



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 454 OF 2016

ALLIANCE MEDIA KENYA LTD.....PLAINTIFF/APPLICANT

VERSUS

SPORTS KENYA.....DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion of 11th November, 2016 seeks the following substantive Prayers:-

3. The Honourable Court be pleased to issue a temporary injunction restraining the Defendant by itself, its servants, agents and/or associates from proceedings with processing of the tender in respect of No.SK/RFP/004/2016-2017 and/or issuing contract in outdoor advertising at Nyayo National Stadium pending the hearing and determination of this suit.

4. The Honourable Court be pleased to issue a temporary injunction restraining the Defendant by itself, its servants, agents and/or associates from deflighting, removing or in any way interfering with the Plaintiff's use of its flexis, bill boards and other outdoor advertising media at Nyayo National Stadium pursuant to the tender pending hearing and determination of this application.

5. The Honourable Court be pleased to issue a temporary Injunction restraining the Defendant by itself, its servants, agents and/or associates from delighting, removing or in any way interfering with the Plaintiff's use of its flexis, bill boards and other outdoor advertising medial at Nyayo National Stadium pending hearing and determination of this suit.

2. At these Interlocutory Proceedings this Court needs to highlight the following.

3. Sports Kenya (the Defendant) is a Public Entity established under the Provisions of the Sports Act 2013 and a Successor in title to Sports Stadia Management Board (SSMB) and by dint of Section 3(a) of the said Act, all Obligations, Rights, Duties, Assets and Liabilities of SSMB existing immediately prior to the commencement of the Act were transferred to the Defendant.

4. There is litigation,being Civil Suit No.246 of 2012,which was filed by the Plaintiff against SSMB. It is therefore contended by the Plaintiff in paragraph 14 of the Plaint herein that:-

“On or about November 2015 the Plaintiff and Defendant met reconcile accounts and with a view

to setting all issues between them. In meeting of 5th November 2015 the following issues were agreed;

- a. The Plaintiff would pay the Defendant a total of Kshs.7,887,500/= as full and final settlement on all outstanding dues as at 30th September 2015.
- b. The Defendant would issue the Plaintiff of three (3) years in respect of the bill boards at Nyayo National Stadium at an agreed rental of Kshs.125,000 for month and with a further option to renew for another two years.
- c. The existing case to be withdrawn as part of an out of court settlement on the terms set out above”.

5. The Plaintiff further avers that in Performance and Confirmation of the above Agreement, the Defendant wrote to the Plaintiff a letter dated 1st December 2015 confirming the Agreement and further that the Defendant issued the Plaintiff with Invoices at the agreed rental amount of Kshs.125,000/=.

6. The Plaintiff is of the view that a Contract exists between itself and the Defendant in that it has paid an amount of Kshs.4,000,000/= towards the agreed outstanding amount as at 30th September 2015 and has paid rental of Kshs. 125,000/= against Invoices issued upto December 2016.

7. The Plaintiff is aggrieved because the Defendant has failed to execute a renewal contract in favour of the Plaintiff and further has advertised tender for the services which it claims are the subject matter of the existing Contract between them.

8. The Application before me is one for Interlocutory Injunction and a Suitor therefore must satisfy the well known condition in **Giella Vs. Cassman Brown** which are:-

- a. An Applicant must show a prima facie case with a probability of success.
- b. An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.
- c. If the Court is in doubt, it will decide an application on the balance of convenient.

9. In the Affidavit of John Muswa of 11th November 2016 filed in support of the Motion is attached a document that has caught the attention of Court.

10. It is the unsigned Consent dated 3rd March 2016 drawn by the Lawyers of the Plaintiff. It reads,

3rd March, 2016

AFC.A.0047.DMM.cj

Deputy Registrar

High Court of Kenya

Nairobi

Dear Sir,

RE: HCC NO. 246 OF 2012

ALLIANCE MEDIA KENYA LIMITED VS. SPORTS STADIA MANAGEMENT BOARD

Find herewith the following consent.

By consent of the parties I kindly record the following consent

a. The Plaintiff herein Alliance Media Kenya Limited shall pay the Defendant Kshs.7,887,500/= as full and final settlement of dues agreed as outstanding as at 30th September 2015.

b. In consideration of the Plaintiff making the payment set out in paragraph (a) above and in order to compensate the Plaintiff for the utilized portion of the period of parties of the agreement existing at the time of the filing of this suit the Defendant shall draw an agreement allowing the Plaintiff to operate and maintain its billboards at Nyayo National Stadium at rental premium of Kshs.125,000 per month for a period of three (3) years and with a option to renew for a further two (2) years period.

c. Upon due performance by each party of the terms set out in paragraphs (a) and (b) above this matter be marked as settled with no order as costs.

MICHUKI & MICHUKI

ADVOCATES FOR THE PLAINTIFF

WARUHIU K'OWANDE & NG'ANGA

ADVOCATES FOR THE DEFENDANT

11. Whilst it was not clear when the sum of Kshs.7,887,800/= was to be paid, a letter of 1st December 2015 from the Defendant requests for its immediate settlement. However a possible construction of paragraph (b) of the Consent is that the consideration for the entry of a new 3 year Contract was the payment of Kshs.7,889,500/=. From the Pleadings and Affidavit by the Plaintiffs, it is clear that only Kshs.4,000,000/= out of this has been paid to date. The question that the Trial Court will have to grapple with is whether there is a Contract on the basis of the Meeting of 5th November 2015 and part Performance through rental payments when the consideration for the Contract has not been paid in full. But at this stage this Court is unable to find that the Plaintiff has established a prima facie case with a probability of success.

12. The Court takes that view even without considering the argument by the Defendant that to read a Contract into the alleged meeting of 5th March 2015 would be to commit a State Corporation into a Contract in a manner that is contrary to the Provisions of The Public Procurement and Disposal Act(in operation at the time material to the dispute herein) which, ordinarily, required the Procurement process to be done through competitive bidding.

13. At any rate it seems clear enough that the Plaintiff was aware by 18th October, 2016 or so soon thereafter that the Defendant was intent on procuring the services by way of Public Bids. The closing date for the Bids was 9th November 2015. The plaintiff has not explained why it came to Court two (2) days after the closing date and about 26 days after the date of advertisement to seek the Injunctive Orders. Given that the process may affect other third Parties, the Plaintiff was obliged to explain why it did not act soon after it learnt of the invitation for bids or at any rate before the closing date.

14. The Notice of Motion of 11th November 2016 is without merit and is hereby dismissed with Costs.

Dated, Signed and Delivered in Court at Nairobi this 10th day of February ,2017.

F. TUIYOTT

JUDGE

PRESENT;

Okeyo h/b for Michuki for Plaintiff

N/A for Defendant

Alex - Court Clerk