



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 219 OF 2011

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

VERSUS

NAKIMU CLASSIC TRAVELLERS SACCO LTD.....DEFENDANT

RULING

[1] This suit was filed on **29 June 2011** by **Kinatwa Co-operative Savings Credit Society Limited** for, *inter alia*, a permanent injunction to restrain the Defendant from infringing its trade mark **Number 62849**. Along with the Plaintiff, the Plaintiff filed the Notice of Motion dated **2 June 2011** for interim injunction pending the hearing and determination of the suit. That application was heard and ruled on the **17 January 2013** in favour of the Applicant. The Defendant thereafter filed an application dated **16 July 2013** for review of the Court's Ruling of **17 January 2013**, which application was dismissed **20 September 2013**. All this while, the Defendant continued to infringe on the Plaintiff's trade mark and took no steps to comply with the Court Order. Consequently, the Plaintiff filed the application dated **26 September 2014** seeking an order for the committal of the Chairman, Secretary and Treasurer of the Defendant to civil jail for 6 months for contempt of the court order or **17 January 2013**. That application was heard and determined on **26 February 2016**, whereby the Court made a finding that the officials of the Defendant were indeed in contempt of Court in respect of the injunctive orders issued herein on **17 January 2013**. Their committal to civil jail was however reserved to give them an opportunity to appear in court for purposes of mitigation.

[2] The three officials of the Defendant, namely: **Thomas Mutua, Andrew Kagwa Kiarie** and **Linus Wambua Munyao**, attended court on **14 September 2016**, whereupon the Court was urged by their Counsel, **Mr. Ngala**, to accord them more time to comply. **Mr. Ngala** relied on the affidavit sworn by **Kennedy Ng'ang'a** and filed on **21 June 2016**, wherein it was deposed that the officials of the Defendant honestly believed that since they had a duly registered trademark, they had the right to use the colours appearing on their motor vehicles. It was further averred that the officials were remorseful and were in the process of changing the offending colours. To this end, it was deposed that:

[a] The shareholders convened a meeting in early May and passed a resolution for the directors to urgently remove the offending colours.

[b] On the **13 May 2016**, the Defendant lodged an application with the Kenya Industrial Property Institute for amendment of their trade mark.

[c] On **16 May 2016**, the Defendant effected payment for the advertisement pursuant to [b] above.

[d] The Defendant is currently pushing for gazettelement of their new colours as approved.

[3] It was further deponed that the process aforementioned takes no less than 90 days from the date of gazettelement to completion, for which reason the court was urged to provide time of at least 45 days to enable full compliance.

[4] **Mr. Mutua** for the Plaintiff was of a contrary view. He urged the Court to take note that its orders had been deliberately defied, and that the Defendant had clearly given an indication that it would only comply with the court order of **17 January 2013** at its own convenience, as it continues to infringe upon the Plaintiff's trade mark with impunity. He therefore urged the Court to stamp its authority by having the directors of the Defendant committed to civil jail for contempt of court or to pay fine in lieu.

[5] I have carefully considered the submissions made herein by Learned Counsel. The merits or otherwise for the application to cite the Defendant's officials for contempt was dealt with and a Ruling delivered on **26 February 2016**. What is up for determination is whether there are any mitigating circumstances to warrant the court's leniency as sought by the Directors of the Defendant. I have, in this regard looked at the Affidavit filed by the Defendant, and I would agree with **Mr. Mutua** that there is no justification therein for the continued disobedience of the Court order of **17 January 2013**. That order was clear in terms, it was made after a careful consideration of the each party's case; and its effect was that the Defendant ceases the infringement forthwith. It has been over three years since, and the excuse that the Defendant cannot ground its vehicles, or that there is a 90 day process involved in change of colours, is absolutely untenable. To the contrary, it merely goes to confirm that the Defendant has deliberately disobeyed the court order of **17 January 2013** with blatant impunity. I reiterate what the Court of Appeal stated in **Shimmers Plaza vs. National Bank of Kenya [2015] eKLR** 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..."

[6] In view of the foregoing, I find no justification whatsoever for the continued breach by the Defendant. It counts for little at this point in time for the Defendant to say that it has commenced the compliance process, granted that the order in question was made in 2013. Accordingly, it is hereby ordered that each of the three Directors, namely: **Thomas Mutua, Andrew Kagwa Kiarie** and **Linus Wambua Munyao**, pays a fine of **Kshs. 50,000** in default to serve **3 months' Imprisonment** pursuant to **Order 40 Rule 3(1) of the Civil Procedure Rules, 2010**. It is further ordered that the three Directors do take steps to purge their contempt within the next 45 days.

Orders accordingly

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2016

OLGA SEWE

JUDGE