



**Alpha & Jam Kenya Limited v Kenya Airports Authority (Commercial Case E120 of 2023) [2023] KEHC 19919 (KLR) (Commercial and Tax) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E120 OF 2023  
JWW MONG'ARE, J  
JULY 10, 2023**

**BETWEEN**

**ALPHA & JAM KENYA LIMITED ..... PLAINTIFF**

**AND**

**KENYA AIRPORTS AUTHORITY ..... DEFENDANT**

**RULING**

1. On March 21, 2023 by a Notice of Motion under a Certificate of Urgency, the Plaintiff has moved this Honourable court seeking the following orders;
  1. Spent
  2. Spent
  3. THAT this Honourable Court do and hereby issues a temporary injunction stopping the Defendant/Respondent, by themselves or their agents, employees or anyone else at their behest from threatening, intimidating and/ or harassing the Plaintiff/Applicant by purporting to unlawfully and un-procedurally remove the Plaintiff/Applicant's digital screens at Jomo Kenyatta International Airport pending full hearing and determination of the main suit.
  4. THAT the Honourable Court do and hereby issues an order directing the Respondent to cease any form of harassment, interference and unfair practices towards the Applicant's business and operations at Jomo Kenyatta International Airport.
  5. THAT this Honourable Court do and hereby issues an order directing the Respondent to immediately reinstate unduly and unlawfully disconnected electricity/power to our client's infrastructures at Jomo Kenyatta International Airport pending the hearing and determination of the main suit.



6. Any other order that this Honourable court may deem fit in the interest of justice
7. Costs of this application be provided for.
2. The application is supported by the grounds set within it and the supporting and supplementary affidavits of Anthony Kimani sworn on March 21, 2023 and April 12, 2023 respectively. The application is opposed and the Respondents have filed a replying affidavit sworn by Abel Gogo, the Defendant's airport manager, on April 3, 2023.
3. The Applicant, a digital media advertising company, secured a site advertising agreement at the Defendant's premises, the Jomo Kenyatta International Airport, with Scanad & Media Edge, concessionaires with the Defendant, to operate for the period of the concessionaire agreement that lapsed on November 30, 2021 and October 30, 2021 respectively. The Plaintiff argues that it has heavily invested in infrastructure towards its operations and is seeking to restrain the Defendants from evicting it from the Airport or disconnecting the power to its equipment and therefore disabling it and rendering its operations untenable in the circumstances. The Plaintiff argues further that it has met the threshold for a grant of injunction. The Plaintiff further reiterates that it had legitimate expectation that the Defendant would allow it to continue to operate as it rolled out the new concession agreements with the new Advertising companies.
4. The Respondent on the other has opposed the application by the Plaintiff. The Defendant argues that the application before the court is unmerited and without basis and urges the court to dismiss the same. It is the Defendant's position that the Plaintiff is a stranger to the alleged concessionaire agreements between the Defendant and Scanad and Media Edge and further argues that the said concessionaire agreements have since lapsed and no longer available to the Plaintiff to make reference or reliance on. Being third party agreements to which the Plaintiff was not a party, the Plaintiff is therefore an imposter and a stranger at the airports and therefore a threat to the public. The Defendant further contends that in any event, new concession agreements have already been created between the Defendant and different parties pursuant to tender floated, to which the Plaintiff had notice of but opted not to participate in. The Defendant argues that it had not entered into a contractual relationship with the Defendant from which rights and obligations emanate to warrant the orders being sought and urges the court to dismiss the application with costs to it.

#### **Analysis and Determination:**

5. I have considered the pleadings and the submissions together with the list of authorities filed by the parties and I have identified one issue for determination, to wit; 'whether the Plaintiff/Applicant has met the threshold for a grant of an order of injunction'. In the Locus Classica case of *Giella v Cassman Brown Company limited, (1973) EA* at page 353 and elaborated in the Court of Appeal case of *Nguruman Limited v Jan Bode Nielsen & 2 others, (2014)eKLR*, the court stated that 'In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;
  - (a) Establish his case only at a prima facie level,
  - (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
  - (c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.'
1. From the material placed before me by the Plaintiff and having considered the facts of this case, I note that in order for a grant of an order of injunction to issue, the facts of this case must be put through the three-step test set out above. The first step is to establish whether a prima



facie case has been established. In the case of *Mrao Limited vs. First American Bank & 2 others (2003) eKLR*, Justice Bosire observed as follows;

' So, what is a prima facie case? I would say in Civil cases, it is a case which on material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or a rebuttal from the latter. The evidence must be that of an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly the standard, which is higher than an arguable case.'

6. It is the Plaintiff's case that it was granted a sub contract to a concession agreement between the Defendant and third parties, not parties to this suit. It has been admitted by both parties that the said concession agreements have since lapsed and a new procurement process commenced and completed with new concession agreements being created between the Defendant and other different third parties not parties to this suit. The Plaintiff had notice of the new procurement process and chose not to participate in it. Instead, the Plaintiff has moved the court seeking to restrain the Defendant from removing its digital boards from the airport and also from disconnecting power to the said digital screens as it seeks to engage the new concessionaires for renewal of its contract.
7. The role of the court at this stage is to determine whether the Plaintiff has established a prima facie case as envisioned in the Mrao case(supra). Having considered the arguments put forward by the Plaintiff and the responses by the Defendant, I am satisfied that the Plaintiff has not put placed sufficient material to establish a prima facie case with a high chance of success. To this end and in line with the court of appeal directions in the Ngurumani ltd case(supra) the factors for granting an injunctive order as set out in Giella(supra) are to be determined sequentially and if the court is satisfied that a prima facie case has not been established, then it need not consider the other two factors. In the case before me, the Plaintiff has not demonstrated how it is entitled to the orders sought seeing that the Plaintiff acknowledges that there is no contractual agreement or relationship between itself and the Defendant. Further, the Plaintiff acknowledges that even the concession agreement to which it was a subcontractor have also lapsed. What the Plaintiff is seeking is for the court to create a relationship between it and the Defendant for the orders to be tenable. This cannot be the case because courts can only interpret and give life to contracts that both parties before it have willingly agreed to participate in. I am satisfied therefore in the case before me and going by the facts as presented by both parties, the Plaintiff has not established a prima facie case with a likelihood of success for me to consider the other two remaining steps to award an order for injunction. I will therefore not evaluate the same.
8. In the premises therefore, I find and hold that the application for injunction is without merit and order that the same is hereby dismissed with costs to the Defendant. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2023**

.....

J. W. W. MONG'ARE

JUDGE

**In the Presence of:-**

Ms. Mwago for the Defendant/Respondent.

Wanyingi for the Plaintiff/Applicant.

Sylvia- Court Assistant

