



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 33 OF 2015

SOROYA MOTORS SPARES LIMITED.....APPLICANT/PLAINTIFF

- VERSUS -

SHANGHAI AUTO TYRES.....1ST RESPONDENT/DEFENDANT

THUNDERSTONE TYRES LTD.....2ND RESPONDENT/DEFENDANT

FOUZI TYRES LTD.....3RD RESPONDENT/DEFENDANT

PAK SOUNDS LTD.....4TH RESPONDENT/DEFENDANT

R U L I N G

INTRODUCTION

1. The Application before this Court is the Applicant's Notice of Motion dated **29th January 2015** and filed on even date. It is expressed to be brought under **Section 3A** of the **Civil Procedure Act, Order 40 Rule 1(b)**, and **Order 51 Rule 1** of the **Civil Procedure Rules**. It seeks the following orders:-

1. *Spent*
2. *Spent*
3. *The Respondents/Defendants be compelled to unconditionally and immediately seek the channelize (sic) any communication with respect to Kenda brand Tyres directly through the Applicant/Plaintiff in their capacity as authorized dealers if the Defendants/Respondents are desirous of trading in Kenda Brand Tyres in tandem with contractual laws and procedures as encapsulated in the relevant statutory instruments.*
4. *The Defendants/Respondents do compensate the Applicant/plaintiff for the substantial loss suffered this far as a consequence of circumventing commercial laws by engaging in unauthorized trading of Kenda Brand Tyres within the territorial jurisdiction of the Republic of Kenya.*
5. *The costs of this application be borne by the Defendants/Respondents.*
6. *Such other and/or further orders that the Court in the circumstances may deem just and fit to grant.*

2. The application is based on the several grounds stated therein and is supported by the affidavit of MOHAMED YASIF YUSUF SAROYA, a director of the Applicant and sworn on **29th January 2015**.

THE APPLICANT'S CASE

3. The Applicant's case is that they are the authorized dealer in the Kenyan territory of Kenda Brand Tyres of the Republic of China and Taiwan having signed a Distributorship agreement with Kenda Rubber Industrial Company. The Applicant's contention is that the Respondents among others have engaged in unscrupulous and unauthorized dealership of the said tyres without their consent or that of the manufacturers.

THE RESPONDENTS' CASE

4. All the Respondents opposed the Application vide the Replying affidavits of their respective directors filed on 12th February 2015. The Respondents also filed a List of Authorities in opposition to the Application. The 1st, 2nd and 3rd Respondents filed their authorities on 12th February 2015 while the 4th Respondent filed theirs on 24th February 2015.

5. The 1st, 2nd and 3rd Respondents' case is that the Applicant is prohibited by law to institute any proceedings for alleged infringement of unregistered trademark. The Respondents aver that they are *bonafide* registered traders in Kenya trading in tyres and they bought the said tyres from Dubai. As such, it is the Respondents' contention that the Applicant should sort out any grievance with Dubai Traders.

6. The 4th Respondent's case is that they have been importing and selling the Kenda brand tyres. It is their contention that it was never brought to their attention that there was a Distributor within Kenya with exclusive rights to import, distribute or sell the Kenda brand tyres.

7. On 25th February 2015 the applicant filed a Reply to the Respondents' affidavits and sworn by its director. The Applicant maintained their argument that the Respondents did not have authority to import and distribute the Kenda brand tyres.

SUBMISSIONS

8. The Application was prosecuted by way of oral submissions on 25th February 2015.

LEGAL ANALYSIS

9. I have carefully considered the pleadings on record as well as the oral submissions by Counsel. Having done so, the main issue for determination is whether the Applicant is entitled to the orders sought.

10. The Applicant's case is that based on the Distributorship agreement they are the officially recognized distributors of Kenda Brand tyres. The Applicant accuses the Respondents of engaging in unscrupulous and unauthorized dealership of the same without their consent or that of the manufacturer. It is their claim that as a result of the illegal dealership they have lost on sales and suffered substantial loss. It is on this premise that the Applicant came to Court seeking for injunctive orders to restrain the Respondents from in any way dealing with the Kenda Brand tyres.

11. The Respondents have not denied their dealership in the said Kenda brand tyres. The 4th Respondent averred that by the date of the issuance of the Distributorship agreement dated 10th March 2014, they had already acquired the Kenda Brand Tyres sometime in the years 2012, 2013 and 2014. It was also averred by the other Respondents that they acquired the said brand of tyres sometime in the year 2013 before the Applicant entered into the Distributorship Agreement. It was the 4th Respondent's case that the Distributorship agreement was not exclusive and did not denote any sole distributorship to the Plaintiff.

12. I have seen the Distributorship agreement between the Applicant and Kenda Rubber Industrial Company Limited which is not in dispute. The Agreement is brief and simply appoints the Applicant as an authorized Distributor of the Kenda brand tyres. In my interpretation of the agreement, there is no

indication that the Applicant was to be the sole and exclusive distributor of the said brand of tyres in Kenya.

13. The Respondents averred that they lawfully imported the brand of tyres from Dubai. The same has not been challenged. This Court is not in a position to know whether or not the dealers in Dubai are authorized distributors of the said tyres. There is no evidence on record to show what kind of arrangement, if any, the dealers in Dubai have with the manufacturers of Kenda brand tyres. In short, there is nothing to show that the importation and sale of the Kenda brand tyres by the Respondents is unauthorized or unlawful. It is not clear what legal rights the Applicant sought to enforce in this matter.

14. In light of the above, the Applicant has not established a *prima facie* case to warrant the grant of any injunctive orders. In any case, prayers (3) and (4) are mandatory in nature and cannot be granted at this interlocutory stage.

DISPOSITION

15. The upshot of the foregoing is that the Applicant's Notice of Motion dated **29th January 2015** and filed on even date is hereby dismissed with costs.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Karanja holding brief for Oyieko for the Plaintiff

Mr. Kigen for the Defendants

Teresia – Court Clerk