



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND 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. The Defendant's Notice of Motion application dated and filed on 16th July 2013 sought the following orders:-
 - i. **Spent**
 - ii. **Spent**
 - iii. **That the honourable court be pleased to and do review the interim injunctive orders issued on the 17th January, 2013; and discharge, vary or set aside them.**
 - iv. **That the costs of this application be provided for.**
2. The grounds on which the Defendant in support of its application were that the Plaintiff had commenced execution of the orders of 17th January 2013 by having its officials cited for contempt. However, it had discovered new and important evidence which after due diligence, could not be produced at the time the injunctive orders were made. It averred that it had a Trade Mark No 71149 which was sealed on 9th July 2013 but was effective from 21st April 2011 and consequently it could not lose that protection.
3. The Defendant also contended that it raised the said issues before the court but Njagi J who issued the injunctive orders pointed out that it was not automatic that its application for gazetteement would be approved. Further the Defendant averred that the Plaintiff though aware of the application for trade mark, did not object to the same.
4. The Defendant repeated the said grounds in its Supporting Affidavit which was sworn on its behalf on 16th July 2013 by Kennedy Nganga, its Vice Chairman.
5. The Plaintiff filed its Grounds of Opposition dated 18th July 2013 on the same date.
 - i. **The application is a confirmation that the Defendant does not respect the authority and dignity of the court.**
 - ii. **The Certificate of Trade mark annexed as KN2 was dated 9th July 2013 after the determination of the suit hence could be "a new and important evidence" as envisaged by**

- law.
- iii. **The fact that despite the decision of the court the Defendant proceeded to purport to register the trade mark was contemptuous of the court decision.**
 - iv. **Once a decision was made by the court on the issue in dispute no other authority had the jurisdiction to adjudicate over it as the Kenya Industrial Property Institute has purported to do.**
 - v. **The alleged trade mark No 71149 had never been subject of the proceedings herein hence could not be used to set aside a review the decision of the court.**
 - vi. **The application was an abuse of the court process.**
 - vii. **The application was meant to delay the prosecution of the Contempt Proceedings.**
6. In its written submissions dated and filed on 26th July 2013, the Defendant submitted that it was not possible despite all due diligence to have provided the logo when the ruling was delivered on 17th January 2013. It was the Defendant's argument that the parties were enjoying distinct trademarks and that the dispute was nothing but business rivalry. It relied on the case of **Ali Abdul Kader Salehbhai Assabwalla vs Khadija Bint Gafoor & Others (1962) EA 571** which stated that a person could not be blocked from using his name or trademark even if confusion was likely to arise. It contended that the new trademark was "a new and important evidence" as was contemplated by Order 45 of Civil Procedure Rules, 2010.
7. The Plaintiff referred the court to **Mulla on The Code of Civil Procedure Volume 4, Sixth Edition page 4116** which states:-

"...Application on this ground must be treated with great caution and as required by r4(2) (b) the court must be satisfied that the material placed before it in accordance with the formalities of the law do prove the existence of the facts alleged ... in Amrit La v Madho Das it was held that where a Decree is based upon a decision of a division bench of the High Court, and that decision is subsequently overruled by a full bench, the reversal is no ground for a review of the decree. Nor is the production of a new ruling or authority, which if brought to the notice of the judge at the first hearing might have altered the judgment; new and important matter within the meaning of this rule. An alteration of the law by subsequent legislation is not the discovery of new matter justifying a review."

8. In **James M Kirangu & 17 others vs J M Kangari & Muhu Holdings Ltd & 2 others [2005] eKLR** in delivering a ruling on an application for review Justice Alnashir Visram (as he then was) stated as follows:-

"Applications on this ground must be treated with great caution. Review cannot be sought to supplement the evidence or to introduce new evidence ..."

9. The Plaintiff urged the court to dismiss the Defendant's application on the ground that he Defendant proceeded to register a trademark after the court had issued an order and purported the same to be a new and important order. According to the Plaintiff, such registration amounted to a decision or change of legal status by an authority.
10. The court has carefully analysed the parties pleadings and their respective written submission and wish to state right at the outset that an application who is seeking a stay of execution under Order 42 Rule 6(2) of Civil Procedure Rules, 2010 must demonstrate that:-
- i. **He has brought the application without unreasonable delay**
 - ii. **That he is likely to suffer substantial loss**
 - iii. **He is able to provide security.**

11. The court, notes that the order issued by Njagi J was a negative order incapable of being executed. There was nothing to be stayed. This was the view of the court in **Civil Application No NAI 219 of 2007 (134/2007 UR) Sonalux Limited & Another vs Barclays Bank of Kenya Limited & others** (unreported) in which the Court of Appeal declined to stay the orders as there was nothing to be stayed. The superior court had in that case dismissed an application for injunction which

- essentially made it a negative order.
12. I have had due regard to Section 2 of the Civil Procedure Act Cap 21 of the laws of Kenya which in the definition of a decree holder, alludes to an order that “is capable of execution.”

In that section, a decree holder is defined as “any person in whose favour a decree has been passed or **an order capable of execution** has been made...” It therefore obtains that there are orders that are capable of execution while others are not.

13. Quoting **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No NAI 79 of 2007 (unreported)** in the **Re Sonalux** case, the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

14. I therefore have no hesitation in observing that prayer No (2) as had been sought by the Defendant was incapable of being given by this court.
15. Turning to the question of review, the court did note the Plaintiff’s submission that the Defendant’s registration of the Trademark No 71149 was made after Njagi J made his order on 17th January 2013. The learned judge restrained the Defendants from advertising, using, marketing, promoting amongst other things from using the colours of the Plaintiff’s trademark or any colours closely resembling the Plaintiff’s trade mark and to cease doing so **pending the hearing and determination of the suit.**
16. The purport of that ruling was that parties were expected to ventilate their case during the hearing and determination of the suit. The question of whether the Defendant had a distinct trade mark from that of the Plaintiff or when its trade mark became effective are matters that are best handled during the trial. The Defendant cannot purport to circumvent the main hearing by filing an application for the review of the order issued by Njagi J. The court is not satisfied that the Defendant has made out a suitable case of a review of the orders of Njagi J. If the court were to uphold the Defendant’s submissions, it would be tantamount to determining a matter that was not only *res judicata* but also a matter that had been heard and determined by a Judge of equal and competent jurisdiction.
17. In the absence of any order from the Court of Appeal showing that the orders of Njagi J had been varied and/or set aside, I am not inclined to grant the orders sought by the Plaintiff. In view of the fact that I have found the Defendant’s Notice of Motion application dated and filed on 16th July 2013 to have been unmeritorious, the said application is hereby dismissed with costs to the Plaintiff.
18. It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of September 2013

J. KAMAU

JUDGE