the Defendant had breached the rules of natural justice and acted unreasonably by issuing a forty eight (48) hour notice for it to pay the alleged advertisement fees. It referred the court to the cases of **Barclays Bank of Kenya Limited vs City Council of Nairobi [2005 (sic)]** and **Republic v Nairobi City Council & Others ex-parte Barclays Bank of Kenya Limited [2011] eKLR** in this regard.
9. The Plaintiff relied on the case of **Republic v Nairobi City Council & Others ex-parte Barclays Bank of Kenya Limited [2011] eKLR** in which the Defendant herein was barred from using the enforcement notice dated 30<sup>th</sup> May 2007 to collect advertising revenue from the Plaintiff. The Plaintiff had alleged that the Defendant was in breach of the orders of the court and that there was the imminent threat of trespass if the orders prayed for were not issued.
10. On its part the Defendant denied that the principles in **Giella v Cassman Brown** (Supra) had been established by the Plaintiff, who in any event had not provided any evidence to show that it was not indebted to the Defendant or that there had been trespass as had been alleged by the Plaintiff or at all.
11. The grant of injunction orders is an exercise of the discretionary powers of the court. For the court to acquiesce to such prayers, it is for the applicant to demonstrate that it had met the criteria that was set out in the case of **Giella v Cassman Brown** (Supra).
12. After a careful perusal of the facts of the case herein, the court failed to see the imminent and impending threat that the Plaintiff alleged or at all. The allegations were unfounded and unsubstantiated as there was no documentary evidence to support the same. The application was filed in 2012 and it was not clear whether the threat of the blocking of its entrance at Queensway Branch is still subsisting. Notably, the Plaintiff did not provide any evidence to show that the Defendant had threatened to take possession of its movable or immovable assets or that it was interfering with its business in any manner.
13. Indeed if there was any contempt by the Defendant of the court's orders, the proper procedure would have been for the Plaintiff to commence contempt of court proceedings. Proceedings in the High Court of Kenya Milimani Law Courts Commercial & Admiralty Division could not be used to grant relief for disobedience of orders that had been issued by a court of equal and competent jurisdiction.

14. Courts must be very cautious about granting orders for the sake of it or just because applications have been pending in court. The arguments about rules of natural justice ought to have been canvassed in the Judicial Review Division as this is a commercial court.
15. Although the facts of the case of **Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd** were distinguishable from the facts of this case, the principle that this court wishes to borrow from that case was that the Court of Appeal held that a dispute in computation of interest was a mathematical error that did not warrant restraining a chargee from exercising its statutory power of sale.
16. In the same vein, the court finds that disputes regarding monies herein would not have been a sufficient ground for it to grant the injunctive orders that had been sought by the Plaintiff. The dispute appeared to be a legal issue rather than a mathematical one more because the Plaintiff did not provide proof that no monies were due from it to the Defendant. Appreciably in the letter of 11<sup>th</sup> June 2012 (on pg 119 of the Plaintiff's application), the Plaintiff was aware of the outstanding monies when it stated as follows:-

**“ Enclosed herein, please find four cheques in favour of Nairobi City Council for Kshs 3,310,860....**

**...we seek urgent clarification of the rates applied as the demand amount appears not to tally with the rates published in the Kenya Gazette Notice No. 12582.**

**Please withhold any precipitate action against Barclays ..as we are committed to resolving this matter amicably...”**

17. Apprehension of trespass would not in itself be adequate to establish a *prima facie* case with a probability of success or that there is a danger that such a party stands to suffer irreparable loss and damages if the injunction is not granted.
18. Having considered the pleadings, the affidavit evidence and written submissions and case law in respect of the parties' cases, the court found that the Plaintiff had failed to establish that it had met the threshold that was set out in the case of **Giella vs Cassman Brown Co Limited** (Supra). The issue of privity of contract between the Plaintiff and the Defendant were issues this court opted not to consider in determining the application herein as the same was irrelevant.

### **DISPOSITION**

19. For the foregoing reasons, the upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated and filed on 13<sup>th</sup> June 2012 was not merited and the same is hereby dismissed with costs to the Defendant.
20. It is so ordered.

**DATED and DELIVERED at NAIROBI this 18<sup>TH</sup> day of DECEMBER, 2014**

**J. KAMAU**

**JUDGE**