REPUBLIC OF KENYA

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

CIVIL CASE 637 0F 2006

ADOPT A LIGHT LIMITED ……....……PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL ……. DEFENDANT

R U L I N G

Before me are four applications. Three of the applications are by the plaintiff and one is by the defendant. The parties agreed to argue the applications together. Briefly, the 1st application was lodged on 21.11.2006 by the plaintiff and in my view is the genesis of the rest of the applications. That application was brought under the provisions of Section 7 of the Arbitration Act 1995 and Order 39 Rules 1 and 2 of the Civil Procedure Rules. The application seeks the following main orders of the court:

1. An order that the defendant do forthwith return all the advertising media taken down from the permitted streets.

2. An injunction restraining the defendant through its servants or agents from removing any advertising media, including *inter alia* bill boards and advertising frames placed by the plaintiff within the streets of the City of Nairobi.

3. An injunction restraining the defendant, either through it's servants or agents from removing any advertising media, including *inter alia* bill boards and advertising frames that have been or will be reinstated onto the permitted streets as a result of their unlawful removal by the defendant.

The grounds for the application as expressed on the face of the

application are as follows:-

1. That the defendant has pursuant to a contract dated 28.3.2002 (hereinafter "the contract") and a supplemental agreement dated 19.11.2002 (hereafter "the agreement") granted the plaintiff the right to erect advertising media.

2. That in breach of the contract the defendant has without notice and not for the purpose of scheduled repair and/or maintenance removed and continues to remove advertising media placed within the City of Nairobi by the plaintiff in accordance with the terms of the contract and the agreement.

3. That the plaintiff risks losing goodwill among its clients and has been unable to honour agreements entered into with its clients in order to discharge its obligations under the contract. Such action on the part of the defendant is causing the plaintiff loss in future sales which are not possible to quantify adequately for the purpose of recovery.

4. That the defendant's actions are also subjecting the plaintiff to substantial claims for compensation from the plaintiff's clients who have paid for their advertisements to be and remain erected.

5. That the defendant is acting in breach of the contract between the parties and threatens to continue doing so.

The application is supported by an affidavit sworn by one Esther

Muthoni Passaris, the plaintiff's Managing Director. In the affidavit it is deponed ***inter alia:***

1. That the contract aforesaid entitled the plaintiff to advertise on the street poles within the City of Nairobi as permitted therein.

2. That by a written permission of the City Engineer dated 16.5.2002 and in accordance with the contract the plaintiff was granted the permission to advertise on all the street poles on streets within the City of Nairobi as therein stated.

3. That upon reliance upon the contract the plaintiff entered into agreements with numerous advertisers for their advertisements to be placed on the said poles.

4. That by a letter dated 27.10.2006 the defendant confirmed the streets along which it has authorized the plaintiff to place advertisements.

5. That it was a term of the contract that the defendant would give warning of scheduled removal or maintenance of the street poles.

6. That in breach of the term providing for warning the defendant by the actions of its employees, servants or agents has without any notice removed and continues so to do advertising frames lawfully placed by the plaintiff on street poles within the area permitted by the City Engineer of the City of Nairobi without due regard to the loss being occasioned upon the plaintiff.

7. That by letters dated 15th and 16th November 2006, the plaintiff declared a dispute under the terms of the contract.

8. That despite the dispute being referred to arbitration the defendant has continued to remove advertisement frames without warning, and has thereby by its actions put in harms way the very subject matter of this dispute.

9. That on 20.11.2006 the plaintiff observed the defendant's employees removing advertisements placed by the plaintiff along Kenyatta Avenue.

10. That the Town Clerk has told the plaintiff's Managing Director *inter alia* that he cannot continue to honour the contract and that removal of the advertisements placed by the plaintiffs on the poles is as a result of political pressure.

11. That the plaintiff has erected approximately 2000 street poles due to the defendant's failure to carry out its functions for the success of the project.

12. That the plaintiff continues to receive threats of legal action from its customers whose advertisements have been removed and the said customers may not renew their contracts.

13. That the plaintiff will not be able to service its facility of70,000,000.00 with Equity Bank Ltd. as the plaintiff's customers are now refusing to pay for the advertisements.

14. That the project envisaged by the contract has been ongoing for the last 4 years and the plaintiff now has over 150 companies as customers and employs over 200 workers and the entire project is at risk by the conduct of the defendant.

The defendant opposed the application on the basis of a replying

affidavit sworn by one Charles Mugo Chiuri, the defendants' City Engineer. The main points taken in that affidavit are that:-

1. The alleged contract and letters allegedly written by the City Engineer are not in the defendant's records.

2. The allegation that the plaintiff erected 2000 street poles is false as the plaintiff only provides few poles in the early stages of the City's beautification programme.

3. The plaintiff has been advertising on all streets of Nairobi without paying electricity bills and advertisement fees as a result of which the City of Nairobi has lost revenue.

4. The contract in so far as the same was entered into by Nairobi City Council a non entity is invalid, null and void abinitio, is not binding on the City of Nairobi in view of the express provisions of Sections 2, 12(3) and 143 of the Local Government Act.

5. The contract contravenes express and mandatory provisions of the Local Government Act and the Exchequer and Audit Act.

6. On advise of its advocates the defendant believes that the Court has no jurisdiction to refer illegal contract to arbitration.

7. The City Council of Nairobi is not a party to the alleged contract but it did enter into some "kind of arrangement with the plaintiff on street lighting and advertising but this is not in a form of contract." And on 7.10.2004 the arrangement was revoked and a partnership scheme invented in which the plaintiff was awarded a monopoly for life over the entire advertising industry in the City of Nairobi to beautify the City of Nairobi to advertise exclusively on street lighting poles and elsewhere on the roads, streets, avenues and road reserves in the City of Nairobi and to regulate and control all advertisers and to collect rates/fees on advertising and appropriate 80% of such revenue to its own use.

8. The said partnership scheme was quashed in H.C. MISC. NO.1406 of 2004.

9. The City Council of Nairobi is not bound by the alleged contract entered into by a non entity and it is entitled to remove all advertisements the subject matter of this suit and any other advertisements placed by the plaintiff on any street lighting poles or elsewhere in the City of Nairobi as there is no agreement to place them and the plaintiff cannot seek equitable relief on an illegal contract that was entered into with a non entity.

The position taken by the defendant set the stage for the subsequent

applications by the plaintiff and the defendant. The defendant does not dispute the facts deponed by the plaintiff in its affidavit. I understand the defendant to be of the view that as the alleged contract was entered into with a non entity the Council is entitled to remove all advertisements the subject matter of this suit and any advertisements placed by the plaintiff on any street lighting poles or elsewhere in the City as there is no agreement to place them.

That bold averment is in paragraph 13 of the City Engineers affidavit aforesaid.

The plaintiff's subsequent applications dated 31.3.2007 and 31.5.2007 were therefore inevitable. In the application dated 31.3.2007 the plaintiff seeks primarily two orders in the alternative:-

1. That a mandatory injunction do issue to compel the defendant to forthwith return, replace and/or restore all the advertising media taken down from Nyerere Road and Arboretum Drive and any other permitted streets within the City of Nairobi.

2. In the alternative, the plaintiff be allowed to return, replace and/or restore all the advertising media taken down by the defendant from the permitted streets without prejudice to any of the rights to claim compensation or any other rights it may have against the respondent with regard to the foregoing.

The grounds for the application are that the defendant has unlawfully

Removed the media advertisements placed by the plaintiff along Nyerere and Arboretum Drive within the City; that the defendants actions were in disregard of a court order dated 27.10.2006 and further constitutes a breach of contract between the parties granting the plaintiff the right to erect such advertising media within the City and that unless a mandatory injunction is issued to compel the defendant to return all advertising media that it has taken down, the plaintiff risks losing goodwill among its clients as well as facing substantial claims for compensation from its clients who have paid to have the advertisements erected. The application is supported by an affidavit of the plaintiff's Managing Director who has deponed ***inter alia*** that despite the provisions of the contract and an order of the court dated 27.11.2006, the defendants servants and/or its agents unlawfully removed advertisements placed by the plaintiff as a result of which the plaintiff has suffered substantial loss. In the premises, the plaintiff prays for the mandatory injunction aforesaid and in the alternative that it be allowed to return, replace, and/or restore all advertising media taken down by the defendant.

The defendant opposes the application on the basis of a replying affidavit of one James Maina, the defendants' Deputy Director City Planning Department. The same affidavit is said to be a response to the plaintiffs next application dated 31.5.2007 in which the plaintiff seeks the following primary orders:-

1. A mandatory injunction to compel the defendant to forthwith return, replace and/or restore all the advertising media taken down by the defendant through its officers elected officials, servants and/or agents after the application dated 31.3.2007 was presented on 4.4.2007.

2. An injunction to restrain the defendant through its officers, elected officials, servants or agents from permitting and/or authorizing any other person to place any posters, placards, signs, announcements, stickers, advertising, marketing or promotion, in any way to advertise on the poles erected on the streets the plaintiff is authorized to place advertisements.

3. An injunction to restrain the defendant through its officers elected officials, servants or agents from issuing statements adverse to the plaintiff through the media or otherwise and in particular statements concerning the dispute arising out of the contract dated 28.3.2002.

4. An injunction to restrain the defendant through its officers elected officials, servants or agents from permitting and/or authorizing any other person from issuing any enforcement notices under the Physical Planning Act to the plaintiff's customers pending arbitration.

5. An injunction to restrain the defendant through its officers elected officials, servants, or agents from permitting and/or authorizing any other person from enforcing in any manner or take steps to give effect to the enforcement notices issued to the plaintiff's customers including but not limited to Barclays Bank of Kenya and General Motors Kenya Ltd.

The application is based on the following primary grounds:-

1. That the defendant has unlawfully removed the media advertisements placed by the plaintiff along various streets within the City.

2. That the defendant's actions are in disregard of the court order made on 27.11.2006 and further constitute a breach of contract between the parties granting the plaintiff the right to erect such advertising media within the City of Nairobi on the permitted streets.

3. That since the filing of the suit the defendant has through its officers such as the mayor and the Deputy Mayor, without any legal basis alleged that the contract has been cancelled.

4. That unless an injunction is issued the plaintiff risks losing goodwill among its clients as well as facing substantial claims for compensation from its clients who have paid to have the advertisements erected and further the arbitration proceedings instituted as between the parties would be in vain in the event that the award is in favour of the plaintiff.

5. That the defendant has through its officers, elected officials, servants or agents, issued an enforcement notice against the plaintiff's customer's which is adversely affecting the plaintiff's business..

This application is supported by the plaintiff's affidavits filed in support of its earlier applications and the one filed with the application on 31.5.2007. Central to all this affidavits is the contract of 28.3.2002 and the actions of the defendant's officials and/or servants and/or agents in alleged breach thereof. Crucial is also the reference made to arbitration under the Arbitration Act and the injunction order made on 30.11.2006.

In the defendant's replying affidavit sworn by James Maina it is deponed ***inter alia*** that the contract of 28.3.2002 is not valid and binding on the parties. It is also deponed that the said Maina is aware that some ad hoc arrangement which in his view is tainted with illegality, did exist between the defendant and the plaintiff and that the illegal arrangement was later cancelled and/or revoked by mutual consent in favour of forming a partnership. Consequently, the defendant deliberated the issue in its full council meeting on 7.10.2004 and resolved that all prior existing arrangements with the plaintiff including the contract of 28.3.2002 be cancelled or revoked. A partnership was to be formed between the plaintiff and the defendant to regulate outdoor advertising in the City.

It is further deponed that other players in the field were aggrieved and applied for judicial review in H.C. MISC. No.1406 of 2004 and all the arrangements with the plaintiff were brought to an end. It is further deponed that the defendant receives no revenue from the advertisements erected by the plaintiff and is experiencing great hardship in executing its statutory duties of regulating and collecting revenue from advertisements as the plaintiff is claiming the right to collect revenue and grant development permissions to the members of the public. It is also deponed that, the plaintiff obtained an injunction on 27.11.2006 stopping the defendant from removing its advertisements and the plaintiff has interpreted the said orders as granting it powers to issue development permission to advertisers in Nairobi or as authorizing it to carry out all kinds of advertisements without complying with the Physical Planning Act.

It is also deponed that the defendant is required by law to control developments within the City and in so doing ought to collect fees, revenue or charges payable from any developer hence the enforcement notices. It is further deponed that the defendant has taken utmost care to comply with the orders issued on 27.11.2006 and 31.5.2007. However, since the issuance of the said ex parte orders various individuals have erected their advertisements without reference to the defendant and without compliance with the Physical Planning Act. It is further deponed that the plaintiff has been engaging in multi-million profit making project in the city without meaningful beautification contribution and a part from few street poles the plaintiff did not contribute anything to the betterment of the city. It is then deponed that the business activities monopolistically and illegally run by the plaintiff in the city for the last several years have been estimated to be over Kshs.3 billion. The defendant has consequently lost hundreds of millions on account of revenue and licence fees. It is also deponed that the electricity supply to the thousands of advertisements erected by the plaintiff is illegally connected to the council's meter paid and shouldered

by the council. It is then deponed that the only thing the defendant wants of the plaintiff is compliance with the law like any other operator in the advertising sector.

It is further deponed that the alleged contract was procured without tendering process as outlined in the Local Government Act and was not backed by a council resolution. It is also deponed that the contract is contrary to public policy and welfare as no consideration was given and that equity cannot be resorted to in aid of an illegality.

The defendant not altogether surprisingly lodged the application dated 4.7.2007. The same is expressed to be brought under Section 3A of the Civil Procedure Act, Order XXXIX Rule 4, Order L, Rule 1 and 2 and all other provisions of the law. The defendant sets 2 primary orders in the alternative expressed on the face of the application as follows:-

1. That the interim restraining orders granted on 27.11.2006 and 4.6.2007 be discharged and or set aside.

2. That in the alternative the two interim orders be varied and the plaintiff be directed to comply with the Physical Planning Act and City By Laws against it and remove advertisements erected or placed in contravention of the said laws.

The main grounds for the application as expressed on the face of the

application are as follows:-

1. That the plaintiff misrepresented facts regarding the contract of 28.3.2002 and concealed that by a Resolution of the defendant of 7.10.2004 the contract and existing arrangements were discharged and replaced with a partnership scheme.

2. That the plaintiff concealed the fact that the said Resolution and partnership Scheme was quashed by the court.

3. That the said contract is illegal, null and void as the same was procured in breach of the Local Government Act, the exchequer and Audit Act and the Anti-corruption and Economic Crimes Act.

4. That the contract is unenforceable as there was no consideration for the same.

5. That there is no jurisdiction to entertain the suit or grant the injunction on the basis of the contract which was discharged or procured in breach of statute.

6. That the contract and the orders obtained on the basis thereof curtails the defendant's performance of its Statutory obligations of regulating physical planning advertisements and revenue collections.

7. That the effect of the injunction is to aid the plaintiff in the performance of a non existing or otherwise illegal contract.

8. That the plaintiff's activities are outside the contract.

9. That the plaintiff has made and continues to make enormous profits from illegal advertisements without remitting any revenue to the defendant.

10. That the plaintiff has illegally tapped, used and continues using the defendant's electricity without paying for it and posses great threat of electrical faults and fires if the defendant is not empowered to regulate and control the plaintiff's actions.

The application is supported by an affidavit of the defendant's City

Engineer aforesaid. The affidavit is an elaboration of the above grounds. Of significance are the following averments: that the defendant does not have a copy of the contract of 28.3.2002 and there was no council resolution authorizing the Mayor and the Town Clerk to sign the same.

In opposition to the application, the plaintiff has filed a replying affidavit sworn by its Managing Director aforesaid. In the affidavit reliance is placed upon the plaintiff's previous affidavits filed herein. The plaintiff maintains that the contract of 21.11.2006 is a valid and binding contract and has a dispute resolution mechanism of arbitration and the orders of 27.11.2006 were to enable the dispute between the plaintiff and the defendant be dealt with before an arbitrator. The said Managing Director further depones that the contract was not mutually terminated and that in fact the defendant in previous proceedings recognized it. It is also deponed on behalf of the plaintiff that the plaintiff has acted in accordance with the contract and in the terms of the order of 27.11.2006. In the plaintiff's view the defendant is delaying the arbitral process: For instance it has argued a Preliminary Objection before the Arbitrator for over 6 days. The plaintiff denies that the defendant has suffered loss of revenue and gives its explanation. In its view unless the injunction is granted it will not meet its obligations to its clients and in the meantime it has already declared 22 of its employees redundant.

The four applications were canvassed before me on 25.10.2007 by Prof. Githu, Learned Counsel for the plaintiff and Mr. Adan, Learned Counsel for the defendant. Counsel highlighted –Written Submissions which had been filed by consent. I have considered all the applications, the affidavits filed by the parties, the submissions of Counsel and the authorities relied upon. Having done so I take the following view of the matter. I caution myself that I am not trying this case. I should therefore not stray into the province of the arbitrator or the Judge who might eventually hear the dispute between the parties.

At this stage as it is now settled an applicant will not obtain an interlocutory prohibitory injunction unless he can show firstly that he has a prima facie case with a probability of success at the trial and secondly that he stands to suffer irreparable loss or damage which cannot be made good by an award of damages. Thirdly if the court is in doubt it will decide the matter on a balance of convenience. Those principles were set in the precedent setting case of **Giella vs. Cassman Brown and Co. Ltd. [1973] EA 358.**

With regard to interlocutory mandatory injunction, the same principles apply but in addition, an interlocutory mandatory injunction will be granted only in exceptional and clear cases. (See **Locabail International Finance Limited vs. Agro export and others [1986] 1 ALL ER 901.).**

The dispute between the parties revolves around the contract of 28.3.2002. The defendant challenges the said contract on the basis that the same is between the plaintiff and a non-entity and is therefore not binding on the defendant and further that it was in any event revoked by a resolution of the defendant dated 7.10.2004. The defendant further challenges the same contract on the ground that it is not supported by records held by the defendant and on the further grounds that it contravenes the provisions of Sections 2, 12(3) and 143 of the Local Government Act and the Exchequer and Audit Act. There is a further challenge that the said contract is void for want of consideration.

There is a further challenge raised by the defendant that the loose arrangement the plaintiff may have had with the defendant was terminated and a partnership created between them which scheme was quashed by the court in H.C. MISC. APPL. No.1406 of 2004.

The same objections form the basis of the defendant's application dated 4.7.2007. In that application the defendant does not only challenge the contract but the orders of the court made on 27.11.2006 and 4.7.2007. The orders are alleged to have been obtained on the basis of misrepresentations and material non-disclosures on the part of the plaintiff in respect of the same contract of 28.3.2002. In the premises according to the defendant the orders curtail the defendants performance of its Statutory duties under the Physical Planning Act, the Exchequer and Audit Act and the Anti-Corruption and Economic Crimes Act.

The plaintiff has exhibited the agreement of 28.3.2002. The defendant is described therein as Nairobi City Council of Post Office Box 30075, Nairobi. (A Local Authority constituted under the Local Government Act, Chapter 265 Laws of Kenya). The common seal of Nairobi City Council is stated to have been affixed to the contract in the presence of the Mayor and the Town Clerk. The plaintiff has also exhibited the supplemental Agreement of 19.12.2002. The defendant is similarly described and its seal is stated to have been affixed to the agreement in similar manner.

The defendant now says, Nairobi City Council is a non entity because under the Local Government Act Cap.265 of the Laws of Kenya no such entity exists. What exists in the Act is the "City Council of Nairobi". The defendant therefore would wish to avoid the contract and the agreement on the basis of such an argument. As I have already stated above, I am not trying this case I should therefore not appear to conclusively determine the issues in dispute. However, this record has correspondence and other documents allegedly emanating from the defendant in which the names Nairobi City Council and the City Council of Nairobi are used interchangeably. The charge sheets prepared in the enforcement of its By-Laws interchangeably use the two names. The complainant therein is given in some of the charge sheets as Nairobi City Council and in others as the City Council of Nairobi. There are also the affidavits of Dick Waweru sworn on 22.6.2007 and Joe Aketch sworn on 12.6.2007 exhibited by the plaintiff in reply to the defendants application aforesaid. They swear that they are former Mayors of the defendant and confirm that the defendant did indeed enter the contract with the plaintiff. Mr. Dick Waweru in his said affidavit admits executing the contract and the agreement.

There is therefore prima facie evidence that the defendant is a party to both the contract and the agreement and the argument that the plaintiff entered into a contract with a non-entity is in my view not serious. The defendant is a public body. It is not expected to wear a double face.

While not admitting the contract, the defendant contends that whatever arrangement it had with the plaintiff was revoked and a partnership scheme entered into, which subsequently was quashed in Misc. Civil Appl. No.1406 of 2004. Does that not sound like double speak? The defendant admits some arrangement with the plaintiff which it does not define and whose terms it does not disclose, which arrangement it consented to converting into a partnership scheme. Unfortunately the High Court quashed the scheme. So, the defendant argues, there is nothing between it and the plaintiff. Well, I do not wish to enter into the area of the Arbitrator or the Judge who will try the case. However it is a basic principle of Contract Law that a contract which provides its own guillotine procedure can only come to an end in the manner provided. It is not suggested by the defendant that the plaintiff was a member of the defendant who could participate in making resolutions. The purported resolution to determine the contract is therefore open to challenge.

Prima facie therefore, I find that the contract and the agreement may not have been terminated. However, that is the sphere of the Judge or Arbitrator who will handle the dispute on merits.

The defendant further contends that the contract contravenes various statutes among them, the Local Government Act, the Anti-Corruption and Ethics Crimes Act and the Exchequer and Audit Act. In relation to the Anti-Corruption and Economic Crimes Act, counsel did not argue that its provisions were to operate retroactively. With regard to the other statutes cited by the defendant as having been offended by the contract, again without entering the sphere of the final arbiter, the affidavits of Dick Waweru and Joe Aketch both former Mayors of the defendant, are self explanatory. I need however to observe in passing that the defendant itself admits that the plaintiff has been engaged in its operations for several years now. The defendant's officers did not wake up one morning to find evidence of these operations on the streets of Nairobi. The plaintiff was operating under an arrangement according to the defendant. Did that arrangement provide for waiver of fees or charges? Did the requirement for the plaintiff to provide material constitute consideration? Are the documents i.e the contract and the agreement self sufficient in respect of consideration? I should not say more lest I be accused of usurping the final arbiter's role. Prima facie however, I cannot say that the contract and the agreement are illegal or ultra vires statute. Nor can I with certainty say that they are without consideration.

Having found on a prima facie basis against the defendant against all its objections, and further, the

defendant not having put forward a different factual position from that presented by the plaintiff in its affidavit in support of the application dated 21.11.2006, I find that the plaintiff has shown a prima facie case with a probability of success.

The contract at Clause 6.4 provides for arbitration in the event of a dispute. The plaintiff says that it has already declared a dispute and arbitral proceedings are in progress. The defendant argues that the arbitrator has no jurisdiction and it has taken up a preliminary objection accordingly. I cannot anticipate the results of the preliminary objection. However, it is clear that some form of reference to arbitration has been made by the plaintiff. In my view the parties should be given a chance to see whether the dispute between them may be resolved under Clause 6.4 of the contract.

The plaintiff has shown that the defendant is disinclined to honour the contract. The defendant infact in its response to the plaintiff's applications has a concluded view that the contract is null, void, illegal and unenforceable. The defendant has in fact assumed the role of the arbitrator. In view of the position taken by the defendant, unless it is restrained, it will continue to flout the contract with impunity with the consequence that the arbitral proceedings even if they are eventually determined in favour of the plaintiff, will be rendered nugatory.

I will therefore allow the application dated 21.11.2006 in terms of prayer 3 thereof. That finding means that the defendant's application dated 4.7.2007 is for dismissal as no non-disclosure, misrepresentation or illegality, have been shown.

How about the plaintiff's applications dated 31.3.2007 and 31.5.2007. Those applications are for temporary prohibitory and mandatory injunctions. I have already stated that a temporary mandatory injunction will only be granted in clear cut cases. Is this such a case? The plaintiff has deponed to specific incidences of breach of the contract. With respect to the prayer for mandatory injunction the same is expressed in the application dated 31/3/07 as follows:-

"A mandatory injunction do issue to compel the defendant to forthwith return, replace and/or restore all the advertising media taken down from Nyerere Road and Arboretum Drive and any other permitted streets within the city of Nairobi".

The defendant does not deny removing the advertisements as alleged. The defendant's primary argument is that the contract is null and void. In its reply to the plaintiff's application of 21.11.06, the defendant's City Engineer Charles Mugo Chiuri deposes in his affidavit sworn on 29.11.2006 at paragraph 13 as follows:-

"**13. I am informed by my Advocates on record, which information I verily believe to be correct, that the City Council of Nairobi is not bound by the alleged contract of 28th March 2002, entered into with a non-entity and the council is entitled to remove all advertisements the subject matter of this suit and any other advertisements placed by the plaintiff on any street lighting poles or elsewhere in the City of Nairobi as there is no agreement to place them. The plaintiff cannot seek equitable relief on any illegal contract that was entered into with a non-entity"**

That averment clearly indicated that the defendant was entitled to remove the advertisements which are the subject of this suit and any other advertisements placed by the plaintiff on any street lighting poles or elsewhere in the city. In my view that was a clear admission of the complaints made by the plaintiff. And in the supporting affidavit to the defendant's application of 4.7.2007, the same City Engineer at paragraph 15 of his affidavit deponed as follows:-

"**15. The plaintiff's advertisements are erected contrary to Section 3 (d), Section 30, Sections 31 and 33 of the Physical Planning Act. After some Council Officers removed several unmarked advertisements from Nyerere road, the plaintiff company claimed the ownership of the illegally erected bill boards and even filed contempt proceedings against Council officers."**

The principles for the grant of temporary mandatory injunctions as already said were laid down in

Locabail International Finance Limited – vs – Agro export and others (supra). In that case it was held as follows:-

"**A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought the matter ought to be decided at once or where the injunction was directed at a simple and summary act which would easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had been rightly granted, that being a higher standard than was required for a prohibitory injunction."**

Those principles have been applied by Kenyan courts (See the case of **Kenya Airports Authority –vs – Paul Njogu Mungai: Court of Appeal at Nairobi Civil Application No.NAI 29 of 1997 UR).** The position taken by the defendant coupled by the actions of its officers and/or servants as admitted by the defendant's City Engineer, show, prima facie, that the plaintiff is entitled to the grant of a temporary mandatory injunction with respect to the advertising media taken down from Nyerere Road and Arboretum Drive. Those are the roads the plaintiff identified by name. The temporary mandatory injunction will not cover what the plaintiff describes as any other permitted streets within the City of Nairobi. That description is in my view at large and would present difficulties in compliance.

In view of the clear position taken by the defendant, an order in terms of prayer 3 of the said application may prolong conclusion of this matter at this stage which in the language of the **Locabail International Finance case (Supra)** ought to be dealt with at once. I will therefore allow the application in terms of the alternative prayer in paragraph 4 but limited to advertising media taken down from Nyerere Road and Arboretum Drive.

With regard to the plaintiff's application dated 31.5.2007, the plaintiff seeks inter alia a mandatory injunction to compel the defendant to forthwith return replace and/or restore all advertising media taken down by the defendant after the application dated 31.3.2007 was presented on 4.4.2007; (b) a prohibitory injunction restraining the defendant from - (i) permitting and/or authorizing any other person to place any posters, placards, signs, announcements, stickers, advertising, marketing or promotion in any way to advertise on the poles erected on the streets the plaintiff is authorized to place advertisements; (ii) issuing statements adverse to the plaintiff through the media or otherwise in particular statements concerning the dispute arising out of the contract dated 28.3.2002; (iii) issuing any enforcement notices under the Physical Planning Act to the plaintiff's customers and (iv) enforcing in any manner or take steps to give effect to the enforcement notices issued to the plaintiff's customers.

The mandatory injunction order sought as framed is not specific as to location and would present difficulties in compliance. The prohibitory temporary injunction orders sought in (i), (ii), (iii) and (iv) above are respectively; too widely framed and would present problems in execution; they suggest different, and distinct causes of action which the plaintiff is at liberty to pursue in separate proceedings and other parties not joined in these proceedings would be affected. If those other parties' legal rights have been violated, I see no reason why they should not seek appropriate remedies on their own in separate proceedings.

In the premises, the plaintiff has not persuaded me that it is entitled to the prayers sought in the application dated 31.5.2007.

In summary therefore I make the following orders.

1) An injunction is issued in terms of prayer 3 of the application dated 21.11.2006 and the defendant, its servants and/or agents are restrained from removing any advertising media, including inter alia bill boards and advertising frames, placed by the plaintiff within the streets of the City of Nairobi pending arbitration.

2) An order is granted in terms of prayer 4 of the application dated 31.3.2007 and the plaintiff is

allowed 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.

These orders are granted on the condition that the plaintiff files by 1.00 p.m. on 30th November 2007, an appropriate undertaking under its seal as to damages.

3) The application dated 31st May, 2007 is dismissed.

4) The defendant's application dated 4th July, 2007 is also dismissed.

5) Costs shall be in the arbitration.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Adan for the defendants and Imende holding brief for Prof. Githu Muigai for the plaintiff.

F. AZANGALALA

JUDGE

26/11/07