



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE 821 OF 2010**

**DANTE**

**BURBA DIESEL**

**WORKSHOP (1981 LTD. ....: PLAINTIFF**

**- VERSUS -**

**FAIRMONT HOTELS & RESORTS LTD. ....: DEFENDANT**

**R U L I N G**

By a Notice of Motion dated 1<sup>st</sup> December 2010 and filed in court on the same day, the Applicant seeks as the main prayer a grant of injunction directing the Defendant or its agents to return the Plaintiff's generator 150 KVA Acoustic Generator to the Plaintiff's premises in Nairobi unconditionally within fourteen (14) days from the date of the Ruling.

The application is based on the several grounds stated therein and is supported by affidavit of MOHAMED SIBIR ISMAIL dated 1<sup>st</sup> December 2010.

The application is opposed through a relying affidavit sworn by MUNENE NGOTHO dated 27<sup>th</sup> January 2011 together with its annexures.

The brief history of the application as contained in the pleadings is as follows:- Both parties are limited liability companies. The Plaintiff is engaged in the business of importing, buying, hiring out, servicing and repairing generators and diesel injection components and speed governor of different capacities within Kenya. The Defendant is alleged to be an owner/lessee of the hotel known as Mara Safari Club situated within the Maasai Mara Game Reserve.

On or around March 2005 the Defendant's predecessor Lonhro Hotels Limited, which was then the owner and/or lessee of the Mara Safari Club Hotel business aforesaid, instructed the Plaintiff to repair/overhaul its 165 KVA Perkins Generator which had broken down at Mara Safari Club. At the same time Lonhro Hotels Limited asked the Plaintiff to supply for hire/rent a 150 KVA Acoustic Generator to the Mara Safari Club for its use while the broken down Generator was being repaired/overhauled.

Acting on the said instructions by Lonhro Hotels Limited the Defendant, on or around 22<sup>nd</sup> March 2005, transported from Nairobi to Mara Safari Club, a 150 KVA Acoustic Generator for hire/rent and on or around 22<sup>nd</sup> March 2005, the Plaintiff transported to Nairobi the broken down 165 KVA Perkins Generator for repair/overhaul.

On or around 26<sup>th</sup> May 2005 Lonhro Hotels Limited issued to the Plaintiff a Local Purchase Order (LPO) confirming its earlier verbal instructions to have the broken Generator repaired/overhauled and paid Kshs.796,541/= deposit as advance payment for the purchase of parts.

By around 15<sup>th</sup> October 2005 the Plaintiff had fully repaired/overhauled the Defendant's 165 KVA Generator which it transported to Mara Safari Club and collected and transported to Nairobi the Plaintiff's 150 KVA Acoustic Generator.

Soon thereafter on around 23<sup>rd</sup> October 2005 the overhauled generator broke down again and on around 28<sup>th</sup> October 2005 the Plaintiff at the Defendant's request and instance transported to Nairobi the 165 KVA Generator, for further repairs and the Plaintiff's 150 KVA Acoustic Generator was, at the Defendant's request and instance, transported by the Plaintiff to Mara Safari Club for the Defendant's use on hire/rent as the Plaintiff repaired the broken down generator.

Upon dismantling the generator, the Plaintiff found that the oil pump shaft had broken resulting in damage to other parts of the generator. The Plaintiff had difficulties in locating replacement parts because of the old age of Defendant's generator.

In March 2006 Fairmount Hotels and Resorts Limited, the Defendant herein, took over the assets and liabilities of Lonhro Hotels Limited. The Defendant continued using the Plaintiff's generator and thereby allegedly assumed all the rights and responsibilities of its predecessor in respect of both generators.

The Plaintiff now brings this suit to recover the alleged sums and also for an order for the return of the said generator.

The Defendant denies that it is an existing legal entity and on this grounds alone states that the suit is fatally defective and should be dismissed in its entirety. In the replying affidavit the Defendant puts into its own perspective, and admits certain averments, but denies that the Plaintiff is entitled to the orders sought.

I have considered the application, the opposing affidavits and submissions. I am not prepared to write alone Ruling in this matter. On the basis of the suit and the opposing affidavits, it is clear to me that this court cannot grant a mandatory order of injunction at this stage. A hearing is clearly necessary. The Applicant has not disclosed a lot of information. The Respondent's affidavit contains so many annexures the contents of which the Applicant need to respond to. This can best happen at the full trial of the matter. But more importantly, the Applicant has not disclosed or shown any special circumstances to justify the grant of a mandatory injunction.

In **KENYA BREWERIES LTD. – VS – OKEYO** it was held:-

***“A mandatory injunction ought not to be granted at an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff.”***

I direct the parties to complete pre-trial procedures and fix this matter for hearing.

I dismiss the Notice of Motion application dated 1<sup>st</sup> December 2010 with costs to the Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 6<sup>TH</sup> DAY OF JUNE 2012.**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Musyoka for the Plaintiff*

*Aluvale H/B Muthui for the Defendant*

*Teresia – Court clerk*