



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENTAL & LAND CASE 42 OF 2011**

**MAGNATE VENTURES LIMITED.....1<sup>ST</sup> DEFENDANT**

**VERSUS**

**THE BOARD OF GOVERNORS**

**HIGHWAY SECONDARY SCHOOL.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY MIRINGU MUTURI.....2<sup>ND</sup> DEFENDANT**

**LYDIA WAMBUI WANJIKU.....3<sup>RD</sup> DEFENDANT**

**ARTBRIGHT MEDIA LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

This Notice of Motion is taken under a myriad of provisions of the Law, to wit, sections 1A,1B,3,3A,63(c) & (e) on the Civil Procedure Act, Cap. 21 of the Laws of Kenya, as well as under orders 42, Rule 6 and 51 Rules 1 & 2 of the Civil Procedure Rules, 2010. It seeks two main prayers, in addition to the costs of the Motion and it being certified urgent and heard ex parte at the first instance.

The two main prayers are:-

1. ....
2. **The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants whether by themselves or by their agents, servants or otherwise be restrained from trespassing upon, accessing, removing and/or destroying the plaintiff’s billboards on property LR No. 209/6262-3 Nairobi, along Mombasa Road and/or removing, destroying and/or interfering in any manner whatsoever with any media exhibited thereon pending the inter-parte hearing of this Application or the hearing of the intended appeal from the Order made on 9<sup>th</sup> December, 2011.**
3. **The 1<sup>st</sup> Defendant whether by itself agents servants or otherwise howsoever be restrained from leasing the advertising sites on property L.R. No. 209/6262-3 Nairobi, along Mombasa Road to the 4<sup>th</sup> Defendant and /or any person other than the plaintiff pending the inter-partes hearing of this Application or hearing of the intended appeal from the order made on the 9<sup>th</sup> December, 2011.**
4. ....

Prayer 2 was dispensed with at the ex parte stage and what is sought now is prayer 3.

That Motion is grounded on the basis that an earlier application for injunction was dismissed and with the dismissal went an order for Status Quo and a temporary Order of Injunction similar to the one now sought, save that the present Order is sought pending an appeal, and so the Plaintiff/Applicant's apprehension that its billboards and media on the relevant property may be removed or destroyed thereby rendering the intended appeal nugatory. That if removal or destruction of the materials mentioned above were done the Plaintiff/Applicant would suffer substantial loss. The final ground is that the plaintiff is ready, willing and able to provide security for the grant of the orders sought including payment of the relevant rent and the Plaintiff/Applicant believes that it is in the interest of justice that the orders sought be granted.

The managing director of the Plaintiff one **Stanley Kinyanjui** swore the affidavit in support of the motion in which he states, inter alia, that the 1<sup>st</sup> defendant, despite receipt of annual rent for the sites occupied by the billboards, had nevertheless given notice for the removal of such billboards. He adds that no prejudice would be suffered by any party were the orders sought to be granted.

Learned Counsel for the Plaintiff/Applicant submitted that this court had jurisdiction and that the plaintiff had an appeal that could not be described as frivolous. He added that the applicant was on site and was ready to abide with any conditions given on security including payment of rent. No contract was exhibited in proof of an agreement with a party other than the Plaintiff/Applicant and therefore counsel submitted that no hardship would be suffered. For these submissions counsel relied on the authorities of **MADHUPAPER INTERNATIONAL LIMITED –VS- KERR CA Civil Application No. 116 of 1985, Eldoret White Castle Motel Ltd –VS- Kenya Power & Lighting Co. Ltd (2005) eKLR and ALLIANCE MEDIA KENYA LTD –VS- WORLD DUTY FREE CO. COMPLEX (200) eKLR.**

The Application was opposed. The 1<sup>st</sup> defendant had its Replying Affidavit sworn by one **Patrick Kiplagat Maritim** a member of the Board of Governors and secretary to that Board. He deposed that he swore the present Replying Affidavit in opposition to the motion and also reiterated the contents of his earlier affidavit of 31.03.2011. He deposed further that the present Motion was Res Judicata as a similar one was disposed off on 9/12/2011. That in any event the 1<sup>st</sup> defendant had entered into a contractual arrangement with the 4<sup>th</sup> defendant and any injunction granted in favour of the applicant would result in the 1<sup>st</sup> defendant suffering irreparable loss and damage.

Grounds of opposition were also filed by the 1<sup>st</sup> defendant which described the application as bad in law and incompetent, an abuse of the court process and without merit. That this court is functus officio because of its Ruling dated 9<sup>th</sup> December, 2011 disposing of the application for injunction dated 7<sup>th</sup> March, 2011.

There was also filed, in opposition to the motion, a Replying Affidavit on behalf of the 4<sup>th</sup> defendant by its Head of Operations and Business Strategy in which he deposed that the application was incompetent and an abuse of court process meant merely to vex and harass the defendants and that the application is res judicata. The 4<sup>th</sup> defendant contended that any loss the Plaintiff/Applicant can suffer is capable of being compensated by way of damages.

I also heard submissions by all counsel opposing the application and I have considered all the authorities relied on by all the parties to this dispute.

I must start at the point of jurisdiction without which I would not be able to proceed with the Motion. The defendants/Respondents do not state the law correctly when they state that the court is functus officio because of its Ruling of 9<sup>th</sup> December, 2011. The correct position is that this court is clothed with requisite jurisdiction to hear the Motion for an injunction pending appeal. This point has been made in many cases, suffice here to refer to only one, to wit, **Madhupaper International Ltd – vs – Kerr Civil Application (C/A)116/1985** where the Court of Appeal held that where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending

an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision by the appellants court from being nugatory should the appeal succeed. On the strength of the above authority this court has concurrent jurisdiction.

Is this matter res judicata as alleged? One need not go into details as to what constitutes res judicata to dispose of that notion. This is the first time this injunction pending appeal is sought and as that is the undoubted right of the applicant nothing in the likeness of res judicata arises. The same matter has not previously been heard and determined. This application is properly before court, it is not frivolous and it is not an abuse of process. It is a competent application.

The conditions to be met by an applicant who wishes to have an injunction granted to his favour are to show that the grant of such an injunction would not inflict greater hardship than it would avoid and that the appeal is not frivolous so that a denial of the same would not render the successful appeal nugatory (See FREDRICK WAMBARI CHEGE –VS- JAMES KARUME WANJEMA & 2 OTHERS CA Civil Application No. 338/2004 (UR 177/04).

It was advanced by the 1<sup>st</sup> and 4<sup>th</sup> defendants that they have entered into a new contract after a tender after which the Plaintiff/Applicant was advised to have been an unsuccessful bidder. The Replying Affidavits sworn for the earlier application of March, 2011 and the present ones were relied on and the court has looked at and considered both and also the annexures thereto. What is undeniable is that the applicant lost its contract with the 1<sup>st</sup> defendant by firstly, the expiry of time and secondly by being unsuccessful at a tendering process.

In these circumstances it would be wrong to grant an injunction in my considered view as that would probably inflict greater hardship than it would avoid and fly in the face of precedents. As already stated the Applicant's first lease with the 1<sup>st</sup> defendant expired. The renewal was not successful. The successful party being the 4<sup>th</sup> defendant has a lease whose term is running probably without deriving any benefit from such lease and the 1<sup>st</sup> defendant probably not getting an income from either of the warring parties herein, that is to say, the applicant and the 4<sup>th</sup> defendant. Further I consider that ordering the applicant to pay rent by way of security would be tantamount to forcing a party on the 1<sup>st</sup> defendant and the court rewriting or rearranging the relationship between the Applicant and the 1<sup>st</sup> defendant. That, the court declines to do.

The loss that the applicant may incur is one that would be properly compensated by an award of damages, in this court's view. A denial of the order now sought cannot be said to be one that would render a successful appeal nugatory. The upshot is that the motion dated 19<sup>th</sup> December, 2011 and filed in court on 20<sup>th</sup> December 2011 is found to be without merit and it is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2012.

**P.M. MWILU**

**JUDGE**

In the presence of:-

..... Advocate for Applicant

..... Advocate for 1<sup>st</sup> Defendant

..... Advocate for 4<sup>th</sup> Defendant

..... Court Clerk

**P.M. MWILU**

**JUDGE**