



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 528 OF 2012

ALLIANCE MEDIA (KENYA) LTD.....1ST PLAINTIFF

AZAREL INVESTMENTS LTD.....2ND PLAINTIFF

VERSUS

MAGNATE VENTURES LTD.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

Introduction

1. The 2nd plaintiff, Azarel Investments, is the legal owner of the property known as Land Reference No. 209/18866 (Original No. 209/7437) commonly referred to as the International Casino which is situated around the former Museum Hill Roundabout. The 1st plaintiff, Alliance Media, is its tenant.
2. The plaintiffs' grievance against defendants is that the 2nd defendant, the City Council of Nairobi, has permitted the 1st defendant, Magnate Ventures, to construct wall wrap and bill boards at or next to the suit premises with the result that the plaintiffs stand to lose substantial revenue.
3. The plaintiffs have also disclosed that there is a pending suit namely, ***Nairobi Chief Magistrate's Court Case No. 1725 of 2011*** between the 1st and 2nd defendant and the 2nd plaintiff in respect of the same subject matter.
4. Together with the plaint, the plaintiffs moved the court under certificate of urgency by the Notice of Motion dated 15th August 2012 for orders of injunction. On that date, Hon. Justice Mutava granted, inter alia, the following orders *ex-parte*;
 3. *That pending the hearing of this application inter parties, a mandatory injunction be and is hereby issued compelling the defendant to forthwith remove all the construction and all already erected advertisement bill board adjacent to, in front of and/or around the 2nd plaintiff's building on L.R. No. 209/18866.*
 4. *That a temporary injunction be and is hereby issued restraining the 1st defendant from erecting advertisement billboards adjacent to, in front of and/or around the perimeter wall of the building erected on L.R. No. 209/18866 owned by the 2nd plaintiff and now blocking and obstructing the view of the*

building and other existing billboards and wall wraps of the 1st plaintiff herein, pending the hearing and determination of this application inter parties or of this suit, or until further orders herein.

5. *That pending interparties hearing the plaintiff be at liberty to remove the aforesaid billboards and wall wraps, with the assistance of the Kenya Police in particular OCPD Gigiri Division and OCS Parklands Police Station,*

6. *That the Kenya Police and in particular the OCPC Nairobi Area be and is hereby ordered to extend necessary assistance for enforcement of the court orders made herein.*

The 1st defendant's application

7. The 1st defendant, dissatisfied with the *ex-parte* orders dated 15th August 2012, moved the court under certificate of urgency by a Notice of Motion dated 22nd August 2012 and supported by the affidavit of Edwin Sifuna sworn on 22nd August 2012, where it sought the following substantive orders;

[4] The order made herein on 15th August 2012 be set aside and discharged ex debito justitiae.

[5] The plaint dated 15th August 2012 and filed herein on the same day on behalf of the plaintiffs be struck out and the plaintiffs suit dismissed with costs.

8. This application was certified urgent by Hon. Lady Justice Ngugi on 23rd August 2012 and ordered to be heard on 29th August 2012. Unfortunately, it was not listed on that date and I directed that it be heard on 30th August 2012.

9. The Notice of Motion is opposed on the basis of a Replying Affidavit sworn by Abhimanyu Garhwal on 28th August 2012 and a Notice of Preliminary Objection dated 27th August 2012. I directed that the grounds raised in the Notice of Preliminary Objection be heard together with opposition to the application.

Preliminary issues

10. The plaintiffs object to this application on the ground that the application for leave to be heard during the High Court was by way of a Notice of Motion and not by Chamber Summons and that the court did not grant leave for the application to be heard during the High Court vacation under the provisions of **rule 3** of the ***High Court (Practice and Procedure) Rules***.

11. In my view, this is a technical objection which is without merit. Once the matter was considered by Hon. Lady Justice Mumbi Ngugi and certified as urgent and a date fixed during the court vacation, she must be deemed to have admitted the matter for hearing during the High Court vacation. In any case I am satisfied that none of the parties are prejudiced by the hearing of the matter.

12. The plaintiffs have objected to parts of the supporting affidavit of Edwin Sifuna on the ground that the sources of information and belief were not disclosed in the deposition. Although this and several arguments were raised by the parties I think that the main issue for consideration relates to the cases which are undisputed and the inferences to be drawn from the uncontested facts and I shall limit my decision to the effect of these two cases. It is therefore unnecessary for me to deal with the objection raised based on the competence of the affidavits.

13. I asked Mr Adala, counsel for the plaintiffs, whether the issue of previous and pending suits and whose pleadings and other court documents were annexed to the 1st defendant's deposition was in dispute. He conceded that the cases; namely ***Milimani CMCC No. 4003 of 2010*** and ***Milimani CMCC No. 1725 of 2011*** were not disputed and the pleadings and court documents annexed to the 1st defendant's deposition were also not in dispute. It is therefore on the basis on these uncontested facts which are also

matters of the court record that the application before the court shall be determined.

Milimani CMCC No. 4003 of 2010

14. This suit, the first suit, was filed by Alliance Media against Magnate Ventures on 25th June 2010. The plaintiff averred, inter alia, as follows;

[4] On or about 24th June 2010, the plaintiff realised that the defendant was busy erecting a perimeter wall for purposes of erecting bill boards. The plaintiff avers that the intended construction will obstruct the bill board presently occupied by a client of the plaintiff.

[5] The plaintiff avers that the defendant has threatened to infringe on the easement enjoyment by the plaintiff and the plaintiff stands to suffer subs nail loss unless the defendant is restrained from erecting the bill board in a manner that obstructs the view of the bill board erected by the plaintiff.

REASONS WHEREFORE the plaintiff prays for judgment against the defendant for

(a) A permanent injunction to restrain the defendant whether by itself, agents, servants or employees from proceeding with construction work or erecting a bill board along Museum Hill roundabout and in particular along visibility, view accessibility of bill board erected by Plaintiff.

15. Together with the plaint, the plaintiff also filed an application seeking injunctions and on 1st July 2010 the court issued an *ex-parte* injunction, inter alia, on the following terms.

(2) That an interim order be and is hereby granted preventing the defendant whether by itself, contractors, employees or otherwise from putting up flex material or flighting any form of advertisements on the face frame erected on land adjoining International Casino pending the hearing and determination of the preliminary objection raised and or the application dated 25th June 2012.

(3) That status quo be maintained in terms that No construction or any activity carried on further or at all at the disputed site till determination of the preliminary objection and or application the case may be.

16. In the meantime, the Magnate Ventures moved the court to discharge the *ex-parte* orders on 1st July 2010 and to strike out the suit. The learned magistrate duly considered the application and by a ruling dated 8th April 2012 he struck out and dismissed the suit. The court found that the suit was scandalous, frivolous and vexatious on the ground that the Magnate Ventures was granted authority by the Ministry of Roads to put up hoarding on the road reserves and this was approved by the City Council of Nairobi.

Milimani CMCC No. 1725 of 2011

17. The second suit was filed by Azarel Investments against Magnate Ventures and the City Council of Nairobi. According to the Plaint dated 25th May 2011, the plaintiff averred as follows;

[4] In or about May 2011, the plaintiff noticed that the 1st defendant had with the permission purportedly granted by the 2nd defendant erected several advertisement bill boards and metal frames in front of and or about the perimeter wall of the plaintiffs building erected on L R No. 209/18866 owned by the Plaintiff with billboards are blocking the view of the building thereby interfering with the vicinity and clear sight of the said building.

[5] The plaintiff avers that the defendants' actions are unlawful and infringe on the plaintiff rights to have the building on LR NO. 209/18866 properly seen as designed.

[6] The plaintiff further avers that unless the Defendants are restrained forthwith, the plaintiff stands to suffer irreparably.

REASONS WHEREFORE the plaintiff prays for judgment against the Defendant for:

(a) A mandatory injunction compelling the defendants to demolish and or remove the already erected advertisement bill board and metal blocking the view of the building on L. R No. 209/1886 being the plaintiff's property.

(b) A permanent injunction against the defendants restraining them whether by themselves their servants or contractor from further erecting any advertising billboards in front of and or around the building on LR No. 209/18866 which is owned by the Plaintiff.

(c) A permanent injunction prohibiting the 2nd defendant whether by itself, its agents, its servants, employees or contractor or in any manner permitting erection of an billboard in front of and around the perimeter wall of the plaintiff's building on LR No. 209/18866 without the express written consent of the plaintiff.

18. In addition to the plaint, the Azarel Investments, lodged an application seeking *ex-parte* interim relief and on 26th May 2011, the court granted, inter alia, the following orders *ex-parte*;

(2) That a temporary injunction be and is hereby issued compelling the defendants to forthwith remove the already erected advertisement boil boards erected in front of and or around the plaintiff's building on L R No. 209/18866.

(3) That a temporary injunction be and is hereby issued restraining the 1st defendant whether by itself, its agents servants employees assigns and contractors from electing advertisement bill boards in front and or around the perimeter wall of the building erected on L R No. 209/18866 owned by the plaintiff that are blocking and obstructing the view of the building pending hearing on 7th June 2011.

19. Aggrieved by the *ex-parte* order, the Magnate Ventures moved the court to stay and set aside the orders of 26th May 2011. There is an order in force staying the enforcement of the *ex-parte* order issued on 26th May 2011 and confirmed on 23rd June 2011 directing removal of the 1st defendants wall wrap.

Non-disclosure of material facts

20. The 1st defendant's first ground of attack on the *ex-parte* order issued on 15th August 2012 is that the plaintiffs failed to disclose material facts namely the existence of the two suits.

21. Mr Havi, counsel for the 1st defendant, submitted that the plaintiffs did not disclose the fact that ***Milimani CMCC 4003 of 2010*** existed which concerned a claim to the very same site and that a decision had been rendered holding that that Alliance Media could not challenge Magnate Ventures use of the site. The plaintiffs also failed to disclose the existence of orders in ***Milimani CMCC 1725 of 2011*** which stayed an injunction issued to stop removal of the plaintiff's wall wrap. Counsel submitted that this information was within the knowledge of the plaintiffs and their counsel and they failed to disclose it.

22. Mr Adala, on behalf of the plaintiffs, countered that he was not acting for the Alliance Media in ***Milimani CMCC 4003 of 2010*** and he could not disclose what he did not know and in his view what was known to counsel or the client was fully disclosed at the material time. Furthermore, the counsel contended that the failure to disclose that suit was excusable because the suit, having been struck out, was no longer in existence and there was no obligation to disclose the existence of that suit.

23. As regards ***Milimani CMCC 1725 of 2011***, counsel contended that the case had been fully disclosed in paragraph 20 of the plaint in accordance with **Order 4 rule 1(f)** of the ***Civil Procedure Rules*** and that this disclosure was sufficient and the obligation to disclose fully discharged.

24. In the case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1*** the Court of Appeal was emphatic that in *ex-parte* proceedings there should be full and frank disclosure to the

court of facts known to the applicant and that failure to make such disclosure may result in the discharge of any order made upon the *ex-parte* application even though the facts were such that with full disclosure an order would have been justified.

25. Mr Adala states that there was disclosure of **Milimani CMCC No. 1725 of 2011** in the plaint and this was adequate disclosure. I think this misses the point as disclosure goes to the heart of the exercise of judicial discretion. Any party who seeks the court's discretion especially at the *ex-parte* stage must place all relevant and material facts that have a bearing on the court's decision before the court. I have examined the Notice of Motion and the supporting affidavit of Abhimanyu Garhwal sworn on 15th August 2012 that was placed before Hon. Justice Mutava. It does not disclose the contents of the case and nor the fact that the subordinate court had granted orders similar to those sought but which had been stayed. The pleadings, interlocutory applications and orders in the pending suit are not even attached to the affidavit in support of the motion.

26. In my view there was in fact active concealment of material facts by the plaintiffs. Had all the relevant facts concerning **Milimani CMCC No. 1725 of 2012** been brought to the learned judge's attention, it would have materially affected the judge's decision in one way or another. The duty to disclose at the *ex-parte* stage is not limited to a bland statement that there is a case in existence but to disclosing the nature, extent and content of the case. In the circumstances of this case, for the disclosure to be material it had to include all the facts and circumstances relating to the grant of similar orders by the subordinate court.

27. My view regarding non-disclosure of the **Milimani CMCC No. 4003 of 2010** is that the obligation to disclose is firmly fixed on the applicant and if there is failure to disclose material facts to the court by the advocate then his client must take the burden of the failure. Alliance Media knew of the existence of **Milimani CMCC No. 4003 of 2010** whose result was material to the facts and circumstance of the present case.

28. At paragraph 20 of the plaint the plaintiffs' state that, "*Besides an action in the Chief Magistrates Court at Nairobi; namely Nairobi-Milimani Commercial Court – Civil Case No. 1725 of 2011 between the 1st and 2nd defendants and the 2nd plaintiff in respect of the subject matter, there is no other suit pending between the parties hereto over the same subject matter as outlined herein.*"

29. **Order 4 rule 1 (f)** of the **Civil Procedure Rules** provides that every plaint shall have, "*an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.*" [Emphasis mine]

30. **Order 4 rule 1 (f)** of the **Civil Procedure Rules** imposes on the parties to disclose both pending and previous proceedings. Alliance Media as a party to **Milimani CMCC No. 4003 of 2010** had an obligation to disclose the previous proceedings. It did not matter, as Mr Adala contended, that the suit had been terminated. The rule requires full disclosure and the 1st plaintiff failed to disclose the existence of that suit. It must bear the consequences of this failure.

31. As this suit is filed jointly, I find that the plaintiffs failed to disclose material facts relating to the proceedings in **Milimani No. 1725 of 2011** and **Milimani CMCC No. 4003 of 2011**. In the circumstances, I have no hesitation in setting aside and discharging the orders made on 15th August 2012.

Res-judicata and abuse of process

32. The second limb of the 1st defendant's application is that the suit should be struck out on grounds that the matter is *res-judicata*. According to Mr Havi, the subject matter of this suit was finally determined by the decision in **Milimani CMCC 4003 of 2010** where the suit was struck out and

dismissed. There has been no appeal or review of that ruling rendering the present suit *res-judicata*.

33. Mr Adala submitted that the present matter is not *res-judicata* as **Milimani CMCC No. 4003 of 2010** was struck out on a technicality. As regards **Milimani CMCC No. 1725 of 2012**, counsel submitted that only the Azarel Investments, Magnate Ventures and City Council of Nairobi were parties to that suit and that the subject matter is different. In this present suit, counsel further contends, that there are several issues and prayers that differ from the previous suit.

34. Mr Adala also submitted that the Magnate Ventures has no defence to this suit because it has contravened a condition subject to which authority to construct the billboards was granted. According to the letter dated 12th February 2012 from the Ministry of Roads, Magnate Ventures was given permission to construct advertisement structures on condition that, “*the advertisements shall in no way block, endanger, jeopardise, prevent, disadvantage or unreasonably interfere with accessibility and developments of rightful owners of neighbouring areas abutting the road.*” The plaintiffs contend that the Magnate Ventures has not come to court with clean hands in light of the violation of the condition given by the Ministry of Roads.

35. The doctrine of *res-judicata* is one of general application and is given statutory imprimatur in **Section 7** of the **Civil Procedure Act** which provides;

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant relief claimed.

36. The doctrine of *res judicata* has three ingredients. First, the issue in the first or previous suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of **Karia and Another v Attorney General and Others [2005] 1 EA 83, 89, Pop-In (Kenya) Limited and Others v Habib Bank AG Zurich [1990] KLR 609**).

37. I would also quote the case of **Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2012 (Unreported)** where the court stated, “*The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata’*”

38. An analysis of the facts of the cases filed in the subordinate court and the present case shows that the cases revolve around the construction of the advertising bill boards by the Magnate Ventures around the Museum Hill area. The authority for Magnate Ventures to do its business emanates from the letter titled; “*Authority to Construct Hoarding Sites*” dated 12th February 2010 from the Ministry of Roads. This letter is the substratum of the dispute in the first case and is the common denominator in all the suits. **Section 7** of the **Civil Procedure Act** only requires that subject matter be “*substantially the same*” and I am satisfied that the subject matter of the two suits meets this requirement.

39. In the first case **Milimani CMCC No. 4003 of 2010**, Alliance Media Kenya Limited sued on the

basis of a licence issued to it by Azarel Investments entitling it to erect billboards. Although the Azarel Investments was not a party to the first suit, Alliance Media, an agent of Azarel Investments was claiming on the basis of right due to it under the licence. For purposes of the doctrine of *res-judicata*, it does not matter that Azarel Investments was not a party to the first suit. And under **section 7** of the **Civil Procedure Act**, the Alliance Media is a party making a claim on behalf of Azarel Investments.

40. I have considered the ruling of the learned magistrate and in my view it is not founded on “mere technicality.” The learned magistrate made the conclusion grounded on a finding that the authority granted by the Ministry of Roads and approved by City Council of Nairobi did not entitle Alliance Media to agitate the suit. This finding is conclusive of the legal effect of the authority contained in the letter dated 12th February 2010 and cannot be re-opened by filing another suit.

41. In short, the subject matter of this suit has been litigated between the same parties or by parties litigating through them in **Milimani CMCC No. 4003 of 2010** and it meets the test set out in **section 7** of the **Civil Procedure Act**. I therefore find and hold that the present suit is *res-judicata*.

42. Even if I were wrong on the issue of *res-judicata* vis-à-vis the first suit, the second suit, **Milimani CMCC No. 1725 of 2011** is in fact the same as the present suit, it once again deals with the subject of the present suit namely the authority to construct bill boards. What is disheartening is that the plaintiffs had already obtained the orders which were granted by Hon. Justice Mutava in the subordinate court. To my mind, the only inference that can be drawn is that this suit was filed to circumvent the order which was stayed in **Milimani CMCC No. 1725 of 2011**.

43. If there was ever a case of an abuse of the court process, this is the case and the court must put a stop to such conduct by striking out the suit.

Costs

44. Mr Havi submitted that Mr Adala, counsel for the plaintiffs, should be ordered to pay costs on the ground that he was aware of the previous suits and that he failed to make the necessary disclosures. I am not convinced that this is a proper case to mulct Mr Adala with an order for costs but I must state that the line was almost crossed.

Disposition

45. Having given due consideration of the matters, I allow the Notice of Motion dated 22nd August 2012 and make the following orders;

- (1) The *ex-parte* order issued on 15th August 2012 be and is hereby set aside and discharged.**
- (2) The plaintiffs’ suit filed herein be and is hereby struck out and dismissed.**
- (3) The plaintiffs’ shall bear the defendants costs of the application and the suit.**

DATED and DELIVERED at NAIROBI this 3rd day of September 2012

D.S. MAJANJA

JUDGE

Mr M. T. Adala, Advocate for the plaintiffs.

Mr N. Havi instructed by Havi and Company Advocates for the 1st defendant.

Mr Koceyo instructed by Koceyo and Company Advocate for the 2nd defendant.