

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CC-MA-0424-2005

(Arising from HCT-00-CC-CS-0429-2005)

DIGITEK ADVERTISING LTD

APPLICANT

VERSUS

CORPORATE DIMENSIONS LTD

RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. Digitek Advertising Ltd, hereinafter referred to as the applicant, seeks a temporary injunction to issue against Corporate Dimensions Ltd, hereinafter referred to as the respondent, to restrain the respondent from engaging in outdoor advertising using the lighted electronic display signs and L.E.D. technology pending the determination of the head suit. This application is supported by the affidavits of Shiraz Meghani, the managing director of the applicant, Simon Muhumuza, Josephine Karugonjo both of Kampala City Council and Jonathan Muwonge, an engineer.
2. This application is opposed by the respondent supported by an affidavit sworn by Mr. Joseph Magala-Nyago, its managing director.
3. The facts in this application are simple and not in dispute. The applicant has an agreement with Kampala City Council, dated 8th December 2003, in which the council purports to grant the applicant exclusive rights for 3 years to outdoor advertising using

lighted electronic display signs in Kampala City. Following this agreement the applicant established an outdoor lighted electronic display sign at plot 20 Kampala Road. It accepts business from persons and companies that wish to advertise using the media located at this place.

4. The respondent is the holder of a licence from Kampala City Council allowing it to offer outdoor advertising services in Kampala City Council and a licence from the broadcasting council to operate motion picture bill boards. It has a bill board at plot 16/18 Luwum Street in Kampala on which it is carrying on advertising business.
5. It is the contention of the applicant that the business of the respondent carried on at plot 16/18 Luwum Street, Kampala, is in breach of its right to exclusively carry on the business of outdoor advertising by lighted electronic display signs and L.E.D technology. Ms Verma Jivram, learned counsel for the applicant, submitted that for a temporary injunction to be granted the applicant must prove firstly that it has a filed a suit for restraining the respondent from continuing with the infringement of the applicant's right or rights and that such suit has a probability of success. Secondly that it must be shown that the injury suffered by the applicant is irreparable for which a monetary award would not be adequate compensation. And in event of a doubt the matter should be resolved on a balance of convenience. Ms Jivram referred to the cases of *Kiyimba Kaggwa v Katende [1985]H.C.B. 43* and *Giella v Cassman Brown & Co. Ltd [1973]E.A.358* in reference to the law with regard to grant of temporary of injunctions.
6. Ms Verma Jivram contended that the applicant had filed a suit that had a probability of success as it had exclusive rights to the use of the LED signs and technology in Kampala granted to it by City Council of Kampala. Secondly the damage the applicant was suffering was irreparable in so far as the respondent had undercut the applicant's prices when it came on market and the applicant was forced to lower its charges.
7. And in case the balance of convenience had to be considered this should be in favour of the applicant, to protect its rights from infringement by the respondent. The respondent basically contends that it is authorized by the Broad Casting Council to use motion picture bill boards and Kampala City Council for outdoor advertising. Secondly that it is not privy to the contract between the applicant and Kampala City Council, and is therefore not bound by its terms.

8. Mr. Ssozi, learned counsel assisting Mr. Bbosa for the respondent submitted on three points and Mr. Bbosa, lead learned counsel for the respondent submitted lastly on some other three points. Mr. Ssozi agreed with Ms Jivram's summation of the law relating to the grant of temporary injunctions but added that the purpose of a temporary injunction was to preserve the status quo, and not to alter it. In the instant case a temporary injunction would alter the status quo, rather than preserve it, and it ought not to be granted for that reason. He referred to the case of *Kiyimba Kagwa v Katende (Supra)* in support of this position.
9. Mr. Ssozi further submitted that the applicant had failed to establish that the injury it alleges to suffer is irreparable injury that cannot be atoned by way of damages. All the losses of the applicant can be quantified in monetary terms. He further submitted that the balance of convenience in this case ought not to be considered as the application is without merit. No doubt therefore arises to lead a consideration of the balance of convenience. But even if balance of convenience was considered, it would lie with not granting the injunction. The grant would cause much more damage to the respondent's business which would be ground to a halt rather the non-grant that leaves both parties operating until the final determination of the questions to be investigated in this suit.
10. Mr. Bbosa submitted that this case had no probability of success in so far as the respondent were not privy to the contract between the applicant and the Kampala City Council, and cannot therefore be liable on it. Mr. Bbosa further submitted that this suit was premature in so far as it failed to comply with the conflict resolution mechanism in the agreement between the applicant and Kampala City Council which called for arbitration in case of disputes arising. Lastly Mr. Bbosa submitted that this suit was brought in bad in faith with the aim of throwing the respondent out of business. It would ought not to be allowed to succeed. Evidence of bad faith is implicit from Annexures J and K to the applicant's affidavit in support of the application, showing the motivation for bringing this application, which is an attempt to hold its prices in the market.
11. Ms Jivram stated the law correctly with regard to the grounds necessary before a grant of a temporary injunction could be made. In respect of temporary injunctions sought under Order 37 Rule 2 of the Civil Procedure Rules, the main suit must be seeking an injunction against the defendant. The suit ought to have a probability of success. The injury alleged

to have been suffered by the applicant must be irreparable. An award of damages would not be adequate compensation for the same. In case of doubt with regard to the foregoing the court may then consider the balance of convenience. And as was pointed out by Mr. Ssozi, the purpose of the grant of the injunction would be to preserve the status quo until the determination of the questions in issue.

12. Though with regard to the first consideration, that is the existence of a suit with a probability of success, I am inclined to agree with the disquiet expressed by Odoki, J., (as he then was) in Kiyimba Kagwa v Katende (Supra) over the use of expressions like ‘probability of success’ or ‘prima facie case’ at this stage. I prefer to state that the applicant must show that there is a serious question or questions to be investigated in the suit, and this is evident on the material submitted to court, showing that the applicant has an arguable case.
13. In my view, this case raises a question of fundamental constitutional importance with regard to the right of persons in this country to enjoy fundamental rights and freedoms enshrined in the constitution of this country, and in particular freedom of speech and expression. Article 29 (1) of the Constitution provides,

“Every person shall have the right to--- (a) freedom of speech and expression, which shall include freedom of press and other media;”.

The limitation to the enjoyment of this right is set out in Article 43. The limitation includes prejudice to the enjoyment of other fundamental or human rights and freedoms by other persons or public interest. These limitations must not be beyond what is acceptable and demonstrably justifiable in a free and democratic society.
14. Outdoor advertising is a form of speech or expression, a specie of commercial speech which is protected by the right to freedom of speech and expression. See RJR- MacDonald Inc. v The Attorney General of Canada and others [1995] S.C.R. 1999. Lighted electronic display signs and motion picture bill boards are included in the ‘the other media’ and thus are constitutionally protected. If the right of one person is to be limited or if the enjoyment of this right is to be exclusive to one person, and denied to the rest of other people interested in enjoying this right in Kampala, then justification for this limitation, must pass constitutional muster.
15. To pass constitutional muster it must be shown by the person who asserts the limitation that the enjoyment of the right curtails or prejudices the enjoyment of other fundamental

rights and freedoms by other persons or that it is in the public interest that such limitation be imposed. And such limitation as is imposed must be acceptable and demonstrably justifiable in a free and democratic society.

16. On the papers before me I see nothing, in the enjoyment of the right to freedom of speech and expression by the respondent, that points to prejudice of other fundamental rights enjoyed by other persons, including the applicant, or the public interest that would be served, by imposing the limitation. On the contrary the limitation, in the form of the exclusivity clause in the agreement between Kampala City Council and the applicant seems to serve purely private interests, that is profit of one company.
17. I am not satisfied that an arguable case has been put forward that such a constitutional right can lawfully and constitutionally be limited or curtailed by an agreement between Kampala City Council and the applicant, without more. Obviously this is a matter that will arise during the trial of this case and at this stage I am constrained from discussing it in greater length especially as it was not a matter that was argued by the parties, but was raised *suo motto* by the court.
18. In the main suit there is a prayer for an account of the profits or earnings of the respondent from its operation of a motion picture billboard at Plot 16/18 Luwum Street, Kampala. There are also claims for general and punitive damages. In the supporting affidavit of Mr. Meghani to the application, it has been shown that the applicant has been compelled to consider to lower its prices in light of the rates offered by the respondent to its customers. Ms Jivram referred to this matter as the undercutting of the prices of the applicant, leading to irreparable injury.
19. It appears to me that it is clearly possible to quantify this loss, and put a monetary value to it. One would be able to take the total number of customers of the respondent and apply the rates to them that the applicant was initially applying, and you would then get the alleged loss inflicted on the applicant by the entry into an exclusive market by the respondent with lower prices. It is also possible to determine this alleged injury simply by an account of the profits of the respondent in this line of business, which probably would be a better approximation of the actual loss, if any suffered, by the applicant. The applicant has done this in the main suit by seeking for an account.

20. The applicant has failed to show that it will suffer irreparable injury that damages or a money award cannot sufficiently atone. I am satisfied that if the applicant is suffering any injury such injury can be adequately compensated by an award of damages.

21. As both Ms Jivram and Mr. Ssozi seemed to agree, the respondent has been in this business for the last seven or so months, just slightly less than the Applicant, by less than a month. The status quo is that each party is operating its own line of business at a different location within the city of Kampala. Granting a temporary injunction at this stage would not be preserving the status quo but altering it before the questions in issue are fully investigated.

22. For those reasons I am satisfied that this application must fail. It is dismissed with costs.

Dated at Kampala this 20th day of July 2005

FMS Egonda-Ntende

Judge