



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT MILIMANI COMMERCIAL COURTS AT NAIROBI.

CIVIL CASE NO. 333 OF 2010.

STRATEGIC INDUSTRIES

LTD.PLAINTIFF.

VERSUS

SECRET STYLIST AFRICA

LIMITED.....DEFENDANT.

R U L I N G.

By a chamber summons dated 18th May, 2010 the plaintiff sought for what is popularly known as “Antony Pillar” Orders of injunction to be permitted to enter the respondent’s premises to seize and inspect all goods and products which infringe and/or pass off the plaintiff/applicant trade marks “Mitchel and/or celebrity, all purchases and sales records for the past one year and such other documents, copies and any items of whatever nature which constitutes or could constitute evidence necessary to substantiate its cause of action and preserve the same. That application was heard *ex parte* in the first instance on 20th May, 2010. The court granted the order on condition that the plaintiff should provide a suitable undertaking as to damages in the tune of Ksh. 3 million. The applicant filed a chamber summons on 2nd June, 2010 in which he sought leave of the court to commence contempt proceedings against Secret Stylist Africa Ltd., Rashmin Kapadia, Josephat Aswan and Bharat Doshe who are the agents of the defendant. That leave was given by the court on the same day 2nd June, 2010 and the applicant file the notice of motion of the same date. In that Notice of motion the applicant seeks for the following orders:-

(a) A declaration that SECRET STYLIST AFRICA LIMITED, RASHMIN KAPADIA, JOSEPHAT ASWANI and BHARAT DOSHI, being the servants, employees and/or agents of SECRET STYLIST AFRICA LIMITED are in contempt of the order made by this honourable court granted on 20th May, 2010.

(b) That this honourable court do cite SECRET STYLIST AFRICA LIMITED, RASHMIN KAPADIA, JOSEPHAT ASWANI and BHARAT DOSHI being the servants, employees and/or agents of SECRET STYLIST AFRICA for contempt of the order made by this honourable court granted on 20th May, 2010.

(c) That this Honourable court do commit KAPADIA, JOSEPHAT ASWANI and BHARAT DOSHI to civil jail for a period not exceeding six (6) months.

(d) That this honourable court fine **SECRET STYLIST AFRICA LIMITED** such sum as it may deem fit for contempt of its orders made on 20th May, 2010.

(e) That this honourable court do make such other or further order as it may deem fit for purposes of enforcing its orders made on the 20th may, 2010.

The respondent in addition to opposing this application, also filed a notice of motion dated 10th June, 2010 seeking for orders that the leave granted to the plaintiff to commence committal proceedings against **SECRET STYLIST AFRICA LIMITED, RASHID KAPADIA, JOSEPHAT ASWANI and BHARAT DOSHI being employees of SECRET STYLIST AFRICA LIMITED** be vacated or be charged. The court gave direction that both applications be heard together in order to save court's time and basically the respondent application is a response or position to the applicant's application. According to the applicants, the order issued on 20th May, 2010 and extracted on 20th May, 2010 together with the penal notice were served upon the respondent on 25th May, 2010. The order was served upon Rashmin Kapadia and Josephat Aswani who were at the defendant's offices situated at Apartment No. 15 Heava Park on Eldama Ravine Road in Westlands. The two agents of the defendants said they cannot accept service without express authorization by Mr. Aashit Shah who was said to be a director of defendant and was out of the country. Mr. Martin Maina, advocate who had gone to serve the order read the penal notice to the two agents. Mr. Rashid Kapadia went upstairs and returned to inform Josephat Aswani that he had telephoned the director who authorized him to receive serve on behalf of the defendant and make all the relevant decisions. At around 3.30 p.m. the order was served but the agents refused the applicants to inspect and seize the offending material. Mr. Martin Maina was able to see materials packed in cartons some of them which were opened contained the offending material. They took photographs but the applicant were refused to carry out the search. They were later joined by Mr. Kiangoi, learned counsel for the defendant.

In further submissions, Mr. Wambua, learned counsel for the applicant argued that the order was duly served upon the defendant's agents who declined to allow inspection and execution of the order and therefore should be committed to civil jail. He cited the case of **HADKINSON VS. HADKINSON ALL ENGLAND REPORTS 1952 VOL 2 page 569**.

In that case the court emphasized the need for every party who is aware of a court order of injunction to obey the same until it is set aside. The Anton Pillar Order is usually given *ex parte* and I would have been obeyed in the 1st instance. The applicant duly complied with the condition and premised the undertaking as to damages which was filed in court even before the order was extracted. It was finally argued that the application for leave was properly before the court as the Attorney General was served and they acknowledged receipt of the application. Since no apology has been offered the court should grant the order.

On the part of the respondent, this application was offered. Reliance was placed on the grounds stated in the body of the notice of motion dated 10th June, 2010, the affidavits of Aashit Swon sworn on 10th June, 2010 and 28th May, 2010.

It was submitted that the power to punish contempt of court is derived from the provisions of the Judicature Act. Which makes reference to section 52 (2) of the Supreme Court of England. It sets and the procedure to be followed before an application for leave can be made, the Ag office should be served with the statement and the affidavit one day before filing of the application.

Mr. Kiangoi, signed that after his clients were served with the order on 20th June, 2010, he perused the court file and did not find any document in the court file showing that the documents were served upon

the Ag as required by the procedure. The affidavit of Nzuki Musyoki which was filed on 14/6/2010 was an afterthought contrived to seal the loophole. In any event the documents served upon the Ag was not the one seeking for leave to institute contempt proceedings.

Regarding the Order of “Anton Pillar” the applicants did not comply with the conditions. They did not serve the respondent with the undertaking. In any event the undertaking is vague it is not sealed with the company seal of the plaintiff,. It is purportedly signed by a director who is nameless and there is no Board resolution to bind the company. Under section 178 and 202 of the Companies Act. the letter head of the company should disclose the name of the director who are not disclosed in this letter. Counsel for the respondent are faulted the citation of Rashmin Kapadia and Doshi in this application. It is clearly stated in the affidavit of service that the documents were served on Josephat Aswani.

Moreover, under the “Anton Pillar Order the applicant was required to enter the premises carry out an inspection and seize the offending materials. The applicants were allowed ingress to the premise, they failed to take any goods because there were none. It is common ground that the applicants were taken round the premise which are occupied by two companies, the applicants were not allowed to take somebody else’s goods. For these counsel urged the court to dismiss the application and direct the matter to proceed for hearing. The above is the summary of the rival submissions for and against two applications. I will analyse the Notice of Motion as well as the matter taken in objection simultaneously.

It is trite that an order for committal for disobedience of a court order has penal consequences, thus a higher standard of prove of service of the order and the penal notice upon the contemnor is required. In this case the order were served upon Josephat Aswani who accepted service and took the applicant who had gone to effect the service round the premises.

These orders were not served upon Rashmin Kapandia and Doshi, there is no evidence to support that the two are Directors of the defendant. I am in agreement with the submission by counsel for the defendant that these two parties were not necessary parties to this application.

Moreover, the applicants were taken round the defendant premises. They were not denied ingress but they found to enforce the “Anton Pillar Order”. There is tremendous doubt in my mind whether the applicants were denied the enforcement of the order or there were no products for seizure as per the order.

Another issue to consider is whether the orders served upon the defendant were complete. The Anton Pillar Order issued on conditions that the applicant should provide an undertaking as to damages for a sum of Ksh. 3,000,000/=. Although the applicant contents that they filed a letter of undertaking in court, I am of the firm view that since the Anton Pillar Order was a conditional one, it should have been served with the undertaking.

I think I need not say more on this application, save that I find it lacks merit and it is hereby dismissed with costs to the respondent.

Ruling read and signed on this 10th Day of January 2011 at Nairobi

MARTHA KOOME.

JUDGE.