



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI**

Civil Case 156 of 2005 (1)

ALLIANCE MEDIA KENYA LTD PLAINTIFF

VERSUS

MONIER 2000 LTDDEFENDANT

RULING

The Notice of Motion dated 13th May 2005 is brought under Order XLI Rule 4 of the Civil Procedure Rules and all enabling provisions of the Law. The inherent jurisdiction of the Court is also invoked. The primary prayers sought are as follows:-

1. **That there be a stay of the order dismissing the Plaintiff's Application dated 22nd March 2005.**
2. **That pending the lodging hearing and determination of the intended appeal the Defendant/Respondent whether by itself, its agents or servants be restrained from determining or rescinding the Agreement of sale of Assets dated 19.12.2004.**
3. **That pending the lodging hearing and determination of the intended appeal the Defendant/Respondent whether by itself, its agents or servants be restrained from contacting by telephone, letters or orally or in any way whatsoever the Plaintiff's clients and they be further restrained from informing the Plaintiff's client's that the Agreement between the Plaintiff and the Defendant has been determined or rescinded.**
4. **That pending the lodging, hearing and determination of the intended appeal the Defendant/Respondent whether by itself, its agents or servants, be restrained from breaching any of the terms of the Agreement of Sale of Assets dated 19.12.2004.**
5. **That pending the lodging and determination of the intended appeal the Defendant/Respondent whether by itself, its agents or servants be restrained from interfering, trespassing, alienating, dealing in any way with the sites and assets and licences detailed in the 1st, 2nd, and 3rd schedule of the Agreement of Sale dated 19.12.2004.**
6. **That pending the lodging hearing and determination of the intended appeal the Defendant/Respondent whether by itself, its agents or servants be restrained from dispossessing the Plaintiff and from registering and transferring the assets the subject of the**

Agreement of sale dated 19.12.2004 to AI OUTDOOR (K) LIMITED or to any other.

7. **That the Defendant/Respondent whether by itself, its agents or servants be restrained from putting advertisement and/or press release commenting on matters before the Court and generally from speaking to the press on matters pending in Court in this suit.**
Grounds for the Application are given in the Motion of Notice. The Application is supported by an affidavit sworn by one Sophie Kinyua the General Manager of the Plaintiff together with several annextures.

The Respondent opposed the Application and filed a Replying Affidavit sworn by one Moti Mordo the Defendant's Managing Director. There are several annextures exhibited by the Respondent.

The gist of the Plaintiff's case was that because it intends to appeal against the Ruling of this Court delivered on 11th May 2005, it is entitled to the orders sought otherwise it stands to suffer irreparable harm and its appeal will be rendered nugatory. The Plaintiff alleged that the Defendant has acted in bad faith and in a bid to frustrate the Plaintiff's claim put out an advertisement in the press purporting that the Agreement of sale dated 19.12.2004 was terminated with the sanction of the Court and purporting to allege that the assets the subject of this suit have been sold to AI OUTDOOR (K) LIMITED. The allegation of irreparable harm was made on the basis that the Plaintiff pursuant to the Agreement of Sale and in expectation that the Defendant would honour its obligations under the Agreement had part performed the contract and entered into licence agreements with various Landlords and with advertising clients and unless a stay is ordered a situation will arise where the Plaintiff will be entitled to various sites and the Defendant will be entitled to various structures upon the same sites. Further the Plaintiff alleged that unless a stay is granted, the Plaintiff will be exposed to numerous claims from the various landlords and advertising clients while the Defendant will dispose of the assets of the subject of the Agreement of sale thereby destroying the substratum of the intended appeal.

In the Plaintiff's view the purported transfer of assets to AI OUDOOR (K) LTD was illegal as the necessary statutory provisions for transfer of business had not been complied with.

Reliance was placed upon the authorities:

1. **Halki Shipping Corp -v- Sopex Oils Ltd (1997) 3 ALL ER 833** for the proposition that where parties to a contract have agreed to refer any dispute to arbitration the Court should sanction the same.
2. **Re Global Tours & Travels Limited and the Companies Act: HC W/U Cause NO.43 of 2000(U.R.)** for the proposition that where there is a pending appeal a stay of proceedings should be granted to avoid the appeal being rendered nugatory.
3. **Johnson Mwiruti Mburu -v- Samuel Macharia Ngure: HCCC No.716 of 2003 (UR)** for the proposition that where substantial loss may result to an Applicant stay should be granted.

In response to the allegations made by the Plaintiff the Defendant argued that the Application was *res judicata* as the orders sought in the Notice of Motion were the same ones sought in the Chamber Summons that was dismissed on 11.5.2005. In support of this argument reliance was placed upon the case of **Postificio Lucio Gorofalo S.P.A. -v- Security & Fire Equipment Company Ltd & Another: Nairobi HCCC No.966 of 2000 (UR)**.

It was also argued for the Defendant that the orders of injunction sought are not available to the Plaintiff under Order XLI Rule 4 of the Civil Procedure Rules. The Plaintiff had therefore wrongly invoked the jurisdiction of the Court and is therefore not entitled to the prayers sought. For this proposition reliance was placed upon the case of: **Joel Kyegon & 4 Others -v- John Rotich and 4 others HCCC No.995 of 2003. (U.R.)**

The Defendant further argued that the Plaintiff sought restraining orders that would affect a third Party who has not been joined to these proceedings which would offend against the Rules of Natural Justice. According to the Defendant it was irrelevant that the sale alleged between the Defendant and the

third party was alleged to be a Sham. That issue would not be canvassed in the Application at hand.

Regarding the Plaintiff's Application for stay of execution the Defendant's argument was that there was nothing to stay as the Order of 11.5.2005 merely dismissed the Plaintiff's Application for injunction. That order was not capable of being executed.

Regarding alleged substantial loss the Defendant argued that the parties themselves had made provision for consequences of rescission and therefore the issue of substantial loss did not therefore arise. Accordingly, the Defendant was of the opinion that the Plaintiff had not satisfied the conditions set under Order XLI Rule 4 of the Civil Procedure Rules.

Regarding the arbitration process the Defendant argued that, the Plaintiff had not taken any step towards the process and had instead resorted to criminal activities and was therefore not deserving of equitable relief.

I have now considered the Application, the Affidavits and the submissions by Counsels appearing. I have also given due consideration to the authorities cited. Having done so I take the following view of the matter.

The first prayer for an order of stay of the order dismissing the Plaintiff's Application dated 22nd March 2005 is clearly misconceived. On 11th May 2005 I merely dismissed the Plaintiff's Application for interlocutory injunction. I made no positive order in favour of either party that can be stayed. The cases relied upon by the Plaintiff related to Applications for stay of proceedings and execution and are therefore irrelevant to the matter at hand.

Turning now to the prayers for interlocutory injunction pending the intended appeal, I agree with Counsel for the Defendant that the same are not available under Order XLI Rule 4 of the Civil Procedure Rules. However, the Plaintiff has also invoked the Court's inherent jurisdiction. I will therefore consider the Application on that basis. The Courts jurisdiction to grant an interlocutory injunction pending an intended appeal is a discretionary one and as with all judicial discretions it is exercised judicially and not whimsically or arbitrarily. In my view even at this stage, an Application should still satisfy the conditions set in the rule making case of **Giella -v- Cassman Brown Co. Ltd (1973) E.A. 358**. It appears to me that the Plaintiff would like me to reconsider my ruling of 11th May 2005. Since that date my opinion of the Plaintiff's Application has not changed. I dismissed the Application on the basis that it had no merit. This Application has not conferred, merit to the Plaintiff's Application which I dismissed. There is now an additional complication. An entity referred to as AI OUTDOOR (K) LIMITED has now been introduced to the dispute between the Plaintiff and the Defendant. The Plaintiff has alleged that in a bid to frustrate its claim the Defendant has purported to sale the assets, the subject of the suit to AI OUTDOOR (K) LIMITED. There is no allegation that the said entity is fictitious. The Plaintiff seeks orders in this Application against the said entity without seeking to join it to these proceedings. The Plaintiff has alleged that the transaction between the Defendant and the said AI OUTDOOR (K) Ltd is a sham and is merely intended to hoodwink the Court into not granting a stay of the orders pending appeal. I would have thought that it is elementary not to seek orders against a party who has no chance of being heard. The views of the Plaintiff on the validity of the transaction between the Defendant and the said third party are insufficient to oust this basic rule of Natural Justice. In my view the Plaintiff's default in this respect is fatal to its Application which I must dismiss with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2005.

F. AZANGALALA

JUDGE

Read in the presence of

Singh for the Plaintiff/Applicant and Havi for the
Defendant/Respondent.

F. AZANGALALA

JUDGE

4.7.2005