REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

MISCELLANEOUS CIVIL CASE NO.398 OF 2012

KENYA BROADCASTING CORPORATION.....……APPLICANT/PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI ……..……. RESPONDENT/DEFENDANT

R U L I N G

The Plaintiff, in a Plaint dated the 28th August, 2012 and filed in court on 4th September, 2012, described itself as a body corporate, a public Broadcaster performing and assuming the Government of Kenya functions of, inter alia, producing and broad-casting programmes, on a piece of land known as L.R No.209/5918, situated along Harry Thuku Road within Nairobi and otherwise known as Broadcasting House. The Plaintiff avers that the land is registered in the name of the Chief Secretary, Colony and protectorate of Kenya. It also avers that it has power to sue and be sued.

In the said Plaint the Plaintiff avers that between June, 2012 and July, 31st, 2012, the Defendant, the City Council of Nairobi, by itself or through agents/servants or persons claiming under it, entered the Broadcasting House and therein served the Plaintiff with property Rates Demand Notice addressed to the Commissioner of Lands in which the Defendant demanded a payment of rates relating to the property occupied by the Plaintiff as aforesaid, amounting to Kshs.254,949,913/= as at July, 2012. The Plaintiff further averred that the said agents of the Defendant threatened sale and disposal of Broadcasting House to recover the outstanding rates of aforestated, thus exposing the Plaintiff to eminent disruption and disabling of broad casting services which will lead it to suffer losses and damage.

Consequently, the Plaintiff sought a declaration, that it is only a trustee of the Kenya Government in relation or in respect of the L.R No.209/5918 and that therefore, the Defendant has no right of demanding payment of property rates from it but that the rates should be demanded from the Kenya Government.

The Plaintiff also sought an injunction to issue restraining the Defendant from dealing in any way, whatsoever, from disposing or transferring of L.R No. 209/5918 or interfering with the Plaintiff's occupation of the same.

Together with the Plaint, the Plaintiff filed a Notice of Motion dated the same day. It sought that pending the hearing and determination of the suit, an order do issue, restraining and prohibiting the Defendant/Respondent from dealing in any manner whatsoever, including disposing and/or transferring or interfering with Plaintiff's quiet occupation of L.R No.209/5918. The Court granted an interim order to

that end until the application was heard inter partes. The issue now before the court is whether the said interim order should be confirmed until the suit is finally determined.

The application was supported by an affidavit sworn by one Waithaka Waihenya, the Managing Director of the Plaintiff Corporation. The Supporting Affidavit repeats the facts averred in the Plaint, the prominent of which are:-

a. That L.R No. 209/5918 is registered in the name (effectively) of the Kenya Government and that Kenya Broadcasting Corporation is only a trustee of the Government in respect of the property.
b. That the servants or agents of the Defendant who served the Notice demanding rates on one Henry Momanyi the Finance and Administration Manager of the Plaintiff, and that they threatened to sell or dispose the Broadcasting House in order to recover the rates, if not priorly settled.
c. That the Defendants should look to the Government, and not the Plaintiff, to recover those rates.
d. That the Demand Notices served on Plaintiff were addressed to the commissioner of Lands and not the Plaintiff.
e. That if the Defendant carries out its threats, the operations of the Kenya Broadcasting Corporation will suffer loss and damage, hence it requires an order of injunction as sought to prevent such threat from occurring.

The Defendant filed a Replying Affidavit sworn by one Karisa Iha, the Acting legal Affairs Director of the City Council of Nairobi. He swore that the applicant has failed to disclose a lot of relevant facts that would assist the court to arrive at a fair decision. He further deponed that the Defendant has not at any time threatened to dispose or sell the Broadcasting House to recover the demanded rates. That further, a process of recovering rates by disposal of the rateable property is long and is only ordered by the particular court of law which takes into account all issues including those raised by the Applicant.

The Defendant further deponed that the Plaintiff's admission that it occupies the L.R No.209/5918 Nairobi and that it does so as trustee of the Registered owner of the property, confirms the fact that for the purpose of the Rating Act (Cap 267) of the Laws of Kenya, the plaintiff is the rateable owner of the property and accordingly liable to pay the rates in the first instance.

The defendant also deponed that all public land is rateable land under the Valuation of Rating Act (Cap 266) of Laws of Kenya. That Section 7 thereof exempts public land that is expressly exempted by the relevant Minister from being rated. That in the case of L.R No. 209/5918 which even the Plaintiff admitted is public land, no such ex emption is shown to exist.

The Defendant further deponed that the Plaintiff has always known that it is liable to pay rates and that it indeed owned the Broadcasting House and further that it had earlier requested for the exact amount due in a letter dated 25th August, 2011 with a view to pay the same. That by a letter dated 26.9.2011 the Defendant replied giving the amount then outstanding but the Plaintiff failed to settle the same.

The defendant rounded up by saying that the Plaintiff was never ambushed by being served with the Demand Notices which triggered this case as alleged.

I have carefully considered the application, taking into account all the material placed before me including the written submissions from both sides.

Assuming that this court has jurisdiction to deal with this matter in view of the Chief Justice's Practice Directions dated February, August and November, 2012), the threshold for granting the injunctions as set out in the case of **Giella Vs Cassman Browns Co. Ltd (1973) EA 358** are that:-

i. The applicant must demonstrate a prima facie case with a probability of success.
ii. The applicant must stand to suffer irreparable loss which cannot be compensated by way of damages and
iii. If the court is in doubt, it will decide the application on the balance of convenience.

In this case, the land L.R No. 209/5918, otherwise known as Broadcasting House, is effectively Government public land. It is situated in the City Council of Nairobi, now Nairobi City County. Section 3 of the Rating Act (Cap 267) of the Laws of Kenya, confers upon the City Council of Nairobi the duty to levy rates over every rateable property within its area of jurisdiction.

Rateable property is defined in Section 2 of the Valuation of Rating Act (Cap266) as all land precluding public land that is defined and provided in Section 25 of the Act. Section 25 of the Act precludes from payment of rates any public land that the relevant minister, by express order, exempts from such valuation and from any contributions in lieu of rates and also exempts public land reserved for public use subject to consultation with the relevant local Authority.

It seems clear therefore that Broadcasting House land being a public land, and being in the locality of Nairobi, is rateable land unless deliberately exempted by the order of the relevant minister. It is also clear to the court that the person to show that the said land is exempt from rating, is the relevant Government Ministry or its agents or servants in occupation or possession of the same who actually is the Plaintiff.

The court notices further the definition of a "rateable owner" to include "***a person having any interest over property entitling him possession thereof as if he were a lessee."*** In ***Republic Vs Municipal Council of Limuru, Ex parte, David Ngure Kienjeku***, Nairobi Misc. application No. 124 of 2007,this court, defined a rateable owner under Section 7(1) (a) of the Valuation of Rating Act as including:-

> ***"...the owner of a registered freehold or tenant for life or a lessee of that property for a definite period not less than 25 years or the natural life of that person...."***

In this court's view, the Applicant/Plaintiff herein, the Kenya Broadcasting Corporation, qualifies to be and is a rateable owner of L.R No.209/5918, Nairobi. It has occupied and has and is in possession of the said land all its known life. It has interest on it and uses the land whether as an agent or trustee of the government. Indeed the Supporting Affidavit of this application by Waithaka Waihenya confirms the Plaintiff's interest on the land for the purpose of broadcasting.

In the English case of **Arsenal football Club Vs Smith (valuation officer) and another [1977] 2 All ER, 267**, the court was faced with a similar situation. Arsenal Football Club owned and occupied a stadium in the London Borough of Islington. The issue was whether Arsenal or one Mr. Ende, who was the Managing Agent of the stadium, was the rateable owner. The court (Lord Wilberforce) held:-

> ***"there is no doubt that his name (Mr. Endes) appears in the rate-book in respect of this property; he is personally liable for the rates. His goods could be distrained against if he did not pay.... the section, in my opinion, put him, for purposes of rating, in the position of a rate payer – and no doubt does so deliberately so as to save the local authority the trouble and expense of searching for the owner and proceeding against him....."***

In this case a letter was produced dated 25/8/2011 written by the Plaintiff and herein marked "K12" in which the Plaintiff admitted, inter alia, that it owned several parcels of land within the city. It requested the City Council of Nairobi to provide it with outstanding rates for each, for its further action, so that the Plaintiff could plan on how to develop the said parcels of land which included Broadcasting House. In the circumstances the Plaintiff was, in the court's view, always aware that it was liable to pay the rates for L.R No.209/5918. It is difficult for the court to understand therefore, why on being served with a demand notice(s) to pay the rates which earlier it had sought to know, the Plaintiff would feel threatened and would rush to court seek protection from fulfilling its statutory obligation of paying the rates for the properties it owns and is not afraid of announcing to own to anybody who would care to listen. Was it scared by the largeness of the accumulated amount of rates over the years?

Having arrived at the conclusion that the Plaintiff is the rateable owner of the Broadcasting House land over the years and that the Plaintiff has not this far shown evidence of exemption from paying rates over

the said public land, then all that remains to say, is that the Plaintiff on the face of things, has stood and stands liable to pay the outstanding rates in respect to the Broadcasting House land known as L.R No. 209/5918, Nairobi up to the time it was served with the demand notice to pay. This raises the question as to whether the plaintiff has shown a prima facie case with chances of success.

In the Plaint and application before the court, the Plaintiff effectively averred that it is not the owner of the above mentioned land and therefore not a rateable owner and that the land itself belongs to the Government and that the land is not itself rateable. The Plaintiff also claims that the Respondent's agents who served the rate demand not ices, threatened that the property would be sold for the recovery of the rates if not settled soon, hence the reason for the filing of this case and this application.

I have considered the issues. The court has shown above that the land in issue is public land owned by the Government of Kenya and situated in the locality of the former City Council of Nairobi, now Nairobi City County. The court has also concluded that the land is rateable and that the Plaintiff is the rateable owner and therefore the one liable to pay the outstanding rates unless exempted by the relevant minister. Finally the court has arrived at the conclusion that even if the agents who served the demand not ices may have issued threats of selling the suit land, (which this court does not believe the agents did or even had capacity to do), the threats merely amounted to a factual truth always in existence i.e. that any outstanding rates are an outstanding charge on the property they related to or arose from. The agents' utterances if any, accordingly, did not amount to any threat to the Plaintiff who knew or ought to have known all along, that in default of paying rates, the Respondent was entitled to sell the rateable property to recover the outstanding rates. And for what it may be worth, the process of selling or disposing of a rateable property to settle or recover outstanding rates under Section 19 of the Rating Act (Cap 267) is such a cumbersome process that it can only be ordered by the Rating Court after giving the rateable owner sufficient opportunity to be heard before a final decision is made on merit. It was not intended to ambush or threaten the rateable owner as are the fears of the Plaintiff herein.

The result is that this court finds that the Plaintiff/applicant's suit herein does not show a prima facie case with chances of success which form the first condition in the **Giella case** earlier cited.

I am aware that in his case an interim order of injunction as sought by the Plaintiff was granted and is still in place. However, as stated by Mwera, J as he then was, in **Bao Investments & Officer Management Service Ltd Vs Housing Finance Company of Kenya Ltd in Kisumu HCCC NO.75 of 2005*:-***

> ***"....it must be clearly understood that a party who goes to a judge in the absence of another side assumes a heavy burden and must put before the judge all relevant material including material which is against him. It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all parties an opportunity to be heard. Ex parte orders, whether they are injunctions or whater, form an exception to this rule and for a party to benefit from the exception, there must be a good and compelling reason for it....."***

In this court's view accordingly, the interim orders were made by the court without the benefit of all the facts which were placed before this court and which had they been placed before the earlier court, would have denied the Plaintiff the interim orders it obtained. Furthermore as found and stated in the case of **Benir Investments Ltd Vs The Commissioner General & Another, Milimani, HCCC NO. 600 of 2008**, where the court finds that the first condition in **Giella case** has not been demonstrated by the applicant in any application for injunction, the court need not address the second condition, because these conditions are sequential so that the second condition can only be addressed if the first one is satisfied.

The end result therefore, is that this application by the Plaintiff for an injunction to issue against the Defendant has no merit and is hereby dismissed with costs. Orders accordingly.

DATED and **DELIVERED** at Nairobi this **5th** day of **May, 2014**.

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D.A. ONYANCHA

JUDGE