



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 219 OF 2011

KINATWA CO-OPERATIVE SAVINGS

CREDIT SOCIETY LTD.....PLAINTIFF

-VERSUS-

NAKIMU CLASSIC TRAVELLERS SACCO LTD.....DEFENDANT

RULING

1. There are two Applications before the Court. The first one is the Plaintiff's application dated **26th September, 2014** seeking an order for committal of the Chairman, Secretary and Treasurer of the Defendant company to civil jail for 6 months for disobedience of a Court order issued on **17th January, 2013**. In the alternative, the Plaintiff prays for orders that the assets of the Defendant be attached to satisfy any amount that the Court deems appropriate. The application is expressed to be brought under the provisions of **Section 5** of the **Judicature Act Cap**.
2. The second application is by the Defendant and is dated **12th October, 2015** seeking a declaration that the suit herein has abated and that the orders of injunction issued on **17th January, 2013** have lapsed. In the alternative and without prejudice to the foregoing prayers, the Defendant seeks for an order to discharge and set aside the injunctive orders of **17th January, 2013**. The application was brought pursuant to the provisions of **Order 5 rule 2 (7)**, **Order 40 rule 7** as read with **Order 51** of the **Civil Procedure Rules**.
3. The Plaintiff's application is supported by the affidavit of **GEORGE N. MURIU**. It is the Plaintiff's case that the officials of the Defendant have disobeyed the injunction order issued by this Court in a ruling made on **17th January, 2013** despite having been served with the same.
4. The Plaintiff contends that the Defendants have continued to infringe on their intellectual property rights by their failure to rebrand their motor vehicles.
5. On **6th November, 2014** the Defendant filed a Notice of Preliminary Objection and a Replying affidavit sworn by one **KENNEDY NGANGA** in response to the application, contending that the persons allegedly cited for contempt were never served as the alleged process server was unknown in the corridors of justice and as such incapable of effecting service. It was also their case that the suit herein had abated by operation of law and hence the orders of **17th January, 2013** had ceased to exist as they could not operate in a vacuum.
6. The Defendant thereafter filed their application aforementioned, dated **12th October 2015**. That application is supported by the affidavit of **KENNEDY NG'ANG'A** sworn on **12th October**,

- 2015, in which it was averred that since the Plaintiff obtained the injunctive orders herein on **17th January 2013**, it had not taken any steps towards the prosecution of the main suit. It was therefore the Defendant's case that by dint of **Order 40 rule 6** of the **Civil Procedure Rules**, the order lapsed one year thereafter. The Defendant further averred that the Plaintiff had failed to serve them with Summons to Enter Appearance since the filing of the matter and hence, by operation of **Order 5 Rule 2** of the **Civil Procedure Rules**, the Court ought to declare that the suit had abated.
7. In the Plaintiff's Replying affidavit sworn by **GEORGE N. MURIU** on **22nd October, 2015**, it **was** averred that the matters raised in the Defendant's application had been canvassed before the Court and decisions made, hence the application was an abuse of the Court process. It was the Plaintiff's assertion that the Court declined to set aside or discharge the injunction orders herein as prayed by the Defendant's application dated 16th July, 2013. It was therefore the Plaintiff's case that the current application is *res judicata*.
 8. The applications were canvassed by way of written submissions, following the directions made on 27th October 2015 that the two applications be heard simultaneously. Thus, the Plaintiff filed its written submissions dated **11th November, 2015** on even date while the Defendant filed its submissions dated **25th November, 2015** on even date.
 9. I have considered the pleadings herein as well as the written submissions by Counsel in support and opposition to the respective applications. Having done so, I take the following view of the matter.

Defendant's application dated 12th October, 2015

10. The Defendant's application seeks orders that the suit has abated and the orders in issue have thereby lapsed. In the alternative, the Defendant seeks orders for the discharge or setting aside of the said orders. The Plaintiff also raised the question of *res-judicata* and argued that the foregoing issues had been determined by the Court in the Defendant's earlier application dated **16th July, 2013** and its preliminary objection dated **20th January, 2014**.
11. A perusal of the record shows that the Defendant had filed the application dated **16th July, 2013** seeking for a review of the injunctive orders issued on **17th January, 2013**. The application for review was brought on the premise that there was new and important evidence as contemplated under **Order 45** of the **Civil Procedure Rules**. The same was heard and dismissed by the Court on **20th September, 2013** on the ground that the Defendant's registration of the Trademark number 71149 was done after Njagi J had given the injunctive order of 17th January 2013. In effect, the court was of the view that unless overturned on appeal, the orders of 17th January 2013 were in force. In the present application, the Defendant is seeking for a declaration that the injunction orders issued on **17th January, 2013** have lapsed by operation of **Order 40 Rule 6** of the **Civil Procedure Rules**. From the foregoing, it is patent that the earlier application for review is distinct from the current one.
12. Nevertheless, the essence of the objection raised by the Defendant in its Preliminary Objection dated **20th January, 2014** was that the injunctive orders issued on **17th January, 2013** had lapsed as the Plaintiff had not prosecuted the matter within 12 months of the grant of the said order. The Defendant relied on **Order 40 rule 6** of the **Civil Procedure Rules** which is the same provision of the law that it has relied on in the present application in seeking for a declaration that the injunctive orders have since lapsed. In determining the said preliminary objection, the Court noted that on **16th July, 2013** the Defendant had filed an application seeking a review of the injunctive orders issued herein. The Court was therefore of the opinion that it was dishonest of the Defendant to purport that the period of twelve (12) months as envisaged under **Order 40 rule 6** of the **Civil Procedure Rules** had lapsed. The Court eventually dismissed the Defendant's Preliminary Objection. In other words, the Defendant could not claim that the suit had not been determined within 12 months from when the injunction was granted yet it had filed an application within that period seeking for review the said injunctive orders.
13. For the doctrine of *res judicata* as provided for in Section 7 of the Civil Procedure Act, (Chapter 21 of the Laws of Kenya) to come into play, the following conditions must be proved:

- a) the matter must be directly and substantially in issue in the two applications;
- b) the parties must be the same or must be litigating under the same title;
- c) the matter must have been finally decided in the previous suit

(see **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others) Civil Appeal No. 36 of 1996**)

14. These conditions have been shown to exist in respect of the Defendant Preliminary Objection dated **20th January, 2014** and the instant application. In the circumstances foregoing, the prayer in the Defendant's application seeking for a declaration that the orders of injunction issued on **17th January, 2013** have lapsed is *res judicata* as the same had already been determined by this Court while dealing with the preliminary objection.
15. With regard to the abatement of the suit, it is the Defendant's case that summons to enter appearance have not been served upon them, a fact that was not controverted by the Plaintiff. In fact, the Plaintiff did not attempt to address the issue of summons either in its response to the Defendant's application or its submissions. The Defendant relied on the provisions of **Order 5 rule 2 (7) of the Civil Procedure Rules** which provides that:-

“Where no application has been made under Sub-rule (2) the Court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons”
(underlining supplied)

16. The Defendant also introduced the provisions of **Order 5 rule 1 (6) of the Civil Procedure Rules** in its submissions to support its argument that the suit had abated. A careful perusal of the court record shows that summons to enter appearance duly issued by this Court on **20th June, 2011**. There is no evidence on record to show that the same was served upon the Defendant and there is no specific rebuttal by the Plaintiff in this regard. The Plaintiff has also not made any application to extend the validity of the said summons which expired on or about **20th June, 2013**.
17. Nevertheless, it bears noting that provisions of Order 5 rule 2 (7) of the Civil Procedure Rules not couched in mandatory terms. Hence, it is in the discretion of the Court to dismiss or not dismiss the suit depending on the circumstances of each case and upon just terms. In the circumstances of this case, the Defendant has been an active participant in the matter, having filed and responded to the various applications and preliminary objections that have been dealt with by the court in the course of the life-course of this suit. I take the view that the purpose of serving summons is to bring to the Defendant's attention the filing of a suit against them and to enable them to defend the case, if they so wish. That being the case, it cannot be said that the Defendant herein was not aware of the suit for purposes of such defence. The Defendant itself has sought the audience of this Court severally since the suit was filed and this Court does not see any prejudice caused to it thus far.
18. It should however be noted that the failure to serve summons is not a mere procedural technicality for it is at the root of fair hearing, a cardinal tenet of the rules of natural justice. While I find no merit in the Defendant's application dated 12th October 2015, it is hereby directed that this procedural aspect be complied with by the Plaintiff forthwith, and in any case within the next 7 days of this Ruling.

Plaintiff's application dated 26th September, 2014

19. The Plaintiff's application dated **26th September, 2014** seeks for orders that the Chairman, Secretary and Treasurer of the Defendant be committed to Civil jail for contempt of the court Order and Ruling dated 17th January 2013. The law of contempt in Kenya is provided for under **Section 5 of the Judicature Act Cap. 8 of the Laws of Kenya**, which provides as:-

“5.(1) The High Court and the Court of Appeal shall have the same power to punish

for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of Court shall be appealable as if it were a conviction and sentence made in exercise of the original criminal jurisdiction of the High Court.”

20. The power to punish for contempt of Court possessed by the High Court in England and applicable to Kenya as envisaged above is to be found in the provisions of the **Contempt of Court Act of 1981 of England** and **PART 81 of the Civil Procedure (Amendment No. 2) Rules, 2012**.
21. It is the Plaintiff's case that on 17th January, 2013 the Court issued an injunction order restraining the Defendant from infringing on its intellectual property rights which order was served upon the Defendant on **22nd March, 2013**. However, according to the Plaintiff despite being served with this order, the Defendant has continued to infringe on its intellectual property rights.
22. In opposing the application, the Defendant averred that no service was ever effected on the persons sought to be cited as the alleged process server was unknown in the corridors of justice and as such incapable of effecting service. The Defendant went ahead and attached a letter from The Process Servers Committee confirming that the alleged process server was not licenced to effect service as of **22nd March, 2013**. It appears that the Defendant is not disputing the fact of service. Its contention, as I understand it, is that it was served, save that the person effecting service was not licensed to serve process at the time of effecting such service. For the purpose of the contempt application, that would not, in my respectful view, amount to a forceful argument in response.
23. More importantly, the aspect of personal service of Court Order and the Penal Notice has evolved in the recent past, as was pointed out in the case of **Basil Criticos Vs Attorney General & 8 Others [2012] eKLR** in which the court the Court stated as follows:-

“...the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary.”

24. The Court of Appeal endorsed this position in the case of **Shimmers Plaza Ltd vs National Bank of Kenya Limited [2015] eKLR**. The Court of Appeal in the said case held that knowledge of the judgment or order by the advocate of the alleged contemnor was sufficient for purposes of contempt proceedings, particularly where the advocate was present in court representing the client. The Court in holding so placed reliance on **Rule 81.8 of the Civil Procedure Rules of England, 2012 aforementioned**.
25. The Defendant herein was represented by Counsel who was present when the injunctive orders herein were granted. It is therefore deemed that the Defendant, through its officials, were aware of the existence of the aforesaid injunctive orders. In fact, the Defendant has not explicitly denied knowledge of the said orders.
26. With regard to the substantive application, the Defendant has denied any infringement of the Plaintiff's trademark or the Court Order of 17th January, 2013. What is however curious is the Defendant's argument that it is not violating the order of 17th January, 2013 or the Plaintiff's trademark but enjoying trademark No. 71149 which is distinct and separate from the Plaintiff's. The foregoing argument raised by the Defendant is, plainly, a confirmation to this Court that the Defendant did not take heed of the injunctive orders issued on 17th January, 2013 and has therefore continued to disobey the said orders.
27. In the case of **Shimmers Plaza Limited Vs National Bank of Kenya (supra)** thus;

“... obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a Court order or not... The dignity and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they

lead us all to a state of anarchy...”

The court cited, with approval, the case of **Hadkinson vs. Hadkinson (1952) All ER 567** in which **Romer, L.J.**, had this to say to underscore this obligation:

“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...”

28. It is noteworthy that the issue of the existence of aforesaid Trademark was brought up for the first time in the Defendant’s application dated and filed on **16th July, 2013** whereby it sought for a review of the injunctive orders on the basis that it had discovered new and important evidence. This new evidence was the aforesaid trademark No. 71149 which according to the Defendant was sealed on 9th July, 2013 but was effective from 21st April, 2011. The Court dismissed the Defendant’s application for review in its Ruling of 20th September 2013 and noted that the registration of the Defendant’s trademark, was done after the injunctive orders had been issued. Clearly therefore, the aforesaid trademark cannot be used as a justification for disobeying the court order of 17th January, 2013.
29. Without saying more, the Defendant’s insistence that its aforesaid trademark became effective as at 21st April, 2011 is in outright defiance of the injunctive orders issued by this Court order aforesaid and therefore amounts to contempt.
30. In view of the foregoing, the Plaintiff’s application succeeds and is hereby allowed with costs. The Court finds the officials of the Defendant as stated in the Plaintiff’s application dated 26th September 2014 to be in contempt of the injunctive court orders issued on 17th January, 2013. The orders for committal to civil jail are however reserved to give the contemnors an opportunity to appear before this Court for further orders of the court.

Summons requiring their attendance to issue accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2016.

OLGA SEWE

JUDGE