



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Case 33 of 2012

MAGNATE VENTURES LIMITED.....PLAINTIFF
-VERSUS-

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

MUNICIPAL COUNCL OF
MOMBASA.....2ND DEFENDANT

RULING

1. The Plaintiff and 1st Defendant are competing outdoor advertising companies. Both are members of the Outdoor Advertising Association of Kenya. Since 2002, the Plaintiff has erected billboards at various locations in Mombasa including: Makupa Causeway, Kenyatta Avenue (Makupa Roundabout); Malindi Road (Nyali Bridge, Buxton junction); Malindi Road (Nakumatt Nyali), South Coast (exit from Likoni Ferry; Kenyatta Avenue/Ronald Ngala Street, Airport Road and Changamwe Roundabout (**“the Plaintiff’s sites”**)). The billboards are erected with the permission of, and on payment to, the 2nd Defendant, for the Plaintiff’s various clients. They cost large amounts of money to erect.

2. During 2008 to 2010, the 1st Respondent obtained the 2nd Respondent’s permission to install arches and gantries at Changamwe Roundabout, Nyali Bridge, Makupa Causeway, Mombasa Island and Nakumatt Nyali on Malindi Road. According to the Plaintiff/Applicant, the 1st Respondent’s billboard gantries at these areas have caused obstruction to and do block the view of the Plaintiff’s billboards on the Plaintiff’s Sites.

3. By a Notice of Motion dated 17th January, 2012, the Plaintiff/Applicant sought temporary and mandatory injunctions against the 1st and 2nd Defendants to prohibit them from erecting or allowing the erection of billboards in front of or so close to the Plaintiff’s sites as to block those of the Plaintiff. The court granted them an interim injunction *exparte* on urgency. In addition, the Plaintiff seeks a mandatory

injunction to compel the 1st and 2nd Defendants/Respondents to pull down and remove the arches and gantries erected by the 1st Respondents, which are obstructing the view of advertisements on the Plaintiff's sites.

4. Finally, the Appellant seeks an order of injunction directed at the 2nd Respondent compelling it to ensure that neither the 1st Respondent nor any third party interferes with the billboards of the Plaintiff erected in the Municipality of Mombasa, including erecting advertising structures in close proximity to/or that may block the Applicant's/Plaintiff's billboards.

5. The annexures to the Plaintiff's Supporting Affidavit include: permits for the various sites; agreements with its customers for rental or advertising space on its various billboards; and a letter dated 6th September, 2011 by the 2nd Defendant referring to the 1st Defendant to remove its gantry located at Nyali Bridge near Engen Petrol Station, and all other foundation bases in various sites in Mombasa Municipality; and various photographs showing the 1st Respondent's gantries blocking the view of the Plaintiff's billboards.

6. The 1st Respondent filed its Replying Affidavit deponed by John Wambua, its Business Development Media Specialist. He asserts that the 1st Respondent obtained all necessary permissions and consents from the local authority and relevant ministries and complied with the conditions imposed. He exhibited copies of the same, and also photographs of the various gantries and arches, to show that they were not obstructing other advertisers' billboards as alleged.

7. In a Further Affidavit, the Plaintiff/Applicant depones that the 1st Respondent is a relatively new entrant to the Kenyan market compared to the Plaintiff; that it adopted a business strategy of encroaching on sites with existing media to **"piggy back"** on their goodwill; and that by the time the 1st Respondent was applying for permission, the Plaintiff was already on the sites in dispute;

8. The Plaintiff and 1st Respondent filed written submissions on 18th and 19th March, 2012, respectively, and highlighted the same orally on 20th March, 2012. The 2nd Respondent neither filed a Replying Affidavit nor written submissions. In addition, and quite strangely, although they were represented at the hearing by Ms Wanjeri, on behalf of Mr. Lumatete Muchai, they made no submissions. This has been an unhelpful posture taken by the 2nd Respondent given their critical role in approvals and the public law issues that arise herein.

9. The Plaintiff referred to the American case of **S.J. Rogers et al vs Clarkes Scaling Number 15873** Court of Civil Appeals of Texas Fort Worth; and supplied a copy. In that case, the owners of two adjoining buildings had a common party wall, flush with their east property line. The Defendant erected a sign on its half side which extended so far out of the common wall over the sidewalk that the Plaintiff's advertisement on its wall could not be seen by the obstruction caused by the Defendant's advertisement. The court held that while the Defendant had a right to use his property as he pleased, such right must not thereby injure others. The court discussed the owner's right of use of his property stating:

"It is a right which takes into account the equal rights of others, for it is, qualified by the obligation that the use of the property shall not be to the prejudice of others."

Whilst the above case is neither binding nor in direct point in relation to the issues before me, and is easily distinguishable, I agree with the principle that a party's right to use **"space"** even if leased out from a public entity, must **"take into account the equal rights of others"** as its rights are **"qualified by the obligation that the use of its 'space' shall not be to the prejudice of others."**

10. In the present case, it must be noted that the **"space"** which the parties have rented for their commercial objects of advertising, is public space, a public asset or resource administered by the 2nd Respondent Council. It should be the responsibility of the Council to ensure that in granting out such space, the rights of all other parties are not prejudiced. It is for the 2nd Respondent to ensure proper

measurement of lines of sight and of the potential risks of obstruction of other parties' advertisements. That is why I think it is a pity that no representations were made by the 2nd Respondent.

11. I have carefully considered the available submissions of the parties, the application, affidavits deponed and annexures thereto.

I note from the photographs provided by the parties as follows:

The following Plaintiff's annexed photographs show that there will be obstruction or blockage of the Plaintiff's or other parties' advertisements, namely, EWS 10, EWS 11 and EWS 13.

The Defendant's annexed photographs as follows, show that there will be obstruction or blockage of the Plaintiff's or other parties' advertisements, namely: JM8e, except that the photograph has been taken from the roadside and not along the line of traffic sight; and also the photograph at Page 21 annexed to the Affidavit of John Wambua Muswa, if taken from within the road and along its line of sight.

12. The photographs I have referred to seem to show that the 2nd Defendant's public "**space**" for advertising along roadsides is heavily congested with advertisements. As a consequence, it seems that later entrants seeking erection of newer billboards or gantries and the like, would be disadvantaged purely from the fact of congestion. But it also appears that there are billboards and other advertisements that partially obscure or obstruct the view and appreciation of other billboards, erected further ahead in the line of sight. So that it appears to me that other considerations beyond merely the commercial, would come into play in the equation.

13. A site visit would, in this case, have been, I think, useful to enable me to clearly appreciate the alleged obstruction of the Plaintiff's advertisement. That opportunity should be available at the full hearing of the matter. From the descriptions I have given of the photographs annexed, it appears to me that the Plaintiff has made out a *prima facie* case within the well established principles set out in **Giella vs Cassman Brown**, and is entitled to some form of protection.

14. In my view, the dispute herein is not merely limited to commercial law issues. It raises a number of public law and public policy considerations which require to be addressed. These include:

- a) What are the principles, beyond the purely technical requirements for consents by public authorities and public agencies, which undergird the issuance of public "**space**" to competing advertisers?
- b) What considerations, including those of a policy nature, must be taken into account in determining the *locale* and *situs* of each competing advertisement?
- c) Are there third party considerations that should be taken into account? If so what are they?
- d) Is a public entity entitled to grant or approve the hire and use of public "**space**" under its control without granting an opportunity for all interested parties to participate, give their views or object and have third party views taken into account?

I am aware that these issues were not directly raised by the parties herein, who are merely interested in their commercial rights, the viability of their bottom line and their advertisers' interests. But these issues necessarily arise because it is only when the public entity, in this case the Council, has properly dealt with the public interest elements, that the commercial issues become readily resolvable.

15. If, for example, the 2nd Respondent had sought public participation before granting consent to the use of any public advertisement "**space**", the objections of the Plaintiff herein would have early been raised and dealt with from policy angle and also professionally and technically, so that the emergent situation would have been obviated. In the absence of information indicating the existence of application of any policy considerations by the 2nd Respondent, it is inevitable that situations such as the complaint herein

will become the order of the day, couched as commercial disputes.

16.I have already indicated that I am satisfied that the Plaintiff has established a *prima facie* case against both defendants. I have also said that a site visit to **each** of the disputed sites to determine the level of obstruction is necessary. Such site visits cannot be a sustained activity of the Judiciary in future, and cannot be an apt use of judicial time unless a public policy element or regime which may include stakeholder participation is put into place by the 2nd Respondent in the near future.

17. In this regard, the full and active participation of the 2nd Respondent will be essential otherwise it may find that evidence may point to restrictions or limitations that could arise against it, which, if left unclarified, would lie to its detriment. This is all the more important because it is the responsibility of a public entity, such as Council, to ensure the provision and use of public “space” in such a manner that there is fairness and the public benefit outdoes the private interest of a party.

18. Accordingly, I am prepared to grant injunctions in terms of Prayer 3 against the **1st and 2nd** Defendants pending the hearing of the suit. The injunction shall be in relation only to the five (5) sites identified in prayer 3.

I will not grant prayers 4 and 5 as no case has been made out for mandatory injunctions. Further, I cannot grant prayer 5 because of the scope of the prayer which seeks to protect **all** the Plaintiff’s sites within the whole Municipality of Mombasa, when no case was fashioned in respect thereof.

I further order that the matter do proceed expeditiously to full hearing, and that the parties comply with Order 11 Civil Procedure Rules in relation to pre-trial documentation within the next thirty (30) days. In fashioning the issues for determination, parties are to take into account the public law issues pointed out earlier; and to allow for an opportunity for the court to visit the sites in issue.

Given the nature of this matter, I consider that the costs of this application shall abide the outcome of the suit, and I so direct.

Orders accordingly.

Dated, signed and delivered this 15TH day of JUNE, 2012

R.M. MWONGO
JUDGE
Read in open court
Coram:

1.Judge: Hon. R. Mwongo

2.Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)