



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HCC NO. 72 OF 2011**

MAGNATE VENTURES LTD.....PLAINTIFF  
VERSUS  
KENYA FERRY SERVICES LTD.....DEFENDANT

**RULING**

1. I have before me a notice of motion dated 28<sup>th</sup> March, 2011. The motion has been brought by Magnate Venture Limited (hereinafter referred to as the plaintiff). The application is anchored on a suit filed by the applicant against Kenya Ferry Services Limited (hereinafter referred to as the defendant). In the suit commenced by way of a plaint, the plaintiff essentially seeks an order of specific performance of an agreement entered into between the plaintiff and the defendant, and a permanent injunction restraining the defendant from leasing the sites on which the defendant's Bill Boards are erected. The notice of motion which was filed simultaneously with the plaint seeks several prayers some of which are already spent. The prayers which are now for determination are as follows:

“4. the defendant whether by itself agents, servants or otherwise howsoever be restrained from leasing the sites on the defendant's property at Likoni Ferry on which the plaintiff's 5 billboards are erected, maintained and advertising media exhibited to any other person, pending the hearing of this suit.

5. The defendant whether by itself agents, servants or otherwise howsoever be restrained from trespassing upon, accessing, removing and/or destroying the plaintiff's 5 billboards on the defendant's property at Likoni Ferry, removing, destroying and/or interfering in any manner whatsoever with any advertising media exhibited thereon including any such advertising media that may be exhibited on the 5 billboards by the plaintiff to replace the advertising media removed and/or destroyed by the defendant, pending the hearing of this suit.

6. Defendant whether by itself, agents, servants or otherwise howsoever be directed by an order of mandatory injunction to print and return to the plaintiff all the advertising media removed from the 5 billboards in the state and condition in which the same were, before their removal and/or destruction, pending the hearing of this suit.

7. The costs of this application be provided for.”

2. The application is based on an affidavit sworn by the plaintiff's Managing Director Stanley Kinyanjui on 28<sup>th</sup> March, 2011, and a supplementary affidavit sworn by the same person on 11<sup>th</sup> April, 2011, as well as grounds which have been stated on the motion. In short, the plaintiff company entered into an agreement with the defendant pursuant to which the plaintiff was given a licence in May 2001 to erect and maintain 5 advertisement billboards on specific sites on the defendant's property at the Likoni Ferry, in consideration for which the plaintiff was to pay the defendant an agreed rent.

3. The plaintiff erected the Bill Boards on the site and continued maintaining the billboards. By a letter dated 23<sup>rd</sup> January, 2009, it was agreed *inter alia*, that the plaintiff would continue maintaining the existing billboards for a period of 5 years with effect from November, 2008. The plaintiff entered into agreement with various clients for whom it has been exhibiting advertising media on the billboards. By a letter dated 8<sup>th</sup> February, 2011, the defendant informed the plaintiff that it had contracted a 3<sup>rd</sup> party Nova Media Limited to manage all advertising activities in their premises. The defendant therefore advised the plaintiff to remove all the billboards by the end of that month and contact Nova Media Limited if they wanted to continue advertising. Subsequently, the plaintiff's billboards were removed and destroyed.

4. The plaintiff maintains that the defendant is in breach of the agreement entered into through the letter dated 23<sup>rd</sup> January, 2009. The plaintiff also states that Nova Media Limited was incorporated on 15<sup>th</sup> June, 2010 and their services could not therefore have been properly procured. The plaintiff contends that the defendant cannot unilaterally terminate a licence which had a fixed term of 5 years. The court was therefore urged to issue an order of injunction to stop the attempted revocation of the contract between the plaintiff and the defendant.

5. The plaintiff maintains that it will suffer irreparable loss if the injunction is not granted, as it has entered into contracts with its clients which contracts would have to be undertaken based on the fixed term of 5 years. Further, the court was urged to find that the site at Likoni Ferry where the billboards were erected is a peculiar site to the plaintiff's client. The court was urged not to allow the defendant to breach the agreement merely because it could compensate the plaintiff.

6. On the balance of convenience, it was submitted that the plaintiff has been having 4 billboards on the site since the year 2001 while the 3<sup>rd</sup> party Nova Media Limited to whom the defendant has now awarded a contract, was only incorporated on 25<sup>th</sup> June, 2010. It was submitted that the 3<sup>rd</sup> party has not put anything on the ground and was not likely to suffer any loss if the injunction was granted.

7. The application was opposed through a replying affidavit sworn by Bakari Gowa on 8<sup>th</sup> March, 2011 and a further replying affidavit also sworn by Bakari Gowa on 15<sup>th</sup> April, 2011. Bakari Gowa the Financial Controller of the defendant company, states that the plaintiff erected and maintained 5 billboards and has advertised media in the defendant's property at Likoni Ferry since the year 2005. The terms and conditions of the operative agreement were however not clear nor was the contract reduced into writing, nor signed by both parties.

8. The defendant company being a statutory corporation within the meaning of the Statutory Corporations Act Cap 446 of Laws of Kenya, it was found that the procurement of the plaintiff's services did not comply with the provisions of the Public Procurement & Disposal Act 2005. The defendant therefore called for tenders in compliance with that Act. Nova Media Limited emerged the highest bidder having met all the requirements. This company entered into an agreement with the defendant for management of advertisements at the defendant's premises and facilities. It is maintained that the plaintiff was fully aware of the tender process and is therefore stopped from challenging the process, or award of the

tender to a different person. It was argued that the plaintiff failed to stop the tendering process or to appeal against the award to Nova Media Limited as provided under section 93 of the Public Procurement and Disposal Act. The court was urged to find that there was no proper cause to grant the order of injunction sought, as the advertisement sites were leased to Nova Media Limited, before the commencement of the suit. Therefore the court cannot restrain what has already been procedurally and lawfully done. It is reiterated that there is no existing enforceable contract or licence, or lease, subsisting between the plaintiff and the defendant.

9. At the outset I must clarify that what is before me is an interlocutory application seeking interlocutory orders pending the hearing of the main suit. This is significant because this court cannot make definitive findings at this stage, but should only determine whether on the material placed before me a *prima facie* case with a probability of success has been established. Thus the position is distinguishable from an application for judicial review or a petition where the full evidence has to be considered and conclusive findings made.

10. With the above in mind, I have carefully considered all the affidavits filed in support of the application and those filed in opposition to the application. I have also taken note of all the contending arguments made before me.

11. In line with the now notorious case of *Giella vs. Cassman Brown & Company Limited 1973 EA 358*, the main issue in this matter is whether the plaintiff has established a *prima facie* case with a probability of success, and if so whether the applicant will suffer irreparable loss or whether damages will be an adequate remedy.

12. It is evident that the plaintiff has been using sites on the defendant's property for advertisement media. The defendant concedes that there was an agreement between the parties for this arrangement. The issue is whether the letter dated 23<sup>rd</sup> January, 2009 which purported to give the plaintiff a licence to maintain advertisement media on the sites for 5 years with effect from November, 2008 resulted in an enforceable agreement capable of specific performance. That is obviously an issue which will have to be canvassed and determined during the trial.

13. Suffice to note that the defendant's contention that it is a statutory body subject to the Public Procurement & Disposal Act 2005 has not been disputed. This means that from the time that Act came into effect the defendant was bound to comply with this Act. It is apparent that the services or licence to erect and maintain advertisement media on the sites, qualifies to be a procurement under section 3 (1) of the Public Procurement & Disposal Act 2005. It is also evident that the defendant did not comply with the procurement procedures at the time when the letter dated 23<sup>rd</sup> January, 2009 was written. The defendant has demonstrated that it subsequently invited tenders for the provision of the services and that although the plaintiff purchased the tender documents the plaintiff did not return the documents. *Prima facie*, it is evident that the relationship between the plaintiff and the defendant regarding the licence was terminated by the defendant's letter dated 8<sup>th</sup> February, 2011 in which the defendant gave the plaintiff notice to arrange to remove the bill boards and to contact Nova Media Limited if it was still interested in the advertisement. But even before this, the plaintiff apparently had notice of the defendant's intention to award the tender for the sites.

14. Having failed to return the tender documents the plaintiff ought to have challenged the process before the award of the tender if they felt aggrieved. The tender has now been awarded and a 3<sup>rd</sup> party has apparently moved in. The plaintiff cannot now request the court to restrain the defendant from removing the plaintiff's bill boards or leasing the site to another party, when all these actions have already taken place, and the site is under the control of someone else. Moreover, the plaintiff has not satisfied this court that it is likely to suffer irreparable loss if the order of interlocutory injunction is not granted. It is true that the plaintiff may be exposed to liability as a result of commitments it may have entered into. However, there is nothing to show that such liability cannot be adequately compensated by an award of damages.

15. I find that the plaintiff has failed to satisfy the conditions set out in the case of *Giella vs. Cassman Brown & Company Limited*. The application for interlocutory injunction fails. It is accordingly dismissed with costs.

16. Those shall be the orders of the court.

**Dated, signed and delivered this 26<sup>th</sup> day of October, 2011.**

**H. M. OKWENGU**

**JUDGE**

In the presence of:

Mulandi for Havi for the Plaintiff/Applicant

Ms. Abir H/B for Nyongesa for the Defendant

Kioponda Court Clerk