



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 58 OF 1999

SANITAM SERVICES (E.A) LTD.....PLAINTIFF

VERSUS

RENTOKIL (K) LTD.....1ST DEFENDANT

KENTAINERS (K) LTD.....2ND DEFENDANT

RULING

1. The plaintiff has asked this Court to hold the 1st defendant in contempt of the orders of the Court of Appeal, which were made on 28th July 2006.

2. The Court of Appeal had granted orders in the following terms;

1. Permanent Injunction to restrain the Defendants from manufacturing and/or using the foot operated sanitary bin and/or holding out to customers the use of such bin.

2. Trading in Kenya in a manner likely to cause the business of the Defendants to be confused with the business of the plaintiffs.

3. Trading in any manner which does not sufficiently differentiate or distinguish the defendants business from that of the plaintiffs.

4. Using the Patent registered under Certificate Number AP 773 hereof or any other, calculated to confuse the goods sold by the defendants as being goods manufactured or provided by and on behalf of the plaintiffs, or otherwise infringing any of the plaintiff's registered patent.

5. Otherwise passing-off the business of the defendants as the plaintiff's business?.

3. The plaintiff asserts that the order was served upon the 1st defendant and also upon 2 directors of the said defendant. The 2 directors who were allegedly served are SIMON MWAGO and PATRICK NYAGA.

4. However, the directors have vehemently denied having been served.

5. Having given due consideration to the affidavits sworn by the process server, and the directors, I find

myself unable to make a conclusive and definitive finding that the directors were personally served with the orders in issue.

6. But on the other hand, there is absolutely no doubt that the 1st defendant and its 2 named directors are aware of the orders. I so find because the 1st defendant and the 2 named directors have participated in court proceedings in which the orders in issue were the subject matter.

7. In my considered view, it is important that orders which are directed at particular persons be served upon the said persons. Once service had been effected, they are obliged to comply with the terms of the orders.

8. In the event that the person served with the order acts in a manner which constitutes a disregard or a violation of the order, the person is in contempt of court. In those circumstances, when the court is moved appropriately, it will hold the person in contempt, and it would impose penalties on the person.

9. However, even though service of the order is important, it is no longer open to any person to escape penalties if it is proved that he disregarded or violated an order which he was aware of.

10. In the case of JUSTUS KARIUKI MATE & ANOTHER Vs HON. MARTIN NYAGA WAMBORA & ANOTHER, CIVIL APPEAL No. 24 of 2014 (*at Nyeri*), the Court of Appeal said;

“The trial court was correct in holding the law as then was, in contempt of court, has since changed:the law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings”.

11. The learned Judges of Appeal went on to emphasize the fact that;

“The duty to obey the law by all individuals and institutions is cardinal in the maintenance of the rule of law and due administration of justice”.

12. I wish to add my voice in that regard by saying that there ought to be no excuse permissible when a person, institution or company disobeys an order which he has knowledge of. Romer L.J. described the duty imposed on all persons, to obey court orders, as follows, in the case of HADKINSON Vs HADKINSON [1952] ALL.E.R.567;

“It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void”.

13. In this case, there were previous applications seeking to punish the 1st defendant and its directors for contempt of court. Those applications were dismissed. Therefore, the respondents had suggested that the current application was *res judicata*.

14. I hold the view that the current application is not *res judicata*. I so hold because the matters complained about, allegedly took place after the previous applications were determined.

15. In effect, the matters giving rise to the present application cannot have been made the subject matter of the previous applications, and therefore, the said matters cannot and did not form any part of the previous determinations.

16. The orders complained about were of a permanent nature, and thus if the 1st defendant or its directors violated them subsequent to the dismissal of the previous applications, it was open to the plaintiff to bring the current application.

17. As regards the alleged violation of the orders, the respondents deny having done so.
18. First, I emphasize that the orders by the Court of Appeal were not limited to barring the defendants from manufacturing the foot operated sanitary bins.
19. Therefore, the fact that the 1st defendant was now importing bins, cannot exonerate them, if such bins were foot-operated or if such bins could be confused with the plaintiff's patented bins.
20. Of course, there was a period of time when the validity of the plaintiff's patent had lapsed. However, I find that the ARIPO Board of Appeal did order that the patent be reinstated onto the Register in Kenya and Uganda. The said order was made in Case Number 01/2007, which was determined on 30th August 2007.
21. Accordingly, if the respondents were manufacturing or holding out foot-operated bins, which violated the plaintiff's patent, that would amount to contempt of court.
22. The respondents were under an obligation to ensure that their business did not pass-off as that of the plaintiff.
23. It is the duty of the respondents to ensure that their business was sufficiently differentiated or distinguished from the plaintiff's business.
24. In this case, my evaluation of the bins being utilized by the 1st defendant, leads me to conclude that they are distinguishable from the plaintiff's patent.
25. Yet again, it appears that some bins which the 1st defendant has distributed, could be confused with those of the plaintiffs. Obviously, any bins which violate the court order cannot be allowed to remain in the market or in use by the customers of the 1st defendant.
26. Accordingly, the court cannot make a blanket order to condemn the respondents wholesale. But, on the other hand, if there are any offending bins, the court cannot allow them to remain in place.
27. In the circumstances, the plaintiff is hereby authorized to enter onto the premises of the 1st respondent, and the premises of the clients of the 1st respondent, with a view to obtaining therefrom, the bins deemed to be violating the court orders.
28. In the first instance, the bins will not be destroyed. Instead, the bins will gathered together, and the parties will thereafter have the opportunity of addressing the court, with a view to having the court make a determination on whether or not the bins so gathered, violated the court orders.
29. If any bins should be found to be violating the court orders, the same shall be destroyed.
30. The court reserves its decision on the issue of costs of the application, to await the process outlined above.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of May 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mutiso for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk.