



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL SUIT NO. E003 OF 2021

KINATWA CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED.....PLAINTIFF

VERSUS

KINATWA PRESTIGE LTD.....DEFENDANT

RULING

1. Before this court is a *Notice of Motion* dated **26th April, 2021** brought by the Defendant/Applicant herein, who has invoked **Article 47 & 50 of the Constitution, Sections 1A, 1B and 3A of Civil Procedure Act, and order 45 of Civil Procedure Rules** in asking for the following reliefs namely: -

(i) *Spent.*

(ii) *Spent*

(iii) *That this Hon. Court be pleased to set aside the orders issued by this Hon. Court on 22nd April, 2021.*

(iv) *That this court be pleased to hear and determine the Plaintiff's application dated 30th March, 2021 on merit.*

(v) *That leave be granted to the Applicant to file a replying affidavit in respect to the application dated 30th April, 2021.*

(vi) *That the draft replying affidavit annexed and sworn by Clinton Wambua be deemed duly and properly filed.*

(vii) *Costs of this application be provided for.*

2. The grounds upon which this application has been brought are listed as follows: -

(i) That this Hon. Court, granted orders dated 22nd April, 2021 restraining the Defendant/Applicant from interfering with the stages of the Plaintiff/Respondent herein, and stopping it from picking and dropping passengers at Afya Center, Ola Stage along Tom Mboya Street, Nairobi and to compel the Applicant to remove the green colour from its motor vehicles.

(ii) That, the said orders were obtained through concealment of material facts to wit a similar matter pending in **Milimani Law Courts, Chief Magistrate's Court Civil Case Number E037 of 2021** between Respondent as the Plaintiff and the Applicant as the Defendant where similar orders are being sought to inter alia to stop the Applicant from trading in the name of "Kinatwa".

(iii) That the case in Nairobi Chief Magistrate's Courts, is pending for determination and orders of status quo is in place.

(iv) That the Plaintiff/Respondent came to this court with unclean hands contrary to the maxim in equity which states that he who comes to equity must do so with clean hands.

(v) That the Plaintiff/Respondent herein, misled this Hon. Court under oath by pleading in paragraph 20 of the plaint that "There is no suit pending and there are no previous proceedings between the Plaintiff and the Defendant over this subject matter."

(vi) That this matter is sub judice on account the matter in Nairobi Chief Magistrates Court.

- (vii) That the orders sought to be set aside herein, are likely to prejudice the Applicant and occasion it economic loss.
- (viii) That the Applicant has been in existence since 2019 with the knowledge of the Respondent.
- (ix) That the application dated 31st March, 2021 and the entire suit herein are in its view malicious and is a result of business rivalry and competition.
- (x) That the Respondent herein, is now abusing court process by filing multiple cases against the Applicant.
- (xi) That the Respondent did not affect service on through the registered office of the Applicant either in Kitui or Nairobi or through its managing director.
- (xii) That the Respondent did not move this court to lift the veil of its incorporation and that it has the capacity to sue or be sued in its own name.
- (xiii) That the Director served, Caren Mutua, was ailing at the time from Covid-19 and was in self isolation and bed rest and was not in the right frame of mind to comprehend the nature of documents served on her.
- (xiv) That in the face of orders issued on 22nd April, 2021, the Applicant has no avenue of carrying out its business.
- (xv) That the Applicant has a response to the dispensed application which raises triable issues.

3. The Applicant has supported its application and grounds through an affidavit sworn by Clinton Wambua sworn on 26th April, 2021, where She has reiterated the above grounds.

4. The Applicant has exhibited a copy of a plaint of the case pending in **Nairobi Chief Magistrate's Court Civil Case Number E037 of 2021** through a supplementary affidavit sworn on 3rd May, 2021. It has also exhibited orders issued in **Nairobi Chief Magistrate's Court Civil Case Number E7816 of 2020** and **Miscellaneous Application Number E212 of 2021** in the same court. The orders issued in **Nairobi Chief Magistrate's Court Civil Case number E7816 of 2020**, prohibits the Respondent herein, from interfering with the assets, motor vehicles, picking and dropping zones and operations of the Applicant. Essentially the order is in direct conflict with the orders issued by this court on 23rd April, 2021.

5. The orders issued in **Nairobi Chief Magistrates' Civil Case Number E 212 of 2021** on 14th January, 2021 restrains the Applicant from enforcing suspensions of the directors of the Applicant from their positions as Directors of the Respondent's SACCO.

6. In its written submissions, through Counsel, the Applicant submits that, it has invoked the inherent powers of this court under **Section 3A** to issue orders necessary for the ends of justice. It further adds that **Order 51 Rule 15 of the Civil Procedure Rules** gives this court power to set aside ex-parte orders.

7. The Applicant has implored upon this court to exercise its discretion in its favour. It cites the decision in **Mbogo & Another versus Shah 1967 E.R page 166**, where the Court of Appeal held the court's discretion to set aside an ex parte order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or errors.

8. The applicant also relies on **Gold Lida Limited versus NIC Bank Limited & others 2018 eKLR** where the High Court upheld the right to be heard and also held that a mistake of Counsel not attending court should not be visited upon an innocent litigant. The Applicant also relies on **Philip Chemwolo & Another Versus Augustine Kubede 1982-1988 KAR 103**.

9. The Applicant further submits that this matter should be stayed for being sub judice and relies on the provisions of Section 6 of Civil Procedure Rules and the case of **Nguruman Limited versus Jan Bonde Nielsen and Another 2017 eKLR** where the Court stayed proceedings on grounds of sub judice in view of similar proceedings have been filed earlier over the same subject matter involving same parties.

10. The Respondent has opposed this application through a replying affidavit sworn on 30th April, 2021 by Joseph Kitheka, the Respondent's Chairperson. The Respondent, avers that the Applicant was fully aware of the Respondent's notice of motion dated 30th March, 2021. It has termed this application as full of falsehoods calculated to mislead or deceive this court.

11. It submits that, the subject matter in this suit is different from the subject matter in **Milimani Chief Magistrate's Court Civil Case number E037 of 2021, Kinatwa Co-operative Savings & Credit Society versus Kinatwa Prestige Limited and 4 Others**. It further contends that, the matters in issue here are different to matters in issue at **Milimani Chief Magistrate's Court Civil Case Number E7816 of 2020 and Milimani Chief Magistrate's Court Civil Case number E212 of 2021**.

12. The Respondent contends that the **Chief Magistrate's Court at Milimani** where the other related suits were filed have no jurisdiction to grant the reliefs sought in this suit. It faults the Applicant for failure to enclose pleadings in the cited suits pending in Nairobi (Milimani) Chief Magistrate's Court to enable this court interrogate the issues in that court as opposed to issues before this court.

13. The Respondent however, does not spell out the distinction in this suit and the suits pending in **Chief Magistrate's Court at Milimani Law Courts** but states that **Milimani Chief Magistrate's Court Civil Case Number E037 of 2021, Kinatwa Co-operatives Savings &**

Credit Society Limited versus Kinatwa Prestige Limited & 4 Others, does not relate to infringements of its registered trademark which it contends is in the exclusive jurisdiction of this court.

14. The Respondent further avers that that, the Applicant was directed by **National Transport and Safety Authorities (N.T.S.A)** to rebrand its vehicles and stop using the Respondents colours and were given one month to comply but claim that the Applicant refused, failed and/or neglected to do so, which made it to file this suit.

15. The Respondent claims, it is unaware of Miscellaneous Application Number E212 of 2021 because of non-service but claims that the orders issued in **Milimani Misc. Application Number E212 of 2021, Clinton Wambua and 3 Others versus Kinatwa Co-operative Savings and Credit Society Limited & 2 Others**, were to subsist until 14th January, 2021, after which they lapsed by operation of law. It further points out that, the said Miscellaneous Application was in relation to suspension of some members from Executive Committee and did not touch on infringement of Plaintiff's trade mark.

16. The Respondent further avers that orders issued in **Milimani Chief Magistrate's Court Civil Case Number E7816 of 2021 Kinatwa Prestige Limited Versus Kinatwa Cooperative Savings and Credit Society Limited and Milimani Chief Magistrate Civil Case E212 of 2012** have since lapsed.

17. It reiterates that the subject matter in between it and the Applicant relates to unlawful registration and incorporation of the Applicant herein, while the suit herein, only relates to infringement of its registered Trademark.

18. In its written submissions through learned Counsel, the Respondent submits that, this application is defective for invoking order **45 Rule 1 of the Civil Procedure Rule**. The Respondent contends that the application should have instead be brought under **Order 40 Rule 7 of the Civil Procedure Rule** which deals with discharging of injunctive orders.

19. The Respondent also submits that the court's discretion should not be exercised in favour of a party who deliberately causes delay or obstructs the cause of justice and relies on the decision of **Njagi Kanyunguti alias Karingi Kangunguti & 4 Others versus David Njeru (Civil Appeal Number 181 of 1994)**, where the Court of Appeal refused to set aside an ex parte order entered against a party that had failed to attend court.

20. This court has considered this application, the submissions made and the authorities cited. I have also considered the response made submissions and authorities cited by the Respondent.

21. Before I deal with the substantive issue in this application, which is whether the suit filed herein is sub judice on account of a similar suit or matters pending in the lower court in **Chief Magistrate's Court at Milimani**, I will look at the minor issue which touches on competence of this application.

22. The Respondent has stated that, this application is defective and incompetent for citing wrong provisions of the law. This court finds this objection to be hinged on procedural technicality rather than substance and a court of law in the new dispensation is unlikely to sustain such an objection. While it is true that the applicant has wrongly cited **Order 45 Rule 1 of the Civil Procedure Act**, which deals with review rather than the correct provisions under **Order 40 Rule 7** which deals with setting aside, discharge varying of injunctive relief, I find that the Applicant has correctly cited **Order 51 Rule 15** which generally deals with setting aside of orders made ex parte. It is now a Constitutional requirement for this court to administer or dispense justice without undue regard to technicalities **Article 159(2) (d)** is quite clear on this and this court is not persuaded to strike out or dismiss this application on a mere technicality. Such as failure to cite or citation of a wrong provision of the law. The question that should be addressed is whether the reliefs sought are merited or not.

In **Coast Projects Limited versus Mr. Shah Construction (K) Limited 2004 eKLR 119, the Court of Appeal** was of this view when it held;

“Summary procedure is a radical remedy and a court of law should be slow in resorting to this procedure which can be applicable only in plain, clear and obvious case”.

It is instructive to note that even before the current Constitutional dispensation courts were reluctant to apply the summary procedure in dealing with matters in court. In the current dispensation, the courts have been emboldened the more as seen in **Anchor Limited versus Sports Kenya 2017 eKLR** where the court states as follows;

“One workable and pragmatic definition of a technicality has been bequeathed to us by the learned Honorable Justice Richard Mwongo, in Kenya Ports Authority versus Kenya Power and Lightning Co. Limited 2012 eKLR and another one supplied by the learned Hon. Justice C.W. Githua in James Muriithi Ngotho & 4 Others Versus Judicial Service Commission 2012 eKLR: both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit. In the former case, Justice Mwongo defined a technicality thus:

Combining the meanings of these words, “procedural technicalities may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.....”

23. **Whether this matter is sub judice.**

From the onset, this court wishes to state for purposes of clarity that the orders issued on 22nd April, 2021, were issued on the basis of the pleadings filed which were provided by the Respondent herein. This court was then satisfied with the service of the Applicant going by the affidavit of service. This court will not go into the issue of service in this ruling, since the determination of the issue whether this suit is sub-judice or not will render the question of service academic and for the interest of judicial time, I do not wish to delve on it at least for now.

24. It suffices to state that, when this court issued the orders on 22nd April, 2021, it had no knowledge of the existence of other pending matters related to the suit herein, because the same was never disclosed. The new development only came to light and to the attention of this court, when the Respondent filed an application for contempt dated 26th April, 2021. The Respondent through Counsel, came in with the revelations of other related matters pending in **Chief Magistrate's Courts at Milimani**.

25. The Applicant has insisted that this matter is sub-judice because, in the suit pending vide **Nairobi Chief Magistrate's Court Civil Case Number E037 of 2021 –Kinatwa Cooperative Society Savings & Credit Society Limited versus Kinatwa Prestige Limited & 4 Others**, the Respondent is seeking an injunction to restrain it from trading in the name "Kinatwa" which in its view is also an issue in this present suit. The Respondent has vehemently denied the fact and states that the suit herein is only about infringement of its trademark which matter is in its view, within the purview and jurisdiction of this court. The big question therefore is what is sub-judice or when can a matter be referred to as sub-judice. According to **Black Law Dictionary 9th edition**, sub-judice means- "**before a court for determination.....**"

The doctrine of res sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it.

26. The provisions of **Section 6 of Civil Procedure Act** defines the above principle or the doctrine as follows;

"..... 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 court or any other court having jurisdiction in Kenya to grant the relief claimed."

27. Now before I paraphrase the suit pending in this court, the suit filed by the Respondent vide **Chief Magistrate's court at Nairobi (Milimani Commercial Court) Civil Suit Number E037 of 2021**, going by what has been laid before me, reveals that the Respondent's cause of action emanated from what it termed "passing off" by the applicant herein, which had sort of caused misrepresentation to its prospective customers and consumers of its services that the applicant's services was the same as Respondents services, thus subjecting it to harm and business loss. It therefore seeks inter alia the following reliefs:-

"A permanent injunction restraining the Defendants (read Applicant) whether in itself, its directors, officers, employees, servants or agents or any other persons acting under their instructions from trading in the name of "Kinatwa" or any other closely related name to "KINATWA" in the transport business/industry/sector or any other name or designation bearing a close semblance thereto.

(b) A declaration that the registration and incorporation of the 1st Defendant Kinatwa Prestige Limited under certificate Number PVT-PJULJXR was unlawful, illegal, null and void abintio....."

28. In the present suit before this court the Respondent in its plaint dated 30th March 2021 seeks inter alia the following reliefs namely: -

(i) "A declaration that the defendant/applicant has infringed on the Plaintiff's trade mark, name, logo and colours by branding its motor vehicle in the name, colour and logo of the Plaintiff's (Respondent registered trade mark).

(ii) An Order of permanent injunction restraining the defendant by itself, its authorized agents, servants, employees, workers or otherwise whomsoever from branding its vehicles with the name "KINATWA" and/or using name or logo or colours, configuration, overall design and/or general appearance and/or using a deceptively similar name as KINATWA or otherwise causing such a name, logo and colours to be passed off as the and/or using such colours, logo or name with close semblance to the Plaintiff's name, colour or logo.

(iii) An order of mandatory injunction compelling the Defendant (Applicant herein) to remove colour green and name "Kinatwa" from its vehicles and/or rebrand its vehicles with the colours it has registered with National Transport and Safety Authority(NTSA)"(emphasis added)

29. It is perhaps useful to look at the legal term "trademark" in order to clearly interrogate if the issue(s) between the **Nairobi Chief Magistrate's Court Civil Case No. E037 of 2021** and this suit are similar or to put it in context if they substantively similar. Trademark Law governs the use of device (which may include a word, phrase, symbol, product, shape, logo etc) by a manufacturer, merchant or service provider to identify its good/service and to distinguish it/them from those made, sold or offered by another manufacturer/trader or service provider. An infringement on trade mark is unauthorized use of a trademark or service mark or design in connection with logo and/or services in a manner that is likely to cause confusion, deception, or mistake about the source of goods and/or services.

30. It is clear from the above therefore, that an infringement on trademark is similar to "passing off" because both terms or phrases mean one and the same thing. It is intended to confuse the consumer of the services rendered as to who is providing the goods/services. Going by that, it is evidently clear that, the court in **Nairobi Chief Magistrate's Court Civil Case No. E037 of 2021** which suit is between the same parties in this suit, will be required to inter alia determine if the defendants (Applicants) action in branding its vehicles, did so with a view to "passing off" and hence gain an advantage of good will developed over time by the Respondent (Plaintiff). That issue is exactly the same

issue before this court and hence the similarity in the reliefs sought in the two suits. I am not persuaded by the Respondent's counsel that the suits are distinct and different. They are similar. A determination of either of them, will obviously render the other spent and of no further use. The law requires that in a situation such as this, a subsequent suit is stayed under **Section 6 of Civil Procedure Act** because of the rule of Res sub-judice. In the case of *Kenya Bankers Association versus Kenya Revenue Authority, 2019 eKLR* the court had this to say on the issue of Res sub-judice;

“in addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The ex parte applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the reliefs claimed.

A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub-judice does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same. In Re the matter of the Interim Independent Electoral Commission, the Supreme Court cited with approval the Australian decision where it was held: -

“... we do not think that the word “matter” ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the court...”

31. The rationale behind sub-judice rule is to prevent situation of having conflicting orders emanating from two or more different courts over the same subject matter. That situation has obtained in this instance because, court issued injunctive orders on 22nd April, 2021 unbeknown to it that a different court had issued a conflicting order vide **Nairobi Chief Magistrate's Court Civil Case Number E7816 of 2020, Kinatwa Prestige Limited Versus Kinatwa Coop Savings and Credit Society Limited & National Transport & Safety Authority & Another**. That is exactly the mischief **Section 6 of the Civil Procedure Act** is supposed to cure by providing for a stay of suit or proceedings. In the case of *David Ndi & others versus Attorney General & Others 2021 eKLR*, a bench of five Judges inter alia stated;

“The rationale behind this provision (Section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”

32. This court finds no reason at all why the parties and the Plaintiff in particular, cannot finalize or pursue to conclusion the suits filed in **Nairobi Chief Magistrate's Court Civil Case Number E034 of 2021** and further to that, set aside or vary the conflicting orders issued vide **Nairobi Chief Magistrate's Court Civil Case Number E7816 of 2020**. It has stated that, the said orders lapsed on 20th April, 2021, but he should supply this court with the orders specifically stating that the orders have lapsed by operation of or through an order from the said court. Of course the Applicant has also failed to demonstrate what **Nairobi Chief Magistrate's Court Civil Case Number 7816 of 2020** between it and the Respondent herein, is all about. The Applicant was obligated to at least exhibit copy of pleadings filed in that court to enable this court interrogate whether the issues before this court are similar to those obtaining in the Chief Magistrate's Court. It is granted that the Applicant has only exhibit a copy of an order from that Lower Court which as observed above appears on the face of it to be in conflict with the orders issued by this court on 22nd April, 2021. In the absence of the pleadings the only presumption this court can safely make is that, the application giving rise to the temporary orders probably addressed the same issues with the Respondent's Notice of Motion dated 30th March, 2021 filed in this court. It is safe therefore, to find that on the basis of evidence presented before me, the provisions of **Section 6 of Civil Procedure Act** also applies to this suit until the determination of application dated 23rd December, 2020 filed in **Chief Magistrate's Court Civil Suit Number E7816 of 2020**.

33. In the premises and the reasons advanced above, this court finds merit in the Notice of Motion dated 26th April, 2021 and makes the following orders namely:

(i) *The orders issued by this court on 22nd April, 2021 are hereby set aside.*

(ii) *The suit pending / proceedings herein, is hereby stayed under Section 6 of Criminal Procedure Act, pending determination of Nairobi Chief Magistrate's Court Civil Case Number E037 of 2021 Kinatwa Cooperative Savings and Credit Society Limited versus Kinatwa Prestige limited and 4 Others and the application dated 23rd December, 2020 vide Nairobi Chief Magistrate's Court Civil Case Number E7816 of 2020. This court, owing to the nature of this matter, I shall make no order as to costs at this stage. Each party to bear its own costs.*

DATED, SIGNED AND DELIVERED AT KITUI THIS 31ST DAY OF MAY, 2021.

HON. JUSTICE R. K. LIMO

JUDGE