

REPUBLIC OF KENYA

CIVIL CASE 637 OF 2006

ADOPT A LIGHT LTD.....PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

On 26th November 2007, Azangalala J allowed the plaintiff's application which sought to injunct the defendant, its servants or agents from removing any advertising media, including *inter alia*, billboards and advertising frames placed by the plaintiff within the streets of the city of Nairobi pending hearing of the dispute between the plaintiff and defendant by arbitration. The court further allowed the plaintiff to return, replace and or restore all the advertising media taken down by the defendant from Nyerere Road and Arboretum drive in the city of Nairobi without prejudice to any of its rights to claim compensation or any other rights it may have against the respondent with regard to the forgoing on condition that the plaintiff files an appropriate undertaking as to damages. On 20th July 2009, the plaintiff sought and was granted leave to institute contempt of court proceeding against the defendant's principal officers namely, the town clerk Mr. Phillip Kisia, the director of city planning Mr. Peter Mburu Kibinda, the director of legal affairs Ms. Mary Ng'ethe and the deputy director of city planning Mr. James Maina.

On the same day, the plaintiff filed notice of motion pursuant to **Sections 3 and 63 of the Civil Procedure Act** and **Orders XXI Rule 28(5) & L Rule 1 of the Civil Procedure Rules** seeking orders of the court to direct a duly licenced court bailiff or auctioneer to remove all the advertisement media and frames erected on all the electric poles on Nyerere road and Arboretum drive to enable the plaintiff return, replace and restore its advertisement media and frames taken down by the defendant as ordered by this court on 26th November 2007. The plaintiff further prayed that the Officer Commanding Police Station Kileleshwa be authorized to assist the court bailiff or licenced auctioneer in the enforcement of the said order of the court. The plaintiff prayed that the defendant be compelled to pay the costs occasioned by the enforcement of the said court order. The application is supported by the annexed affidavit of Esther Muthoni Passaris, the managing director of the plaintiff and the grounds stated on the face of the application. The application is opposed. Newton Mung'ala, the deputy director legal affairs of the defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard oral rival arguments made by Mr. Issa for the plaintiff and by Mr. Wachira for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case, firstly for the citing of the principal officers of defendant for being in contempt of the orders of the court and secondly whether the plaintiff established a just case for intervention by the court. Before giving reasons for this court's ruling, I would like to point out the strange procedure that the plaintiff adopted in prosecuting the present application. As stated earlier in this ruling, the plaintiff was granted leave to cite the principal officers of the defendant named in the application for leave for being in contempt of the orders of the court. However, when the plaintiff filed the substantive motion, instead of proceeding with the application for which leave was granted by the court, the plaintiff changed tact and sought the enforcement of the order of this court purportedly under the provision of **Order XX1 Rule 28 (5) of the Civil Procedure Rules** that provides that:

“Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder, or some other person appointed by the

court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.”

It was evident therefore that the order sought by the plaintiff in the substantive motion was completely at variance with the order that was granted by the court pursuant to the leave sought by the plaintiff. No matter. Notwithstanding the procedural misadventure by the plaintiff, the court will render its decision on the merits of the application.

The facts of this application as the court was able to glean from pleadings filed by the parties herein are as follows: The plaintiff and the defendant entered into an agreement on 28th March 2002 by which the plaintiff was granted sole and exclusive rights to advertise on street light poles for a period of five (5) years. There was a clause in the agreement that entitled the plaintiff to request for automatic renewal of the agreement if the plaintiff fulfills certain conditions. It is apparent from the multiplicity of suits that are pending in court between the plaintiff and the defendant that the relationship between the plaintiff and the defendant, pursuant to the said agreement, has not been a happy one. At one point or the other, the defendant made several attempts to thrash the agreement between itself and the plaintiff. There are several issues that are pending determination by the courts, some of which relate to the validity or otherwise of the agreement that is the subject of arbitration between the plaintiff and the defendant.

In April 2007, the defendant passed a resolution affirming and approving a policy on private-public partnership between itself and advertising companies on advertising and street lighting. Pursuant to the said resolution, the defendant advertised a tender requesting for persons with interest to apply for the said private-public partnership. The plaintiff was aggrieved by the said decision of the defendant and sought orders of judicial review to quash the said decision. The suit, **Nairobi HC Misc. Application No. 1110 of 2007 Adopt-A-Light Limited vs. City Council of Nairobi** (*unreported*) was heard by Wendoh J. In ruling whether the plaintiff should be granted leave to mount judicial review application, the learned judge at page 20 of her ruling made the following observations:

“The respondent has a statutory mandate to enter into contracts of the amount specified in that Section only after a tender process. The contracts under challenge involve millions of monies and should be subject to the tender process. The contract relied upon in bringing this application, as earlier observed is under challenge for being an illegality for failing to comply with the above noted Section. For this court to stop the respondent from carrying its statutory mandate would in effect be enforcing and ratifying that contract by guise of Judicial Review. I must again stress that the contested contract must be resolved first in a civil court or by arbitration instead of the parties filing a multiplicity of Judicial Review applications over the same issues.”

The court denied the plaintiff leave to institute a judicial review application. The plaintiff was aggrieved by the said decision of the court and duly filed an appeal to the Court of Appeal. Contemporaneous with filing the appeal, the plaintiff filed an application **under Rule 5 (2)(b) of the Court of Appeal Rules** seeking to stay the execution of the subject decision of the defendant that the High Court refused to stay its operations. The application was disallowed. Khaminwa J in **Nairobi HCCC No. 708 of 2008 Magnate Ventures Limited & Anor. Vs. City Council of Nairobi & 2 others (Milimani)** (*unreported*) granted an interim measure of protection that was sought by the plaintiffs in the suit to bar the defendants in that suit (*including the plaintiff in this suit*) from proceeding with the arbitration in regard to whether the agreement entered between the plaintiff and the defendant dated 28th March 2002 was capable of enforcement by arbitration without involvement of the said plaintiffs in the suit. In her ruling, Khaminwa J observed that there was justification in the objection by the plaintiffs in the suit to the said agreement on the grounds that the same was invalid and illegal in right of the provisions of **Section 143 of the Local Government Act**.

From the above decisions by the court, it is clear that so far no court of law has rendered a decision regarding the validity or otherwise of the agreement between the plaintiff and the defendant. It is apparent that the arbitral tribunal that was set to hear the dispute between the plaintiff and the defendant is yet to render a decision that can be adopted by this court as its judgment. It is therefore evident that as

long as the basis of the plaintiff's application is the agreement which has been challenged by the defendant and other parties, this court cannot grant the application sought. By filing a multiplicity of suits, the plaintiff has been able to obtain opinions from various courts which have watered down the thrust of the plaintiff's case in this application. This court cannot enforce a particular order of this court when it is apparent that other courts have issued orders whose effect is the contradiction of the particular order that is sought to be enforced.

Further, the plaintiff failed to establish to the required standard of the law that the principal officers of the defendant have breached the said order of the court and therefore liable to be punished for being in contempt of the orders of the court. This court is not oblivious of the fact that if the order sought by the plaintiff in this application is granted, the court would in effect be infringing on the defendant's statutory mandate. This court will in the circumstances be seen to be usurping the powers granted to the defendant to regulate the physical planning of the city under the **Physical Planning Act** if it allows the application sought by the plaintiff. I am of the view that remedy available to the plaintiff if it desires to enforce the said order of this court is to quantify the damages that it alleges to have suffered by the defendant's alleged failure to comply with the said order of the court.

In the premises, I find no merit with the plaintiff's application and proceed to dismiss it with costs to the defendant.

DATED AT NAIROBI THIS 27TH DAY OF OCTOBER 2009.

L. KIMARU

JUDGE