



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 47 OF 2012

JAMES NGOCI WAWERU.....1ST PLAINTIFF

ELVIS GITHINJI.....2ND PLAINTIFF

AUTOSCOPE LIMITED.....3RD PLAINTIFF

VS

JAMES MUTITU MWORIA.....1ST DEFENDANT

EMPIRE MICROSYSTEMS LIMITED.....2ND DEFENDANT

RULING

1. Before me is a Notice of Motion is dated 30th January 2012 brought by the plaintiff/applicants in which they seeks orders of injunction to issue against the defendants jointly and severally to restrain them from interfering with the plaintiffs' quiet possession and conduct of their business at the premises known as third floor Shelter Afrique Buidling Nairobi and from interereng with the third plaintiff's accounts and business interests. The applicants further seek an order of mandatory injunction directing the defendants to release to the plaintiffs the domain name and passwords in respect of www.autoscope.co.ke and not to interfere with the same howsoever, pending hearing and determination of this suit.
2. The application is framed under Sections 1A, 1B, 3, 3A and 95 of the Civil Procedure Act and Orders 40 Rules 1, 2,3,8,10 and 11 and 51 Rule 1 of the Civil Procedure Rules.
3. The application is based on grounds set out on face of the application and is further supported by the affidavit of Elvis Githinji sworn on 30th January 2012.
4. In opposition to the application, there is a replying affidavit sworn by the 1st defendant on 17th February 2012.
5. The plaintiffs' case is essentially that the first defendant has unlawfully seized, blocked and retained the third plaintiff's website www.autoscope.co.ke together with the passwords for the said domain name, which domain name the plaintiffs claim is not the personal property of the first defendant. The plaintiffs claim that the first defendant registered the domain name under his company Empire Microsystems Limited as an agent of the third plaintiff. The plaintiffs further accuse the first defendant of stealing the third plaintiff's company funds and accounting computer equipment and system. If not restrained by way

of the orders sought, the unlawful action of the first defendant company would occasion irreparable injury to the business of the third defendant company which may not be adequately compensated by way of damages.

6. In reply, the first defendant avers that sometime in the year 2007, he and his brother David Mworira registered the domain name www.autoscope.co.ke when they carried out vehicle tracking business under the name of Auto Rescue. The domain name was registered under their company known as Empire Microsystems Limited. Sometime in the year 2009, they invited the 1st and 2nd plaintiffs to partner with them in the car tracking business and they all incorporated the company Autoscope Limited in which the four became directors. The 1st defendant offered the new company office space on 6th Floor Shelter Afrique House as well as the domain name in dispute. Around December 2011, the 1st plaintiff informed him that there was office space available on 3rd floor of the building and that as Autoscope Limited had expanded, it could be housed in its own independent office. The directors therefore acceded to the company moved into the new office space. However, on 20th December 2011, the first defendant visited the 3rd plaintiff company at its new offices and was taken aback to establish that the company had changed its name to Autoscope International Limited. He was denied access to the offices. He later learnt that the customers of the 3rd plaintiff company had been advised to pay for services to the new company. That is why he decided to seize vital documents containing information on the 3rd plaintiff's company as well as its domain name until the issue of ownership of the domain name was resolved. He denies that he or his brother David Mworira stole company funds, computers and ETR machines as alleged in the supporting affidavit.

7. I have carefully considered the application, the affidavits sworn for and against the application as well as the submissions made by counsel for the respective parties.

8. The plaintiffs seek to restrain the defendants from interfering with the business of the third plaintiff company but also a mandatory order compelling the first defendant to release the domain name www.autoscope.co.ke to the plaintiffs.

9. In my review of the affidavit evidence tendered, it is clear to me that there has been a fall out between the directors of Autoscope Limited and this has led to the alleged removal of Mr. David Mworira as a director of the company as well as the apparent sidelining of the first defendant from the affairs of the third plaintiff company. It is also evident from exhibit "JMM2" of the replying affidavit of the 1st defendant that the 1st and 2nd plaintiffs have registered a rival company known as Autoscope International Limited with the intent of transferring the business and clients of the 3rd plaintiff to the new company and which would effectively lock out the 1st defendant and his brother and essentially, leave the 3rd plaintiff company as a shell or paper company. The advice to customers of fresh email addresses under the new company Autoscope International Limited as shown in the email annexed as "EG5" leaves little doubt that the 1st and 2nd plaintiffs have indeed effectively moved the business of the 3rd plaintiff company to the new company. The quest for the release of the domain name to the plaintiffs is to me the ultimate move to seal the mission of the migration to the new company. This raises questions as to the bona fides of the plaintiffs in seeking the equitable orders of injunction against the defendants. Are they coming to court with clean hands? I have my doubts.

10. On the other hand, it is discernible that ownership of the domain name www.autoscope.co.ke is contested with the plaintiffs claiming that the name was registered under the 2nd defendant in its capacity as an agent of the 3rd plaintiff while the first defendant claims that the domain name was registered long before the 3rd plaintiff company was incorporated. In my view, the question ownership of the domain name is not one that can conclusively be resolved within the context of the present application. Suffice it to however make the finding that from the registration of the domain name, it is not in doubt that the name was first registered on 10th January 2009 while the 3rd defendant company was incorporated in the month of September 2009 according to the replying affidavit and before it started operations on 22nd October 2009 according to the supporting affidavit of Elvis Githinji. Prima facie therefore, it cannot be

legitimately claimed that the domain name was registered in the name of Empire Microsystems Limited in its capacity as an agent of the 3rd plaintiff company when the latter was not legally in existence. It is therefore more likely than not that the first defendant's claim that the domain name was registered to serve the company Auto Rescue Limited is more consistent with the documented history of the name, than the claim by the plaintiffs. In the circumstances and before the question of ownership of the domain name is fully canvassed and determined, I am unable to grant a mandatory injunction for the release of the name to the plaintiffs. Doing so would amount to determining the matter fully at an interlocutory stage. In the case of **Stephen Kipkebut t/a Riverside Lodge and Rooms vs. Naftali Ogola [2009] eKLR** the Court of Appeal underlined that unless special circumstances existed, a court would not normally grant a mandatory injunction.

11. The claims that the first defendant has stolen computers and ETR machines are, again, a matter of evidence, to be determined at the full hearing of the suit. However, for purposes of order and decency, I am amenable to grant injunction orders preserving the present status quo at the 3rd plaintiff company pending hearing and determination of the suit in this matter.

12. Consequently, I am inclined to make the following orders in respect of the plaintiffs' Notice of Motion dated 30th January 2012.

- 1) The Notice of Motion fails and is dismissed in respect of prayers 3, 4, 6 and 7.
- 2) Pending the hearing and determination of the suit in this matter, the defendants, their agents and/or servants be restrained from interfering in any manner whatsoever with the plaintiff's quiet possession and conduct of their business at the premises situate on 3rd Floor Shelter Afrique Building Nairobi and from interfering with the accounts of the 3rd plaintiff company and business interests.

13. I further direct that the parties do prepare the suit for hearing within 30 days from today and that the suit be fixed for hearing within 14 days thereafter.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2012.

J. M. MUTAVA

JUDGE