

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 89 OF 2014 (FAST TRACK)**

**PINNACLE COMMUNICATIONS LTD.....  
PLAINTIFF**

**VERSUS**

**MENENGAI OIL REFINERIES LIMITED.....  
.....DEFENDANT**

**AND**

**NAKURU COUNTY GOVERNMENT.....INTERESTED  
PARTY**

**JUDGMENT**

1. The plaint dated 2<sup>nd</sup> December, 2014 prays for judgment against the defendant for;
  - i. A perpetual injunction restraining the defendant by itself, its directors, agents, servants, workers or any other person acting under it from removing, dealing, destroying or in any other manner whatsoever interfering with the plaintiff's advertisements mounted on street poles along the Nakuru-Eldoret highway.***
  - ii. General damages for loss of business.***
  - iii. Any other relief the court may deem fit.***
  - iv. Costs of the suit.***
2. The plaintiff's director (**Nicholas Kibe**) filed a witness statement dated 2<sup>nd</sup> December 2014 where he stated that

on or about the year 2012, he entered into an agreement with the Municipal Council of Nakuru, now defunct for the permit to mount adverts on light boxes on street poles along the Nakuru-Eldoret Highway. Further, that on or about March, 2014 the defendant and the plaintiff entered into negotiations for the provision of advertisement services as per the permits issued by the Nakuru County Government. Thereafter, negotiations were completed and the plaintiff obtained approvals by the Nakuru County Government on various dates to carry out the purpose of putting up adverts on light boxes vide letters dated 26<sup>th</sup> February, 2013, 28<sup>th</sup> April 2014 and 21<sup>st</sup> May 2014 respectively from the Nakuru County Government.

3. He further stated that on or about 24<sup>th</sup> November 2014, the defendant alleging to have an approval and permit from the Ministry of Roads started interfering with the adverts put up and threatened to pull them down. This was despite the plaintiff's permit not having been terminated. He added that the defendant did not have any right to pull down the adverts as they comprised property of the plaintiff and the defendant's actions were interfering with such ownership.
4. The defendant filed its statement of defence dated 27<sup>th</sup> January 2015 where, it denied the contents of the plaint save for their description putting the plaintiff to strict proof. However, the defendant admitted the contents of paragraph 9 of the plaint which is in respect of there being no other suit pending and/or there having been no

previous proceedings between the parties herein over the same cause of action.

5. During the hearing, the director Nicholas Kibe testified as PW1. He adopted his witness statement dated 2<sup>nd</sup> February 2022 and the list of documents dated 8<sup>th</sup> December 2021 as his evidence in chief.
6. On cross-examination, he stated that they had approval from the Municipal Council to advertise and they later re-applied to the County Government and after negotiations they were issued with a letter dated 25<sup>th</sup> March 2014. He confirmed that in the letter dated 19<sup>th</sup> July 2014, the interested party gave permission to the defendants to advertise. He further confirmed that the defendant advertised only after being given permission. He acknowledged having received the letters dated 16<sup>th</sup> May 2012 and 5<sup>th</sup> June 2014 from the interested party.
7. The defendant did not call any witness but adopted as its evidence in chief, being the witness statement filed on 17<sup>th</sup> June 2017 by Simon Osiemo. Further, it's list of documents dated 4<sup>th</sup> July 2018 was produced as DExb 1-7.
8. The interested party did not participate in the proceedings despite having been severally notified.
9. Parties were directed to file their written submissions which they did.

### **Plaintiff's submissions**

10. These were filed by the firm of Moses Osoro Advocates and are dated 15<sup>th</sup> October 2025. Counsel gave a background of the case and identified three (3) issues for determination.

11. The first issue is whether the plaintiff was licensed to put up the advertisement boxes. Counsel submitted that the plaintiff had proved that it was licensed to install the advertisement boxes through PExh 2 and PExh 3 which are letters from the interested party signed by the planner on behalf of the County secretary granting the plaintiff the right to advertise in the areas in question for the year 2014. Further, that the approvals granted to the defendant were for the year 2015 as clearly stated in the letter dated 6<sup>th</sup> August 2014 by the interested party.
12. The court's attention was drawn to the decision in **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, where the Court of Appeal held that:  
***“As a general proposition under section 107 (1) of the Evidence Act, cap 80 of the laws of Kenya, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative (sic) of the issue. There is however, the evidential burden that is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act”***
13. Counsel further submitted that the plaintiff's claim that the defendant removed its advertisement boxes was not controverted by the defendant. He added that parties are bound by their pleadings and evidence adduced. Further, that special damages must be specifically pleaded and specially proved. That the plaintiff had pleaded pecuniary damages of Kshs. 6,681,600/= and special damages of

kshs. 1,390,000/= and proceeded to strictly prove them by producing PExh 7.

14. In conclusion, counsel urged the court to make a finding that the defendant's conduct in removing the plaintiff's advertisement boxes before the year 2015 was oppressive, high handed, outrageous, insolent or vindictive and award it general damages. He placed reliance on the Court of Appeal decision in the case of **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] KECA 56 (KLR)**.

**Defendant's submissions**

15. These were filed by the firm of Olendo, Orare, Samba Advocates LLP and are dated 15<sup>th</sup> November 2025. Counsel gave a background of the case and identified two (2) issues for determination.

16. The first issue is whether the defendant owes the plaintiff any general, pecuniary or special damages as pleaded. Counsel submitted that the plaintiff has failed to adduce sufficient evidence to prove that the defendant interfered with its business during the 2013 - 2014 financial year and vandalized its advertisement boxes situate on the Nakuru - Eldoret highway thus occasioning it financial loss. That the defendant had on its part vide defence exhibits 1 - 7 shown that it indeed approached the interested party seeking to lease 299 street lighting poles, renovate the lights and set up advertising boxes for its products as an added marketing tool.

17. The court's attention was drawn to Article 159 (2) (d) of the Constitution, sections 107(1) and (2), 108 and 109 of

the Evidence Act and the decision in **Karak Brother Company Ltd Vs Burden [1972] 1 ALL ER 1210** which has been cited with approval in several of our local cases like **Simba Commodities Limited v Citibank N. Civil Case No. 236 of 2003**) where the learned Judge stated: -  
***“As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this case is the plaintiff company, and not to the authorized signatories.....”***

***“.....While carrying out the customer's instruction a bank is under obligation to exercise reasonable skill and care. That skill and care applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”***

The court further observed as follows:

***“In exercising its duty of care the paying bank was bound to make such enquiries as might, in given circumstances, be appropriate and practical, where it had, or a reasonable banker would have, grounds of believing that the authorized signatories were misusing their authority.....”***

18. Counsel further submitted that the general principle running across all courts and cited in numerous cases is

that no general damages may be awarded for breach of contract except in very exceptional circumstances. Thus, the plaintiff did not deserve an award for damages for breach of contract if any by the defendant. He placed reliance on the decision in **Marine Management Association & Another V National Maritime Authority 2012 18 NWLR 50** which cited with approval the Court of Appeal decision in **Gitobu M'ibutu Karatho Vs. Christopher Muriithi Kubai (2014) eKLR**, where it was held that breach of contract is clearly proved, an award of damages must follow. He submitted that the plaintiff does not deserve of an award for damages for breach of contract (whatsoever/if any) by the defendant in proceeding and mounting its advertisement boxes on the 299 street lighting poles in the year 2015 having paid the requisite fees in July, 2014.

19. On the second issue on costs, counsel submitted that costs follow the event unless there is a good reason to deprive the successful party of the same. He placed reliance on the decision in **Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others [2014] eKLR** and **Eric Omuodo Ounga v Kenya Commercial Bank Limited [2017] eKLR**. He urged the court to award costs to the defendant.

### **Analysis and Determination**

20. Upon analyzing the pleadings, affidavits, evidence and the submissions tendered by the parties in this case, it is my view that the issue arising for determination is

whether the plaintiff has proved its case to the required standard.

21. The plaintiff in its plaint seeks for judgment against the defendant for a perpetual injunction restraining the defendant by itself, its directors, agents, servants, workers or any other person acting under it from removing, dealing, destroying or in any other manner whatsoever interfering with the plaintiff's advertisements mounted on street poles along the Nakuru-Eldoret highway, among other orders. It is the plaintiff's case that it obtained approvals from the interested party on various dates for the purposes of putting up adverts on light boxes vide letters dated 26<sup>th</sup> February 2013, 28<sup>th</sup> April 2014 and 21<sup>st</sup> May 2014.

22. Further, that the approvals granted to the defendant were for the year 2015 as clearly stated in the letter dated 6<sup>th</sup> August 2014 by the interested party. Additionally, that the approvals granted to the defendant were for the year 2015 as clearly stated in the letter a dated 6<sup>th</sup> August 2014 from the interested party. Thus, the defendant did not have any right to pull down the adverts before 2015 as they comprise the property of the plaintiff.

23. The defendant on its part argued that plaintiff failed to adduce sufficient evidence to prove that it interfered with its business during the 2013 - 2014 financial year. Further, that it had approached the interested party seeking to lease 299 street lighting poles, renovate the lights and set up advertising boxes for its products as an added

marketing tool, and an approval was duly granted to it on 15<sup>th</sup> July 2014.

24. Upon perusal of the plaintiff's list of documents, this court notes that indeed there exist letters dated 26<sup>th</sup> February 2013, 9<sup>th</sup> May 2014 and 21<sup>st</sup> May 2014 from the interested party granting the plaintiff permission to advertise on streetlight poles along Nakuru- Eldoret highway at certain points. I also note that there are photographs showing the said advertisements on the streetlight poles. The said documents were adopted as the plaintiff's evidence in chief.

25. I have also looked at the defendant's list of documents and equally note that there exists a letter dated 15<sup>th</sup> July 2014 by the interested party giving the defendant an approval to advertise on the streetlight's poles between Eveready roundabout to St. Mary's Pastoral Centre. There is also a payment receipt for kshs. 5,982,000/= issued by the Interested party in respect to the same and the witness statement filed on 17<sup>th</sup> June 2017 by Simon Osiemo.

26. It is trite law that the onus of proof is on he who alleges a fact. In the case of **Samson Gwer & 5 Others -vs- Kenya Medical Research Institute & 3 Others [2020] eKLR**, the Supreme Court opined as follows:

***“Section 108 of the Evidence Act provides that ‘the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side’, and section 109 of the Act***

***declares that ‘the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.’***

27. Further, in the case of **D.T. Dobie & Company (K) Ltd - vs- Wanyonyi Wafula Chebukati [2014] eKLR**, the court cited with approval the decision of Denning J., in **Miller vs Minister of Pensions [1947]** where it was held that:

***“The degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. .... Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.” (emphasis ours)***

28. In the instant case there is no doubt that the onus of proof was on the plaintiff to justify its claim against the defendant. Looking at the testimony adduced in court, PW1 did not tell the court much about the approvals for advertisement it got from the Interested party. However, the list of documents which were adopted as evidence in chief, contains letters from the interested party granting

the plaintiff permission to advertise on the 40 street poles along the Nakuru-Eldoret highway from Eveready roundabout to Total roundabout. On the other hand, the defendant equally produced a letter dated 9<sup>th</sup> July 2014 allowing it to advertise on the poles starting from Eveready roundabout to St. Marys. It also produced a payment receipt.

29. It is not disputed that both the plaintiff and defendant were granted permission by the interested party to advertise as indicated in their respective letters. During cross-examination, PW1 confirmed that vide the letter dated 19<sup>th</sup> July 2014, the interested party gave permission to the defendants to advertise. He further confirmed that the defendant only advertised after being given permission. He acknowledged having received the letters dated 16<sup>th</sup> May 2012 and 5<sup>th</sup> June 2014 from the interested party.

30. In my view, the plaintiff has failed to prove how the defendant unlawfully interfered with its posters since it was equally granted approval by the Interested party, to advertise. The plaintiff's claim if any, in my view ought to have been made against the Interested party and not the defendant. Further, this court notes that no substantive orders had been sought by the plaintiff against the Interested party.

31. For the above stated reasons, I find the plaintiff's case to be devoid of merit and the same is hereby dismissed with costs to the defendant only as the interested party never participated in the proceedings.

32. Orders accordingly.

**Dated and signed this 20<sup>th</sup> January, 2026 by:**

**H. I. ONG'UDI  
JUDGE**

**Delivered this 17<sup>th</sup> February 2026 in open court at  
Nakuru by:**

**J. M. NANG'EA  
JUDGE**