REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION –MILIMANI
CIVIL CASE NO.156 OF 2005

ALLIANCE MEDIA KENYA LIMITED ::::::::::::::::PLAINTIFF

VERSUS

MONIER 2000 LTD ::::::::::::::::::::::::::::::::::::DEFENDANT

RULING

The Plaintiff seeks interlocutory injunction:

1) to restrain the Defendant from determining or rescinding the Agreement of sale of Assets dated 19th December, 2004.

2) to restrain the Defendant from interfering, trespassing, alienating or dealing in any way with the sites and assets and licences detailed in the 1st, 2nd, and 3rd schedule of the Agreement of sale dated 19th December,2004.

3) to restrain the Defendant from contracting by telephone, letters, orally or in any way whatsoever the Plaintiff's clients.

4) to restrain the Defendant from informing the Plaintiff's clients that the Agreement between the Plaintiff and the Defendant has been determined or rescinded.

5) to restrain the Defendant from breaching any of the terms of the Agreement of Sale of Assets dated 19th December 2004.

The interlocutory injunction is sought pending the appointment of an Arbitrator and determination of a dispute that has arisen between the Plaintiff and the Defendant. The reasons for the application are:-

(a) That a dispute has arisen between the Plaintiff and the Defendant.

(b) That the parties have agreed to the appointment of an Arbitrator

(c) That notwithstanding the Agreement, the matter be referred to an Arbitrator, the Defendant has threatened to rescind/terminate the Agreement of sale of Assets.

(d) That the Plaintiff is willing to honour its obligations under the Agreement subject to the Defendant meeting its obligations.

(e) That the Defendant has been contacting the Plaintiff's clients and warning them

against placing advertisements on sites it previously owned.

The application is supported by an affidavit sworn by one Sophie Kinyua the Plaintiff's General Manager. To this affidavit several exhibits have been annexed. There is also a further affidavit sworn by the said General Manager on 8th April, 2005. The application is opposed and there is a Replying Affidavit sworn by Moti Mordo the Defendant's General Manager. The affidavit runs to 51 paragraphs with several sub-paragraphs. It also has several annextures.

The application was canvassed before me on 8th April, 2005 by Mr. Singh Learned Counsel for the Plaintiff and Mr. Mungai Learned Counsel for the Defendant. The gist of the Plaintiff's case is that despite the deposit made to the Defendant under the said Agreement the Defendant has refused to meet its obligations under the Agreement to wit repair defects on some of the assets, replace missing assets and pay debts due prior to the Agreement. Instead the Defendant by a letter dated 7th March 2005 purported to terminate the Agreement of sale and requested the removal of the Plaintiff's advertisements on assets it purchased. In the premises the Defendant should be restrained by a temporary injunction pending appointment and determination of the dispute by an Arbitrator.

On the other hand the thrust of the Defendant's case is that the Plaintiff is in breach of the Agreement of sale of Assets. It was supposed to pay balance of purchase price on or before 1st February 2005. It has not. According to the Defendant, payment of balance of purchase price was not linked to replacement of missing Bill Boards or any other pre condition. Since the Plaintiff was in clear breach the Defendant was entitled to rescind the Agreement of sale and did rescind the Agreement by its letter dated 7th March 2005.

According to the Defendant the only issue which the Arbitrator will be concerned with will be the issue of damages. Has the Plaintiff shown a p***rima faci***e case with a probability of success. I have carefully read the Agreement for sale of Assets. It was drawn by the present Counsel for the Plaintiff and the firm of the present Counsel for the Defendant is indicated as the vendor's (Defendant's) advocates. One would have expected that there was unity of minds regarding the terms and purport of the Agreement. Unfortunately that does not appear to have been the case.

In the Definitions and Interpretation section of the Agreement, completion date was given as 1st Febraury, 2005 and completion is defined as completion of the sale in accordance with the provisions of the agreement. Balance of purchase price was given under clause 3 at page 6 of the Agreement as U$200,000 and was to be paid by bankers draft payable to the vendor or their nominees through the vendor's Advocate on or before1st February, 2005. There is no proviso to this clause. This payment was not subject to anything else.

Regarding the assets that would be in a state of disrepair the Agreement at clause 8 (b) provided that:

> ***"should any of the assets be in a state of disrepair, the vendor will remedy the defects failing which the purchaser can repair the assets and deduct the costs from the balance of the purchase price."***

And regarding missing assets clause 9 provided that

> ***"the vendor shall replace or relocate the assets to an equivalent site…."***

The purchaser however would avail itself of this remedy in respect of assets declared in schedule 1 and found not to exist on before the completion date. Clause 10 (b) and (c) provided for the remedies available in the event of rescission and clause 13 provided for taking possession of the Assets.

The parties to this dispute have in the Sale Agreement for Assets made provision for nearly all situations including the situation that has arisen. It is not disputed that by the completion date i.e 1st Febraury, 2005, the Plaintiff had not paid balance of purchase price. I have not seen correspondence regarding defective or missing assets on or before the completion date. I have also not seen any takeover as provided for under

the Agreement. On the material available I am not satisfied that the Defendant is in breach of the said agreement. In fact on a *prima facie* basis it appears to me that it is the Plaintiff in breach.

The upshot of the above consideration is that the Plaintiff has not shown a p***rima facie*** case with a probability of success. Even if the Plaintiff had shown a ***prima facie*** case with a probability of success, it has not shown that it stood to suffer an injury which could not be adequately compensated in damages. Indeed the Sale Agreement has its own internal system in the event of breach. Even the Plaint has an alternative prayer for damages for breach of contract which suggests that should the Plaintiff succeed at the arbitration or at the trial, damages would be adequate compensation for it in the alternative.

In the result, the Plaintiff's application dated 22nd March 2005 is without merit and is dismissed with costs.

The parties are ordered to formerly appoint an Arbitrator and file their respective pleadings within thirty (30) days from the date hereof. Each party has liberty to apply. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-