



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 136 of 2009**

**TAIFA OUTDOOR LIMITED .....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA ..... DEFENDANT**

**RULING**

Application by Chamber summons dated 2/3/09 is brought under **Order 39 Rules 1, 2, 3 and 9, Civil Procedure Code** and **Section 3A and 63 (c) and (e) of Civil Procedure Act** seeking orders:-

***1. Pending hearing and determination of this suit or until further orders of the court an interlocutory injunction do issue to restrain the defendant either by itself or through its officers, agents and/or employees from terminating the agreement between the parties of committing breach of contract complained of and from in any manner whatsoever wasting, damaging, alienating or in any manner interfering with the business and/or activities and operations of the plaintiff under the said agreement and other prayers as written under the said Chamber Summons.***

The reasons for requesting the orders are stated in the application.

This application is supported by affidavit of Mohamed Ali sworn on 2<sup>nd</sup> of March 2009. Mr. Mohamed Ali swears that he is a director of Taifa Outdoor Ltd. On 30/9/2008 the plaintiff applied in writing to the Town Clerk, Municipal Council of Mombasa and requested the council to allow the plaintiff to beautify the roundabout at the junction of Digo Road and Moi Avenue in consideration of in return for the plaintiff being allowed to place advertising panels thereat.

The copy of letter is exhibited. On 2<sup>nd</sup> October 2008 the Council duly authorized the plaintiff to go ahead. Thereafter correspondence was exchanged and all aspects of the agreement were agreed upon. The plaintiff started investment in the process of fabrication, recruitment, installation and all other ancillary business expenses which was Kshs.30,000,000/=. This sum was supported by documents.

Later the Council stopped the contract works. The askaris of the Council started harassing the workers. However with discussion from time to time the plaintiff's works was completed to 95% by 10<sup>th</sup> February to 18<sup>th</sup> February 2009. However, by 19/2/09 a letter was received by the plaintiff purporting to terminate the agreement between the parties. The letter is marked "MA 17". That if the contract is terminated the plaintiff would suffer great loss and the employees would lose their salaries.

In reply the defendant has caused an affidavit to be sworn by one Tubman Otieno on 7/5/2009. He swears that after the contract referred to by plaintiff was signed, the defendant moved to implementation

stage. It is alleged that the plaintiff's workers embarked on the streets and started installing the works on all the streets named indiscriminately. It is admitted that the defendant did move in and ordered the plaintiff to stop all the works pending further consultations.

It is admitted that counsel's prosecution arrested the plaintiff's works but that intended prosecution was withdrawn. There were several other meetings. A Christmas break was agreed upon but after 3/1/2009 the Municipal Council again moved swiftly to stop the plaintiffs from performing the works. It is alleged by the defendant that the plaintiff has been more than compensated by offer of other streets where he has been offered where he can place other advertisements.

I have perused the very lengthy affidavit filed by the defendant. The affidavits are argumentative and it appears the council and its officers do not understand the legal consequences of a contract. They admit that there was a signed agreement between the parties and yet they act as if the plaintiff contractor is their employee. They do not appreciate the financial implications of the contract. The plaintiff has demonstrated what loss he has already incurred while the defendant has not expended any money on the project. They cannot be allowed to cause loss to the other party.

I am satisfied that the plaintiff applicant has demonstrated a prima facie case with a good chance of success. The loss incurred to the plaintiff is beyond the loss to be compensated with damages and balance of convenience tilts on the plaintiff's side since he is in possession of sites and has commenced the works and expended money. It is well known that the Local Authorities are not possessed of free money to pay damages they being public bodies. They should ensure the public funds are well applied.

The parties have filed long lists of authorities. The plaintiff has relied on the case of **A.I. Outdoor (K) Ltd. vs. City Council of Nairobi** in which the dispute was similar to the present one. The court was of the view that the plaintiff expended a lot of money on reliance on defendant's approval. On that reliance, the plaintiff has undertaken business transactions of large sums of money. Injunction was granted. The defendant has relied on the well known decision in **Giella vs. Cassman Brown** where the principles of granting injunction are set out.

In this case it is clear the plaintiff has fulfilled the said grounds. In the case of **E. Makhokha – Court of Appeal No.20/1994** the Court of Appeal said at page 10:-

***“It is well established that they cannot be forced to resume their office by the equitable remedy of specific performance. So the only remedy the university can pursue against them would be a claim for damages for breach of contract. Coercive equitable remedy of specific performance of personal service by specific performance will turn a contract of service into a status of servitude.”***

This authority also sets out the principles upon which injunction may be granted and emphasizes that damages are remedies that can be granted. Again, the same authority at page 19 states that:-

***“If injunction cannot be complied with the court will decline to grant it.”***

In the present case the contract was in specific areas and only some parts were affected. New offers on other parts were not affected. The plaintiff still has control, possession and the mandate of other roads listed under paragraph 25 of the affidavit and therefore it is not correct there is a non-existent contract. The letter of offer dated 9/10/08 states:-

***“We are in receipt of your application dated 6/10/08 for consideration to advertise along selected roads within the Municipality.***

***We are pleased to inform you that your request has been acceded to for advertising along the following roads;***

***1. Jomo Kenyatta Avenue;***

2. *Digo Road;*
3. *Nyerere Avenue;*
4. *Moi Avenue;*
5. *Ronald Ngala Road;*
6. *Abdul Nasser Road.*

***Please take note that the sites for placing your advertisement along the said roads shall be identified in liaison with Municipal Engineer.***

***The sites shall be identified and approved by the Municipal Engineer. You shall pay in advance fees:-***

***Kshs.100/= per pole per year;***

***Kshs.2000/= per site per year;***

***Kshs.10,000/= per site per year;***

***Kshs.3,150/= per advert per year.***

***You shall indemnify the Council against the liabilities and claims that might arise out of your actions. Do not cause obstruction to traffic.***

***The structures shall be erected only at the median of roads.***

***Terms and Conditions:***

***The agreement will be for 2 calendar years effective from October 2008.***

***The Council has approved option A of the designs you presented for consideration.***

***You submit a drawing detailing the site and excavation details. The minimum clearance height from the ground shall be at least two metres.***

***It is clear the Council can be prevented from unlawfully terminating the contract.”***

Upon considering the above, it is clear that the Council is bent on committing breach of contract entered into by the parties. It is also clear that the plaintiff has expended large sums of monies.

Under this project TERMINATION is provided for but there is no period of notice indicated. The Council will forfeit all plaintiff's materials without payment. This is contrary to the provisions of the Constitution. What can be noted here is that the term of contract is not yet over.

The plaintiff has demonstrated a strong case with a chance of success and is entitled to injunction. I therefore allow the application and grant order in terms of prayer (1) of Chamber Summons pending the hearing and determination of this suit.

Costs shall be paid by the defendant.

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 29<sup>th</sup> day of July 2009.

**JOYCE N. KHAMINWA**

**JUDGE**