



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 246 OF 2012

ALLIANCE MEDIA KENYA LIMITED.....PLAINTIFF

VERSUS

SPORTS STADIA MANAGEMENT BOARD.....DEFENDANT

RULING

1. Before me is the Plaintiff's Notice of Motion dated 26th of April 2012 and expressed to be brought under Order 40 Rules 2 & 3, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, IB, 3A and Section 63 (c) & (e) of the Civil Procedure Act. The Applicant seeks the following orders:
 - 1) The Honourable Court be pleased to issue a temporary injunction restraining the defendant by itself, its servants, agents and/or associates from levying distress against the defendant and/or proceeding to remove and auction the plaintiff's goods proclaimed on 11th April 2012 and/or in any way interfering with the plaintiff's use and/or dealing with its bill boards located at the defendant's premises at Moi international Sports Centre- Kasarani and Nyayo National Stadium pending the hearing and determination of this suit.
 - 2) The Honourable Court be pleased to issue a temporary injunction restraining the defendant by itself, its servants, agents and/or associates from preventing, stopping or in any way obstructing the plaintiff from removing its bill boards located at the Defendant's premises at Moi international Centre-Kasarani and Nyayo National Stadium pending hearing and determination of this suit.
2. The application is based on grounds that the defendant has unlawfully levied distress on the plaintiff on the suit premises. The plaintiff states that the distress for rent is illegal because the plaintiff's occupation is by reason of a Revenue Sharing Contract and not a leasehold or tenancy arrangement. The plaintiff avers that the chattels upon which distress has been levied are the plaintiff's tools of trade in actual use and therefore exempt from distress under Section 16 of the Distress for Rent Act. The plaintiff further avers that it has a prima facie case with overwhelming chance of success and which meets the test enunciated in the case of *GIELLA VS CASSMAN BROWN*.
3. The application is supported by the affidavit of JOHN MUSWA dated 26th April 2012 with several annexures thereto.
4. The application is opposed vide the replying affidavit of GABRIEL KOMORA and further through grounds of opposition filed in Court on 22 May 2012.
5. The plaintiff's case is that by two agreements dated 25th January 2007, the plaintiff and the defendant entered into an agreement for provision of Outdoor and Indoor advertising services at the defendant's

sporting facilities namely Nyayo National Stadium and Moi International Sports Centre Kasarani. It was a term of the agreements that the plaintiff pay the defendant a sum of Kshs. 650,000/= per month or 40% of the total monthly revenue realized by the plaintiff from the provision of services, whichever amount is greater.

6. The plaintiff avers that the contract based on the aforesaid agreements expired in January 2010. Thereafter, there was no formal contract and the parties embarked on negotiations to formalize a contractual arrangement. This culminated with an offer by the defendant vide a letter dated 2nd November 2010 as follows:-

- **The plaintiff pays Kshs. 3,000,000/= for the period February 2010 to December 2010.**
- **A contract for one year commencing 1st January 2011 be signed for the use of the Nyayo National Stadium facility.**

The plaintiff states that, whilst no formal contract was signed they duly settled the agreed sum of Kshs. 3,000,000 for the period February 2010 to December 2010. They also continued occupation of the defendant premises under the terms of the initial contract and continued remitting kshs. 650,000/= to the defendant who duly accepted the payments.

7. The plaintiff further states that in July 2011, the defendant advertised tender for provision of advertising services for Moi International Sports Centre-Kasarani without their prior knowledge. As a result of this the plaintiff sent the defendant a letter dated 14th July 2011 and proposed to pay Kshs. 375,000/= for the remaining facility, that is, Nyayo National stadium. The defendant did not respond to the said letter but continued to receive the amount of Kshs. 375,000/= as proposed. The plaintiff claims that, in December 2011, the defendant re-advertised the tender and this time included Nyayo Stadium, taking away the only avenue they had left.

8. The plaintiff's contention is that from the expiry of the initial agreements, they continued dealing with the defendant on terms similar to those in the said agreements and that the amounts paid and received by the defendant were paid and received on that understanding. The plaintiff further contends that there was no tenancy agreement between the parties and that there was no rent outstanding as at 11th April 2012. Therefore, distress for rent and the proclamation made on 11th April 2012 were unlawful. The plaintiff relied on a number of authorities including **GIELLA VS CASSMAN BROWN & CO. LTD [1973] EA 388.**

9. The defendant's case is that they entered into an agreement with the plaintiff on 25th January 2007, whereby the plaintiff was to remit rental payments to the defendant in exchange for using their premises at the Nyayo National stadium and the Moi International Sports Centre at Kasarani. It is the defendant's contention that since the agreement had a time limit and subject to the payment of monthly rent they considered it to be a tenancy/leasehold agreement. The defendant claims that, in utter breach of the agreement, the plaintiff omitted to remit rental payments to the defendant and thus leading to substantial loss to the defendant.

10. The defendant states that the agreement was for a term of three years and expired on 24th January 2010 having begun on 25th January 2007. The defendant further states that since the plaintiff's contract with the defendant had expired, they proceeded to invite bidders for provision of indoor and outdoor advertising. The defendant avers that they told the plaintiff on various occasions to vacate their premises in view of the fact that a new entity had been awarded the tender to provide advertising services and also due to the fact that they had outstanding rent to be paid. The defendant claims that the plaintiff owes them a sum of Kshs. 9,050,000/=.

11. The defendant, through its agent Dalali traders, levied for distress for rent owing to the aforesaid debt giving rise to the application herein. As a result, the plaintiff brought this application to Court seeking for a temporary injunction restraining the defendant from levying distress.

12. I have considered the application herein, the affidavits and submissions both in support and opposition of the application.

13. It is not in dispute that there were two agreements between the plaintiff and the defendant, namely Agreement for Provision of Outdoor Advertising and Agreement for Provision of Indoor Advertisement. The said agreements took effect from 25th January 2007 and expired on 31st January 2010. However, the parties continued to do business together until July 2011 when the plaintiff alleges that the defendant without notice invited a tender for advertisement for the Moi International Sports Centre-Kasarani site.

14. From the foregoing, it is clear that from January 2010 the parties were not contracting under any express terms. In other words, there was no agreement between the parties from January 2010 to July 2011 and upto December 2011 when the Defendant re-advertised the tender with a further inclusion of Nyayo Stadium.

15. In my view, the main issues for determination are:-

- Whether there is any outstanding rent owed by the plaintiff to the defendant; and
- Whether the plaintiff is entitled to the orders sought.

16. On the first issue, the plaintiff has produced statements from Standard Chartered bank indicating that it made payments to the defendant as required for use of the defendant's premises. I find the same to be sufficient evidence to support their claim that no rent was outstanding as at the date of proclamation, that is 11th April 2012. On the other hand, the defendant has not substantiated their claim that the plaintiff owes them a sum of over Kshs. 9,000,000/=. The defendant has only produced a statement of account indicating that the plaintiff is indebted to them. The same is merely a print out and I do not find it to be of much probative value to the defendant's claim at this point.

17. On the second issue, the principles for granting an interlocutory injunction are well settled in the case of **GIELLA –VS-CASSMAN BROWN & CO. LTD [1973] EA 388**. The first principle is whether the applicant has established a *prima facie* case capable of succeeding at trial. As earlier stated, the plaintiff has demonstrated that it made the requisite payments to the defendant by producing bank statements which is credible evidence. On the other hand, the defendant has not sufficiently substantiated its claim of over Kshs. 9,000,000/=. There is therefore need for proof of the claim through evidence within the context of a trial. To that end, I find that the plaintiff has established a *prima facie* case.

18. Secondly, will the plaintiff suffer loss that cannot be compensated for by way of damages? The applicant has stated that if the billboards are brought down or rather auctioned, the applicant will suffer irreparable loss for the reason that their reputation with their clients will be compromised. I agree with this position, for the reason that loss of reputation may not be adequately compensated for by way of damages.

19. The third principle is that when the court is in doubt, it will decide the application on the balance of convenience. The court is in no doubt that the balance of convenience tilts in favour of the applicant as any sums owed to the Defendant can always be paid while the removal of the billboards would entail costs and inconvenience to the Plaintiff.

20. In the upshot, the Notice of Motion dated 26th April 2012 is hereby allowed with costs to the plaintiff. The parties may proceed to prepare the matter for hearing by complying with Order 11 of the Civil Procedure Act.

IT IS SO ORDERED.

DATED, DELIVERED AND SIGNED THIS 20TH DAY OF SEPTEMBER 2012

J.M MUTAVA

JUDGE