REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION AT MILIMANI

CIVIL SUIT NO 447 OF 2013

CONSOLIDATED MEDIA LIMITED……PLAINTIFF

Versus

MAGNATE VENTURES LIMITED……..…..1ST DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY……..2ND DEFENDANT

RULING

Temporary injunction

[1] The application before me is dated 4th October 2013 and was filed on 16th October 2013. It seeks for the following orders:-

> **a) A temporary injunction restraining the Defendants or their agents or servants or employees from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Applicant's back lit advertising box systems around Athi River to Kitengela area along Athi River-Namanga Road pending hearing of this suit.**
>
> **a) A mandatory injunction ordering the Defendants to pull down their structures and re-erect the Applicant's structures.**
>
> **c) That Officer commanding Athi River Police Station do enforce these orders; and**
>
> **d) Costs of the application be provided for.**

[2] The application is based on a Supporting and Supplementary Affidavit filed.

The Applicant's gravamen

[3] The Applicants submitted that it is seeking for the protection of a right arising from the sanctity of contract. A party who derogate from the obligations created by a contract infringes on the rights of the other in the contract and courts must intervene to protect the innocent party. According to the Applicant, such is the situation in this instant case. In this case, the 2nd respondent gave the applicant authority to install back lit advertising box systems on street

lighting from the area of Athi River to Kitengela along Athi River-Namanga Road (the road). Further, on the 1st February 2013, the applicant entered into a licence agreement with the County Council of Olkejuado. The applicant also sought approval from the Mavoko Municipal Council; the approval delayed but eventually came through. On the basis of this, the applicant proceeded to install back lit advertising box systems on the said road and incurred a cost of Kshs. 6,000,000.00. The applicant also entered into agreements with several other organizations for the supply of outdoor advertising services agreement worth millions of Kenya shillings. In total disregard of the authority it had given to the applicant, the 2nd respondent proceeded to illegally give the 1stRespondent authority to install back lit advertising box systems on the street lighting along Athi River interchange to Kitengela, which route the applicant already had authority over. Pursuant to the illegal authority given by the 2nd respondent, the 1stRespondent removed backlit advertisement signs erected by the applicant thus occasioning the applicant losses amounting to about Kshs. 4,000,000.00.

[4] It is the applicant's contention that the actions of the 1stRespondent are illegal and unwarranted and as such should be deprecated by this Honourable Court. The said actions amount to an infringement of the applicant's right to property as they have deprived the applicant of the enjoyment of having their back lit advertisement signs along the said road contrary to the agreement the applicant had entered into with the 2ndRespondent.It is the applicant's submission that the said actions by the 2ndRespondent amounts to total disregard of contractual obligations and as such amounts to a breach of contract and ought not to be condoned by this Honourable Court. And further that the said actions by the respondents amount to illegal competition.

[5] The applicant in its supplementary affidavit deposed on the 19th November 2013 replied to all the allegations by the Respondents; on lack of proof of damages it adduced photographs thereof. According to the Applicant, the court should decide;

a) Whether the 2nd respondent had authority to grant additional licence to the 1st respondent after it had already granted the same licence to the applicant.

b) Whether the applicant's right to put backlit advertising signs along the Athi River to Kitengela along the Athi River-Namanga Road can actually be shared with the 1st respondent as the 2nd respondent contends.

c) Whether the 1st respondent's contention that the rights granted to them by the 2nd respondent were in respect of a different section of the road are true.

d) Assuming that the 1st respondent was entitled to erect their backlit advertising signs along the same section of the road as they contend, whether the alleged rights of the 1st respondent enjoyed priority over the applicant's rights, and if so, on what basis.

e) Assuming again, that the 2nd respondent was entitled to erect its backlit signs over the same section of the road as they contend whether the said rights ipso facto also entitled them to remove and/or destroy the applicant's backlit advertising signs that had already been erected there.

f) Whether the 2nd respondent is entitled in law to contradict the clear terms of the letter pursuant to which they granted to the applicant the right to erect backlit advertising signs on the aforesaid road contrary to the clear provisions of section 97 of the Evidence Act, chapter 80 of the Laws of Kenya.

g) Whether the delay in obtaining a licence from Mavoko County Council

operated to take away the applicant's rights already granted by the 2nd respondent.

h) Whether the applicant is entitled to the orders sought.

[6] The Applicant was convinced that the 2nd respondent had no right whatsoever to grant authority with respect to the section of the road which the applicant already had been granted. The licence could only be granted once. The right to grant the authority to erect advertisement could only be exercised once, and the 2nd respondent did so when it gave the applicant the authority to erect the backlit advertisement signs.Any subsequent purported authority for putting up backlit advertising signs on the same stretch of road is thus a nullity. Therefore, the averment by the respondents that the right granted to the applicant ought to have been shared is a fallacy and untrue statement meant to deceive this Honourable Court. According to the Applicant, it is impossible to share the backlit advertisement signs in the said road stretch for the reason that only one side of the road has electricity. It should be noted that backlit advertisement signs utilize power/electricity in order to be effective. It would therefore be unreasonable to be assigned a side of the road that has no power/electricity.More was submitted that even if sharing might have been possible, which the applicant totally denies, there was no sharing mechanism provided by the 2nd respondent to ensure that the applicant and the 1st respondent are properly provided for in erecting their individual backlit box signs.

[7] The Applicant refuted the allegation by the 1st respondent that the authority given was in respect to a different section of the road is a mere contention which is not true. This is because the grantor of the rights has already confirmed through their pleadings that they were given rights over the same section of the road. Therefore, it was not possible for the any subsequent right to be given or to have priority over the Applicant's right on the backlit advertisement. The best position any subsequent right would assume-is legally given- is ''equal right'' to but not ''in priority'' to the applicant's. At the moment, the 1strespondent purported right is a clear case of open competition. Their action thereof is arbitrary and impunity. In any event, the 1st Respondent did not have any right to remove or damage the signs erected by the Applicant. These actions are infringement of right which should be protected by the court.

[8] Again, the 2ND Respondent is precluded under section 97 of the Evidence Act, chapter 80 of the Laws of Kenya from contradicting the contract herein. Section 97 of the Evidence Act, cap 80 of the Laws of Kenya provides:

> **When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.**

[9] On the basis of the foregoing reasons, the Applicant stated that it is entitled to orders sought. It has satisfied the test for interim injunction set out in the case of **GIELLA VS CASSMAN BROWN (1973) EA.** It claims that it has established a *prima facie* case with a probability of success at the trial; that it will suffer irreparable harm of which an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience lie in its favour. The Applicant has right to the property being wasted under the contract herein which has been infringed in the sense of the case of **Mrao vs. First American Bank**. See also the case of **NAIROBI MAMBA VILLAGE V. NATIONAL BANK OF KENYA (2002) EA 197** Ringera J. (as he then was) held:

> **In the context of rule (1) of (former) order xxxix of the civil Procedure Rules the party seeking to prevent alienation, wastage or damage to the property in**

> **dispute therein must establish that he has legal rights in such property which he seeks to protect by the injunction sought.**

[10] The Applicant asserted that there can never be any adequate compensation by way of damages to an illegality and infringement of right to property. See the decision by Justice Waki (as he then was) in **MOHAMMED VS COMMISSIONER OF LANDS & 4 OTHERSK.L.R (E & L) 1 Page 217;** and **by** Warsame, J (as he then was) in **JOSEPH SIROMOSIOMO V HOUSING FINANCE COMPANY OF KENYA NAIROBI H.C.C.C NO. 265 OF2007; (2008) eKLR**, as referred to and adopted in the ruling in **JIMMY WAFULA SIMIYU V FIDELITYCOMMERCIAL BANK LTD [2013] eKLR**, the learned Judge held that:

> **Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.**

[11] On mandatory injunction, the Applicant drew the attention of court to the Court of Appeal case of **KENYA BREWERIES LIMITED &ANO VS WASHINGTON O. OKEYO CIVIL APPEAL NO. 332 OF 2000 [2002]1 EA 109** where the Court held that:

> **A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application**.

It urged that there is a special case that warrants the issuance of mandatory injunction against the respondents.For the above reasons, the Applicant's prayer was that the application be allowed and the orders sought in the application be granted.

The Respondents opposed the application.

[12] The 1st Defendant filed a Replying Affidavit sworn on 28th October, 2013 by Laura Kenyani in opposition to the motion. The 1st Respondent cited the case of **Mureithi –v- City Council of Nairobi, Civil Appeal No. 5 of 1979 (UR)**where the Court of Appeal declined to grant an injunction and held that:-

> **"In order to elucidate the position further from my point of view, I would respectfully borrow the following words from the speech of Lord Diplock in *American Cynamid Co v Ethicon Ltd* supra (1975) AC 396 at pp 406 and 408 with which I see no cause to differ :**
>
> **"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial…if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.""**

[13] Therefore, the Plaintiff has quantified the loss it has suffered as a result of the Defendants' actions at Kshs. 4,000,000.00, which means there can never be irreparable loss in their case. After all, the Plaintiff has not demonstrated that the 1st Defendant is impecunious and will not be able to meet an award of damages, should the Plaintiff's claim succeed.See Magnate

Venures Limited –vs- Kenya Ferry Services Limited H.c.c.c No. 72 of 2011 (UR) on matters of contracts by other parties as is the case here. The judge stated that:

> **"<u>It is true that the plaintiff may be exposed to liability as a result of commitments it may have entered into. However, there is nothing to show that such liability cannot be adequately compensated by an award of damages</u>."**

According to the 1st Respondent, the above argument alone is sufficient to dispose of the entire application by the Plaintiff.

[14] The 1st Respondent submitted that the authority to install back lit advertising box systems on street lighting from Athi River-Namanga Road was granted by the 2nd Defendant on condition that the Plaintiff will seek necessary permits from the relevant authorities before commencement of the works as well as pay the annual fees and charges for the use of street lighting poles for advertising. See Clause 9 and 23 of the approval respectively. They argued that the Plaintiff has not exhibited any approvals/ permits to warrant the use of the sites. The 1st Defendant on its part applied for and was granted permission to utilize street poles lighting on Namanga Road from the Interchange at Mombasa Road to EPZ, Athi River on 5th March, 2013. The 1st Defendant sought for and obtained permission from the County Government of Machakos and paid for the approval. The payment receipt is annexed to the Replying Affidavit of Laura Kenyani as exhibit **"LK5"**. The 2nd Defendant has confirmed at paragraphs 4 and 9 of the Replying Affidavit of Khisa sworn on 28th October, 2013 that the two sites are totally different.The Plaintiff has failed to prove that the 1st Defendant has encroached on its area. The photographs and the map exhibited to the Supplementary Affidavit of Rotich are not clear enough to warrant the Court to issue an injunction.

[15] The 1st Respondent argued that the Plaintiff has not come to Court with clean hands and should be denied relief. See the case of **Tricor Enterprises Limited & 2 others –v Mwok-Handa [1990]KLR.** The 1stDefendant has exhibited the authority from the 2nd Defendant to erect back lit advertising box systems together with the payments to the County Government of Machakos for the use of 100 poles. The injunction will paralyze the business of the 1st Defendant whose loss cannot be quantified. Therefore, the balance of convenience lies in their favour.

The 2nd Respondent's submissions

[16] The 2nd Respondent opposed the application. They urged the court to find that the threshold for grant of injunctions as set out in the case of ***Giella Vs Cassman Brown (1973) EA 358****has not been met.The 2nd Respondent argued that it has denied culpability or involvement with the alleged destruction. The 2nd Respondent at all material times had no control over the actions of the 1st Respondent agents or servants. They stated that the Applicants case is doubtful and the same ought to proceed to trial. they therefore, submitted that the court ought not to grant a mandatory injunction as there are no exceptional or special circumstances. They cited* the case **of Kenya Breweries Limited & Another vs. Washingtone O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109** on grant of mandatory injunction. The 2nd Respondent asserted that the license agreement and the approval of the authority clearly envisaged competition and in any event these are public resources for which no party can be given exclusive mandate to exploit. If there were any illegalities in the procurement process, those cannot be handled by this Court as that is the preserve of Procurement Appeals Tribunal. The Applicant has not demonstrated a case for this Honourable Court to exercise its discretion for the grant of the orders sought and so the Application should be dismissed with costs.

DETERMINATION

[17] Two reliefs have been sought; temporary and mandatory injunction. I will not re-invent the wheel. Injunctive relief, just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before. And courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set in the case of **GIELLA vs. CASSMAN BROWN** to wit:-

> **a) Has the Applicant established a prima facie case with high chance of success?**
>
> **b) Will the Applicant suffer irreparable damages unless an injunction is issue? and**
>
> **c) Where does the balance of convenience lie?**

See the decision of Mabeya J in ***JAN BOLDEN NIELSEN VS. HERMAN PHILLIIPUSSTEYA Also Known As HERMANNUSPHILLIPUS STEYN & 2 OTHERS (2012) eKLR***wherehe citedOjwang Ag. J (as he then was)in the case of***SULEIMAN VS AMBOSELI RESORT LTD (2004) eKLR 589***as follows:-

> **'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-**
>
> > **'…….counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."**
> >
> > **Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.**

i. **Is there a prima facie case….**
ii. **Does the applicant stand to suffer irreparable harm…**
iii. **On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice……**

[18] I will apply the above test on temporary injunction.

[19] As for mandatory injunction, I will use the test enunciated in the case of **KENYA BREWERIES LIMITED &ANO VS WASHINGTON O. OKEYO CIVIL APPEAL NO. 332 OF 2000 [2002]1 EA 109**and the case of **Kenya Airport Authority vs. New Jambo Taxis NBI Civil Appeal No 29 of 1997 (C.A).** In these cases, the Court of Appeal, applied the decision of Megary J. (as he then was) in **SHEPHERD HOMES V SANDHAM [1979] 3 WLR 348** and also cited with approval the passage in ***"Halsbury's Laws of England,"*** Volume 24, at paragraph 948

to the effect that:

> **"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff … a mandatory injunction will be granted on an interlocutory application."**

[20] Ringera J (as he them was) in the case of **ShowindInducstries Ltd vs. Guardian Bank Ltd & Another [2002] 1 EA 284 (CCK)** also gave a good rendition on the test in the grant of mandatory injunction as follows:

> **''As I understand the law, an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of a court of equity or his equity has been defeated by laches''.**

[21] I have considered all the pleadings, affidavit evidence, submissions by parties as well as the applicable law. I take the following view of the matter. There is no doubt that 2nd Respondent gave the Applicant authority to install back lit advertising box system on street lighting from the area of Athi River to Kitengela along the Athi River-Namanga Road. See letter dated 28th December 2012. The Applicant erected the back lit advertising box system. The approval was valid for two years. Again on 5th March 2013, the 2nd Respondent granted authority and approval to the 1st Defendant to erect back lit advertising box systems on street lighting poles on Athi River-Namanga Road. This is essentially the same route. Arguments that the 1st Respondent and the Applicant were to share the route is not supported by anything. The authority given to the 1st Respondent and the Applicant do not state expressly or imply such alleged sharing of the route. There was no sharing mechanism was provided to the 1st Respondent and the Applicant either verbally or in writing or in any other intelligible format. Those arguments are afterthoughts but which have no foot on which to stand. I reject them.

[22] Also, despite arguments that the Applicant did not obtain approvals from the relevant authorities, there is nothing before the court to show that the contract between the 2nd Respondent and the Applicant or the authority and approval to install back lit advertising box system on street lighting from the area of Athi River to Kitengela along the Athi River-Namanga Road was terminated or repudiated or revoked. It subsisted as at the time the 2nd Respondent granted authority to the 1st Respondent to do the install back lit advertising box system on street lighting from between Athi River-Namanga Road. Also from the material before me, the Applicant installed the back lit advertising box systems along the designated route. And evidence provided so far show that the 1st Respondent pulled the said back lit advertising box systems and installed their own in place thereof. Rights accrued to the Applicant under the contract. Also property rights accrued to the Applicant on the back lit advertising box systems which it erected pursuant to the authority given by the 2nd Respondent. The argument that the Applicant did not obtain relevant approvals from the relevant county government is neither here nor there. In fact that is a matter for evidence at the trial. The agreement between the 2nd Respondent and the Applicant as well as the authority to erect the advertising box systems has not been denied by either respondent. Therefore, the 1st Respondent did not have any right or authority of the law to remove the back lit advertising box systems erected by the Applicant. there was no formal mechanism that was followed which would have resulted into removal or destruction of the Applicant's property.

[23] As Waki J (as he then was) in **Mohammed Vs Commissioner of Lands & 4 OthersK.L.R (E & L) 1 Page 217;** andWarsame, J (as he then was) in **Joseph SiroMosiomo vs.**

Housing Finance Company of Kenya NairobiH.C.C.C NO. 265 OF2007; (2008) eKLR, as referred to and adopted in the ruling in **Jimmy Wafula Simiyu vs. FidelityCommercial Bank Ltd [2013] eKLR**, I too hold the view that:

> **Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.**

[23] The Applicant has demonstrated a clear infringement of its rights by a concerted action of both the Respondents. Its property rights have also been violated. And in such clear cases of infringement of right, a mandatory injunction will also issue. I think the respondents, whether by design or default, deliberately entered into the second agreement knowing too well the infringement it was going to occasion on the rights of the Applicant. Such designs are loathe in law as they are aimed at stealing a match from the Applicant. The obscurity being created by the Respondents in this matter is also part of the designs to crowd the true character of this case. In the circumstances, despite the great expense that the 1st Respondent may incur, the infringement is much weightier; the loss is self-inflicted. The 1st Respondent was aware of the existence of the authority granted to the Applicant and the boxes were physically visible. See the submissions and affidavits filed by the Respondents. Therefore, being guided by the case of **Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, on the material presented to the court, and properly directing myself thereon, I conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. Also this is a clear case which should be determined at once for it is an attempt to steal a match from the Applicant. Thus, a temporary as well as mandatory injunction is merited. Accordingly I issue a temporary injunction and mandatory injunction as prayed. The 1st Respondent shall remove their back lit advertising box system and restore those of the Applicant at their cost within 14 days of today. Should they fail to do so, the Applicant shall seek the assistance of court bailiff to enforce the order at the cost of the Respondents. Costs of the application shall be borne by the Respondents. It is so ordered.

Dated, signed and delivered in court at Nairobi this 1st day of July 2015.

F. GIKONYO

JUDGE