



REPUBLIC OF KENYA

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

Civil Case 558 of 2006

A. I. OUTDOOR (K) LIMITEDPLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBIDEFENDANT

RULING

The Plaintiff's Chamber Summons dated 6th October, 2006 is brought under Section 3, 3A, 63 (e) of the Civil Procedure Act and Order XXXIX Rules 2, 3 and 5 of the Civil Procedure Rules. The Plaintiff seeks the following orders:-

2. Pending the hearing and determination of this application inter-partes, this suit or until further orders:-

(a) The Defendant whether by itself, agents, servants or otherwise howsoever be restrained from breaching or terminating the development permissions and license agreements on the Plaintiff's sites on Plot L.R. No.1870/ix/54 Westlands, Nairobi and Plot L. R. No.209/2535/1 Parklands, Nairobi.

(b) The Defendant whether by itself, agents, servants or otherwise howsoever be restrained from trespassing upon, accessing, removing and/or destroying the Plaintiff's two billboards erected on Plot LR. No.1870/IX/54 Westlands, Nairobi and Plot L. R. No.209/2535/1 Parklands, Nairobi and/or removing, destroying and/or interfering in any manner whatsoever with any advertising messages places thereon.

(c) The OCS parklands police station be directed to supervise and ensure compliance of the orders a) and b) above.

The Plaintiff's General Manager swore an affidavit in support of the application. It was deponed that the Plaintiff was contracted by Celtel (K) Limited to mount and exhibit advertisement messages on its billboards. Celtel (K) Limited selected additional sites which the Plaintiff was required under the contract to procure and erect billboards for the said advertisement messages. The Plaintiff approached two landlords on the sites where the billboards were to be erected mainly Hardware Transporters of Plot LR. No.1870/IX/54 Westlands and C. H. De Souza of Plot LR. No.209/2535/1 Parklands. The said landlords granted the Plaintiff permission to erect billboards on site on their premises. The Plaintiff in turn executed 3 year licence agreements with the said landlords in respect of those sites and paid licence fees totaling Kshs.1,650,000/=. Plaintiff is of the view that the two sites are of special significance to Celtel and the Plaintiff in view of the wider strategic audience of exhibition of advertisement messages to be placed there. Those sites were approved by Celtel (K) Limited. In accordance with the provisions of

Physical Planning Act Cap 286 the Plaintiff applied to the Defendant for development permission and licences to erect two billboards on site. The Plaintiff's application is dated 4th August, 2006. On 11th and 20th September, 2006 the Defendant by the letters dated those dates accepted the Plaintiff's application subject to certain requirements set out in that letter. The said letters annexed to the affidavit were in respect of the two sites. They were in similar terms save for reference to the specific title number and reference to the amount payable and stated as follows:-

"I refer to your applications dated 4th August 2006, on the above subject.

The City Council of Nairobi has no objection to your request. The following conditions however, must be observed before work starts.

- i) Submission of satisfactory structural details to the City Engineer.**
- ii) Upon approval of (i) above, supervision of the works by the City Engineer or his representative to confirm its structural stability.**
- iii) Indemnify the City Council against any eventuality that may arise out of these works.**
- iv) Submission of certificate of planning compliance by registered physical planner.**
- v) Payment of *quarter* annual i.e. October – December 2006 advertisement fees and charges Kshs.191,637.50 before mounting/displaying any advertisement.**
- vi) Notification of the council at least 7 days prior to any changes to the advertisement content/medium.**
- vii) Approval shall be valid for three years after which the approval may be extended for a further three years upon application".**

The Plaintiff deponed that he complied with all the requirements that is submitted drawings of the billboards and paid a licence fee for Kshs.191,637.50 for the site on Plot LR No.1870/IX/54 Westlands and Kshs.65,640/= for site on Plot LR No.209/2535/1 Parklands. The Plaintiff was thereafter given the development permission and licence to erect the two billboards on site. Plaintiff is of the view that by a letter of acceptance written by the Defendant together with Plaintiff's compliance of the conditions thereof constituted a binding agreement between the Plaintiff and the Defendant. The Plaintiff was of the view that that agreement had specific express terms which could only be terminated by terms of the law that is:

- (a) Subject to payment of requisite fees the Defendant would honour the development permission and licences given to the Plaintiff for a period of 3 years.
- (b) The Plaintiff would be entitled to quiet possession and use of the site for the term of the licence and the renewal term.
- (c) The Plaintiff would be entitled to at least 90 days notice to comply with any further requirement by the Defendant with regards to the billboards erected on two sites.

Furtherance to that agreement the Plaintiff contracted an engineer who constructed and erected the two billboards for a total costs of Kshs.3,160,000/=.

On 4th August, 2006 the Plaintiff stated that the Defendant Assistant Director of Urban Designs and Development summoned the Plaintiff's General Manager and ordered the removal of the two billboards before the end of that day. In response the Plaintiff's advocate wrote to the Defendant protesting with regard to that order and requested the Defendant to confirm that it would not breach the licence

agreement. It is deponed that the Defendant refused or failed to respond to that demand. It is further deponed that on 5th October, 2006 in further breach of the development permission and licence agreement, Defendant served the Plaintiff with what the Plaintiff termed as illegal enforcement notices requiring the removal of the two billboards with immediate effect. The Plaintiff termed those breaches as illegal for the following reasons:-

- (a) No enforcement notice can be issued in respect of development permission duly issued by the Defendant.
- (b) The term of the development permission and licence agreement have not expired.
- (c) Any such enforcement notice under the Physical Planning Act are required to be given at least 90 days notice for compliance.
- (d) The Defendant is estopped from issuing any enforcement notices in respect of the two sites as the same were approved by the Defendant and paid for by the Plaintiff.

The Plaintiff was of the view that it stands to suffer substantial losses if the two billboards were removed or destroyed. The Defendant according to the Plaintiff is obliged to honour its obligations or specifically perform its part of the licence agreement. The Plaintiff deponed that the two billboards have already been exhibited with the advertisement messages of Celtel (K) Limited. The Plaintiff stated that the possible loss of the entire Celtel (K) Limited contract was at a value of Kshs.300 million. That in addition to that the damages which the Plaintiff would suffer if it lost the two sites would be over Kshs.19,363,330/=. The Plaintiff was of the view that the Defendant would not be in a position to compensate for that loss. The Plaintiff therefore prayed for restraining orders from the court against the Defendant in respect of its threat to breach the licence agreement and threat to destroy or remove the billboards.

The Defendant opposed the application by filing a replying affidavit. The affidavit was sworn by an employee of the Defendant in the position of Director of City Planning. He deponed that the Respondent is statutorily mandated to regulate, control and licence any developments including construction and erection of bill boards within its territorial jurisdiction. Pursuant to that legal mandate the Defendant has put in place mandatory regulatory requirements that must be met by any person making an application in the nature of the one that was made by the Plaintiff on 4th August, 2006. Those requirements are expressed at the back of the standard application form. The specific regulations are stipulated in the document referred to as guiding principles to advertisement and which guideline draws its legal authority from the respondent's resolution made by the Town Planning committee and general purpose Committee. The Defendant deponed that the Plaintiff is aware of the requirements contained in the guiding principles to advertisement and other legal requirements. The Defendant confirmed that the Plaintiff's application was accepted through its letters dated 11th and 20th September, 2006. The contents of those letters has been quoted herein before in this ruling. The Defendant stated that the Plaintiff has yet to meet the conditions stated in the said letters and the Defendant particularly emphasized requirement No.(i). That requirement stated that the application was to submit structural details of the proposed billboards to the City Engineer. The Defendant was of the view that that requirement was fundamentally important for such details would give the Defendant an opportunity to examine the nature, type and strength of material to be used in construction and erection of the billboards.

This was in order to ensure safety of the billboards. The conditions contained in the letters quoted hereinbefore in this ruling were in the opinion of the Defendant meant to protect members of the public by ensuring that only approved structures are constructed and to guard against accidents out of weak unapproved structures. The Defendant was of the view for that reason the continued existence of the Plaintiff's bill boards was exposing members of the public to inherent danger without any possibility of any compensation in case of such eventuality. In this regard the Defendant stated that the payment made by the Plaintiff in respect of licences was but one of the pre-requisite of granting a licence. The Defendant stated that the letters of acceptance of Plaintiff's application did not constitute a binding contract between the Applicant/Plaintiff and the Defendant. The Defendant stated that a contract would be established between the parties upon issuance of a licence to the Plaintiff. The Defendant was of the

view that a licence has not been issued to the Plaintiff. According to the Defendant there did not exist either express or implied contractual duties. That the Plaintiff in disregard of the law and without obtaining a licence from the Defendant commenced and embarked on unauthorized erection and construction of the billboards. That the said action by the Plaintiff of erecting the billboards without authorization was itself a breach and disregard for the rules and regulations of the Defendant. The Defendant on taking note of illegal construction of the said billboards first approached the Plaintiff and informed the Plaintiff of such illegality and the Defendant stated that instead of complying the Plaintiff instructed counsel to communicate with the Defendant. The Defendant stated that in view of the violation and breaches of existing rules and regulations and provisions of the Defendant by-laws and Physical Planning Act the Defendant had no other option other than to notify the Plaintiff of the unauthorized, irregular and illegal nature of the structure. The Defendant's intention was that if the Plaintiff failed to remove the billboards it would proceed to demolish the same. The Defendants were of the view that the notification of the enforcement was proper bona fide and lawful. The Defendant also stated that the Plaintiff on receiving that enforcement notice ought not to have rushed to court but rather ought to have complied with the notice. That the Plaintiff did submit architectural plans and those plans were subsequently approved by the Defendant. However, the Defendant stated that the Plaintiff in total disregard to the approved architectural plans constructed and erected billboards which were in total departure from the approved plans and as they did this they did not have a licence and did not obtain approval to the changes of that plan. The billboard erected on LR No.1870/IX/54 and on Plot No.LR.209/2535/1 were said to have been constructed mono poled instead of tri poled. Further the billboard erected on No.LR.209/2535/1 has been constructed in breach of by-laws which require that no structures should be erected in proximity of any living room window without giving safe distance of six metres. The said erection on No.LR.209/2535/1 had exposed the Defendant to possible civil suit by the residents within its jurisdiction. That the Plaintiff in coming to court with the present application had come with unclean hands by deliberating misrepresenting facts and concealing that which was within its knowledge. For that reason the Defendant was of the view that the Plaintiff was not entitled to the prayers sought.

The Plaintiff's advocate in oral submissions, in respect of the Defendant's claim that this court has no jurisdiction to entertain the present action, stated that this court under Section 60 of the Constitution and Sections 3 and 3A of the Civil Procedure Act, High Court had jurisdiction to deal with equitable reliefs which cannot be issued by committees as provided in the Physical Planning Act. The Plaintiff in support of that proposition relied on the case of **Dr. Rajendrasingh Gohi v commissioner of Customs & Excise & F. S. Abdalla, C.A. No. 45 of 1992, (www.lawafrica.com)**. The Plaintiff relied on the following passage:—

“Under section 60 of the Constitutional of Kenya

High Court has unlimited original jurisdiction in civil and criminal matters. Section 205(2) of the Act (*Excise Act Cap 472*) does not in any way curtail that jurisdiction”.

Plaintiff also relied on the case of *Narshidas & co. Ltd v Nyali air conditioning & Refrigeration Services, C.A. No.205 of 1995, [1995] LL 409 CAK (www.lawafrica.com)* and in particular the following passage:-

“What does a controlled tenant confronted with an illegal treat of forcible eviction do? He cannot go to the Business Premises Rent Tribunal established under the Act as the Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. That Tribunal has no jurisdiction to do so as was held by High court in the case of the Republican vs. Nairobi Business Premises Rent Tribunal & Others, *exparte Karasha, (1979) K.L.R. 147* and also in the case of *Re: Hebtulla Properties Limited (1979) K.L.R. 96*.

The learned Judge was therefore in our view clearly wrong in holding that the superior court had no jurisdiction to hear the matter before him. There was clearly jurisdiction to deal with the matter.

We would also point out that it was not open to the Judge to proceed to strike out the Plaintiff when there was no application to do so before him and especially when the parties were still arguing whether or not the court could grant the injunction sought. That was unprocedural and would create a dangerous precedent if permitted. The remedy of striking out is to be used sparingly and only in the cases where the plaintiff is incontestably bad and that too when the court is properly seized of the matter upon a proper application, subject also to the remedy of allowing or ordering an amendment of the plaintiff if an amendment would cure the defect.

It is quite obvious that the superior court had the jurisdiction to adjudicate upon the issued before it. It is also quite obvious that court was duty bound to grant the injunction sought”.

The Plaintiff further placed reliance on the book of **Chitty on Contracts, 20th Edition Vol. 1 London Sweet & Maxwell 2004** and in particular the following passage:-

“a “bare licence” is revocable at any time upon the licensor giving clear and adequate notice to the licensee. The position of a contractual licensee is that, if a licence is given for consideration and coupled with an agreement, whether express or implied, that it will not be revoked until the effluxion of a specified period of time or the happening of a particular event, it is irrevocable until the expiration of the period or the happening of the event. An injunction will be granted to restrain the licensor from revoking the licence, or from acting in pursuance of the purported revocation, and the licensee may also claim damages for breach of contract and for assault should he be forcibly ejected by the licensor”.

Plaintiff’s counsel submitted that the above quoted passage applied to the Plaintiff’s case.

Plaintiff’s counsel further submitted that by the act of the plaintiff paying for the licences coupled with the Defendant’s approval constituted a contract between the parties. That this contract was to subsist for three years. The advocate stated that such approval is provided under section 33 (1) (a) of Cap 286. He stated that the application form reproduced the fifth schedule of that Act. In this regard Plaintiff relied on **Halsbury’s Laws of England, 4th Edition Reissue, Bol.9(1) Butterworths London 1998** and the following passage from that book:

An acceptance may have legal effect, notwithstanding that it may appear to be conditional by reason of any of the following factors:

- (1) ...
- (2) **The new terms apparently introduced by the acceptance are trivial, or are only such as would in any event be implied in fact or in law;**
- (3) ...
- (4) **The acceptance is conditional, but the offer was made subject to the same condition;**

With regard to the Defendant’s statement that the Plaintiff’s billboards were blocking a window of a building and that were blocking an advertisement by a competitor of the Plaintiff, Plaintiff’s counsel stated that such complaints ought not to be entertained because the landlord of the property in Parklands had given authority to erection of the billboard and further because the Defendant should not be partisan and entertain a complaint by the Plaintiff’s competitor. Plaintiff’s counsel was of the view that the Defendant’s notice to immediately remove the billboards could not be entertained because there existed a contract between the parties for three years. In any case the Plaintiff stated that the law does not allow the Defendant to revoke the licence granted to the Plaintiff. In support of that the Plaintiff relied on the case of **Hurst v Picture Theaters, Limited (1915) 2 KB1**. This case approved the finding made in the case of **Wood v Leadbitter (1) 13M & W 838**” as follows:-

“A mere licence is revocable; but that which is called a licence is often something more than a

licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and, on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol”

Plaintiff’s counsel further submitted that the court does have jurisdiction to grant an injunction for specific performance. To support that argument counsel relied on the case of **James Jones & sons, Ltd v Earl of Tankerville, (1909) 2 Ch. 440.**

Defendant’s counsel in oral submission argued that the plaintiff ought not to have filed the present case that the Plaintiff ought to have appealed against the enforcement notice through the liaison committee of the Defendant according to Section 38 of Cap 286. Immediately the Plaintiff would have filed an appeal at that Liaison committee the Defendant counsel stated that the enforcement notice would have stayed and that in the effect would have granted the Plaintiff the relief it now seeks. That the authorities relied upon by the Plaintiff did not have a bearing in this case particularly the cases the Plaintiff relied upon in regard to the jurisdiction of this court. The Defendant counsel denied that what exists between the Plaintiff and the Defendant is a contractual relationship. She stated that the relationship of the Plaintiff and the Defendant is to be found under Cap 286 and Cap 265. Those two statutes provide the Defendant with power to control development within the Defendant’s jurisdiction. With regard to the requirements stated in the Defendant’s approval letter Defendant counsel stated that what the Plaintiff submitted was architectural plan and not the structural details of the billboards. That in such a plan the Plaintiff were required to show existing buildings around the proposed billboards. Defence counsel was emphatic that the Plaintiff was not licensed to erect the billboards. She denied that the Defendant was under any obligation to give 90 days notice for any enforcement notice. Defendant’s counsel stated that the Defendant has an obligation to the safety of members of the public to ensure that the structures constructed are proper. This is not withstanding any approval for such erection given by any land owner.

As it is obvious from above this is a matter that was truly hotly contested by both sides. As much as that is the case it is important for the court to remind itself that what it is considering is interlocutory application and accordingly it is important that in making any finding this court ought not to take away the discretion of the trial judge. It is obvious that the Plaintiff made an application to the Defendant dated 4th August, 2006 for approval to set up two billboards on two separate plots. The Defendant as mandated by section 33 Cap 286 granted the Plaintiff the approval setting out the conditions that the Plaintiff ought to comply with. The Plaintiff’s case is that it complied and subsequently paid for the licence as provided in that letter of approval. On such compliance the Plaintiff at great expense to itself constructed the two billboards. It transpires that the Defendant by the enforcement notice although not dated was to take immediate effect, that is the Plaintiff was required to remove the two bill boards immediately on receipt of the enforcement notice. Although the Plaintiff stated that Section 30 required such enforcement notice to give the party being served a period of 90 days to comply, I find that the pertinent section that the Defendant ought to have come under was Section 38. This is because it does seem that the Defendant’s case is that the Plaintiff in constructing the billboards did not comply with the authority granted to it. If indeed the defendant had given notice under section 38, the statute does not envisage that such notice would take effect immediately. This is because under Section 38 (4) of Cp 286 the statute provides that a party aggrieved by such notice ought to within the period specified in that notice to file a notice of appeal with the relevant Liaison committee. It would therefore, seem from that provision that it is necessary for the enforcement notice to give a period of compliance to enable the party affected by the notice the right to appeal to the liaison committee as provided in that subsection. The Defendant by the enforcement notice gave no period of compliance. That enforcement notice simply stated that the Plaintiff was to “remove immediately” the billboards. If indeed the enforcement notice was intended to be under Section 38 on a prima facie basis this court will find that the Defendant failed to comply with statutory provision. But on closer examination of the enforcement notice served on the plaintiff, I find that the Defendant quoted the Section under which the notice was given to be section 30)1) Cap 286. If that be the section upon which the Defendant was moving under then the statute clearly requires the Defendant to give 90 days period of compliance. The Defendant did not give such period as stated hereinbefore. The Defendant’s enforcement notice stated “erecting structure contrary to approved plan”. It further stated

“failure to comply (i) approval letter”. Those two statements in that enforcement notice seem to contradict each other. This is because the Defendant seems to first of all say that the Plaintiff had erected the billboards contrary to the approved plan. If that be so, then the second statement that the Plaintiff had failed to comply with No. (i) of the approved letter which had required the Plaintiff to submit structural details of the billboards then the enforcement notice is self contradicting. The court finding therefore is that even the enforcement notice what it required the Plaintiff to do does seem on a prima facie basis to be contradicting and not very clear as to the wrong the Plaintiff had committed. What the court does not understand with regards to the complaints made by the Plaintiff’s competitor and by the landlord to the adjoining plot in Parklands that the billboards were an obstruction is exactly what the Defendant had approved by its letters of approval. It would seem that when the Defendant gave the approval it was aware of exactly where the billboards were to be constructed. If that be so it is not clear why there would have been complaints after the billboards were constructed. The Defendant in its replying affidavit annexed photographs of the two billboards which were original on the affidavit filed in court. The Plaintiff complained that the copy of those photographs served on it were on black and white and were therefore not easily discernable. On response to a question posed by the court to the Defendant’s counsel, Defendant’s counsel stated that the original annexed to the affidavit filed in court were the photographs that had been supplied by the Plaintiff. If that be so, then that photograph shows the billboard to have a mono pole rather than a tri pole. If those photographs had been in possession of the Defendant all along then the court does not understand how the Defendant can be heard to complain that the Plaintiff had erected billboards with a mono pole. In deciding this ruling the court is aware that after the approval by the Defendant, the Plaintiff expended a lot of money on reliance of Defendant’s approval. On that reliance also the Plaintiff has undertaken business transaction of large sums of money. For that reason Defendant needed to prove that indeed it was right in issuing the enforcement notice and as stated hereinbefore that enforcement notice does seem to self contradicting in what it requires the Plaintiff to do. Secondly the Defendant needed to comply with the statutory provisions on the period of notice to be given. The Defendant stated under the enforcement notice that it was given as per section 30(1) Cap 286 that section would have required the Defendant to give a 90 days notice. On the argument whether or not this court has jurisdiction, I would respond in the positive indeed this court has jurisdiction. The procedure provided under Cap 286 does not take away the jurisdiction given to this court under the Constitution. As correctly argued by the Plaintiff the liaison committee does not have the power to grant an injunction as sought by the Plaintiff. In view of the Defendant’s threat to immediately destroy and remove the Plaintiff’s billboards the Plaintiff needed to seek the protection from the court for what it felt was illegal act by seeking an injunction. I do therefore, find that this court has jurisdiction.

In considering the matter in totality I am of the view that the Plaintiff has sufficiently satisfied the conditions of granting an injunction. In view of the contradictions in the enforcement notice and the possible of violation of section 30 Cap 286 I find that the Plaintiff has shown a prima facie case with a probability of success. Although the Plaintiff did show that the loss is likely to suffer is quantifiable, the Plaintiff stated that in all probability the Defendant would not be able to compensate for such loss. This was stated in the affidavit in support and also in oral submission by the Plaintiff’s counsel. This averment and submission was not responded to by the Defendant and accordingly the court is of the view that the fact that the loss the Plaintiff is likely to suffer is quantifiable cannot be a reason to deny the Plaintiff the orders that are sought. Accordingly the court will grant the Plaintiff the following orders:-

(1) The Defendant whether by itself, agents, servants or otherwise howsoever be and is hereby restrained from trespassing upon, accessing, removing and/or destroying the Plaintiff’s two billboards erected on Plot LR. No.1870/IX/54 Westlands, Nairobi and Plot L. R. No.209/2535/1 Parklands, Nairobi and/or removing, destroying and/or interfering in any manner whatsoever with any advertising messages places thereon until final determination of this suit.

(2) Costs of Chamber Summons dated 6th October, 2006 are granted to the Plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 21st day of November, 2006.

MARY KASANGO

JUDGE