



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CAUSE NO. E 206 OF 2019

ADRIAN KENYA LIMITED.....PLAINTIFF

-VERSUS-

KEMNET TECHNOLOGIES LIMITED.....1ST DEFENDANT

MILLENNIA LIMITED.....2ND DEFENDANT

GREATWALL GARDEN MANAGEMENT CO. LTD...3RD DEFENDANT

RULING

1. The plaintiff in this case is **ADRIAN KENYA LIMITED**, hereinafter **ADRIAN**. The 1st defendant is **KEMNET TECHNOLOGIES LIMITED**, hereinafter **KEMNET**. The 2nd defendant is **MILLENNIA LIMITED**, hereinafter **Millenia**. The 3rd defendant is **GREATWALL GARDEN MANAGEMENT COMPANY LIMITED**, hereinafter **Greatwall**.

2. The application before me is the Amended Notice of Motion application dated 1st July 2019 and Amended on 30th July 2019. It was filed by Adrian. Adrian seeks the following orders:

- *THAT Inter-partes, this Honourable court be pleased to issue Orders of temporary injunction, restraining the 1st and/or 3rd Defendants/respondents herein by themselves, their servants, agents and/or employees whomsoever, from further appropriating or continuing to appropriate, use, using or purporting to use the plaintiff's branded or other coded ICT/telecommunications property, passing off, misusing, abusing, sub-letting, selling, contracting, sub-contracting or, in whatsoever manner interfering with the plaintiff's fiber optic infrastructure, networks, sites or other cabling products ICT/telecommunications architecture, networks, sites and/or other related plant or related accessories, currently set up/installed at Greatwall Gardens within the Republic of Kenya, pending the hearing and determination of this suit.*
- *THAT Inter-partes, and in the alternative and without the prejudice to prayer 4 above, this Honourable court be pleased to issue Orders of temporary injunction, restraining the 1st and/or 3rd Defendants/respondents herein by themselves, their servants, agents and/or employees whomsoever, from appropriating or continuing to appropriate, use, using or purporting to use the plaintiff's branded or other coded ICT/telecommunications property, passing-off, misusing, abusing, sub-letting, selling, contracting, sub-contracting or in whatsoever manner, continuing to mount or further mount its FIFTH network or other telecommunication(s) network, using the plaintiff's telecommunication equipment, interfering or further interfering with the plaintiff's fiber optic infrastructure, networks, sites or other cabling products, architecture, networks, sites and/or other related plant or related accessories, currently set up/installed at Greatwall Gardens within the Republic of Kenya pending the hearing and determination of this suit.*

3. The plaintiff's managing director, Benard Wachai Njoroge, swore the affidavit in support of the application under consideration. He deponed that Adrian is in the business of construction, installation and commissioning and maintenance of ICT/Telecommunication infrastructure and Network on behalf of its client. Adrian, in that regard, entered into a contract with Safaricom Limited. By that agreement Adrian was to provide to Safaricom fiber rollout and maintenance services. By subsequent supply arrangements in favour of Safaricom, Adrian was granted, by letter of 30th May 2018, an award for the supply of fiber material. Adrian imported fiber cable which it stored at its warehouse in Kikuyu shopping center. The deponent stated that on routine inspection it was found that some of Adrian's fiber cables were missing. Without stating who requested Adrian, the deponent stated Adrian was requested to carry out a survey for the purpose of putting up a Fifth Network at Great wall residential area with a view to install Safaricom Internet Services. That it was during that survey that it was discovered that the cable used at that site were labelled Adrian-Safaricom. This, according to the deponent was indication that the cables belonged to Adrian. The deponent stated that such unauthorized use of that cables was illegal and unlawful.

4. The deponent stated that the Kemnet and Millenia (1st and 2nd defendants) were passing off Adrian's property/services without consent of Adrian. Following a report made at Kikuyu Police Station, Alex Mwiti Kungutia was arrested and arraigned before the Kikuyu Law Courts.

5. The deponent stated that unless injunctive orders, sought, are granted the suit, hereof, would be rendered nugatory and Adrian would suffer loss and damage, in its business which cannot be adequately compensated by an award of damages.

6. The application is opposed by the defendants.

7. The 1st defendant, by the affidavit of Eric Muthuri Muthaura, Kemnet's operations manager, it termed this suit as misguided, unfounded and **"solely a product of fanciful inclination"** of Adrian. The deponent stated that the suit is a mischievous calculated move intended to harass and frustrate Kemnet in order to stifle business competition. In this regard the deponent referred to the various court actions initiated at the instance of Adrian, being:

(i) *Principal Magistrate's Court at Kikuyu - Criminal Case No. 521 of 2019;*

(ii) *Principal Magistrate's Court at Kikuyu – Miscellaneous Application No. 51 of 2019;*

(iii) *Principal Magistrates Court at Kikuyu – Miscellaneous Application No 61 of 2019.*

8. The deponent denied that any of the property at site belongs to Adrian. That the court was being asked to issue orders over properties which does not belong to Adrian. Further that the criminal case bears no relation to this present action.

9. Kimnet also stated that Adrian had failed to meet the legal parameter of pass off.

10. Greatwall through its director, Zeyun Yang, in the affidavit in reply to the application termed the filing of this suit an exercise aimed at harassing it. Further that Greatwall has an existing exclusive contract, with Kimnet for provision of internet services at Greatwall Gardens Limited. The deponent stated that Greatwall did not invite Adrian to conduct a survey as alleged. Further that Adrian had failed to demonstrate any facts or actions of commission or omission, attributable to it. Greatwall termed the suit as predicated on falsehood and baseless allegations.

ANALYSIS

11. I have considered the parties affidavit evidence. Having done so I will refer to the principles of granting an injunction which have often been re-stated. In the case **Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another [2019] eKLR** those principles were restated as follows:

*"The conditions for consideration further in granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction:-*

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

12. I need to make a preliminary assessment of the merits of Adrian's case to find out if a prima facie case with probability of success has been made. In doing so I will be faithful to the court of appeal holding in the case **Mbuthia v Jimba Credit Finance Corporation & another[1988] Eklr** Where the court held:

"The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits."

13. Adrian, though it's managing director's affidavit alleges that some of its cables were missing. That is contrary to what is pleaded in the plaint. In the plaint Adrian pleaded, interchangeably, that the 1st defendant (Kemnet) ordered from 2nd defendant (Millenia) cabling accessories, while at another paragraph pleaded that Kemnet and Millenia purported to procure cabling from Kemnet.

14. The view of all the defendants is that Adrian is waging a business rivalry battle by filing this case, and other cases. Adrian did not respond to those allegations.

15. On the whole, without wishing to go into a mini trial of the facts, I have concluded that the claim for injunction fails. The orders which are sought by Adrian, would, in my view be next to impossible to police in view of the fact Adrian has failed to give specifics on the amount of cabling which is the subject of the orders sought. Adrian failed to indicate how much of its cabling, if at all, was missing; when it went missing and what connection there is to it missing to this case. I do find that Adrian has failed to show a prima facie case with probability of success. I am also of the view that whatever loss Adrian will suffer, if any, it can be compensated in damages. I therefore decline to grant interlocutory injunction because I am of the view that divergent issues raised by the parties can only be resolved in a full trial. To this end, I find comfort in a decision similar to this one I have reached that is in the case **Amir Suleman v Biraj Brahmhatt & another [2005] eKLR**, where the judge considered an interlocutory injunction application, and after the judge identified the issues that would be resolved at

trial, state stated:

“Only a determination of the foregoing questions will justly and finally dispose of the issues in contention. Since that object can only be achieved through full trial, it follows that the instant application is an unfortunate one, in so far as it seeks interlocutory equitable relief on factual foundations not capable of being ascertained at this stage. The application lacks a firm grounding on fact, and there is not, I am convinced, a prima facie position to support it.”

16. In the end the application fails. The notice of motion dated 1st July 2019 and amended 30th July 2019 is dismissed but the costs, thereof, shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 28TH day of NOVEMBER, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANTS**