



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION - MILIMANI
CIVIL CASE No. 882 of 2010

MARTINAIR AFRICA LIMITEDPLAINTIFF/APPLICANT

VERSUS

MOHAMMAD AKMAL MEHAR T/A MARTINAIR

GLOBAL FREIGHT SERVICESDEFENDANT/RESPONDENT

RULING

The application before the court is brought by a Chamber Summons dated 16th December, 2010 and taken out under **Order XXXIX Rules 1, 2, 3 and 7** of the **Civil Procedure Rules**, and **Section 3A** of the **Civil Procedure Act**. The applicant thereby seeks the following orders:-

1. That pending the hearing and determination of this suit,

the Defendant be restrained whether by itself, its officers, servants or agents or any of them or otherwise howsoever, from doing the following acts or any of them, that is to say:

- a) **Using the name, style or title of “Martinair Global Freight Services” or any other style or name which includes the Plaintiff company’s name or so nearly resembles the Plaintiff’s name.**
- b) **Passing off any of its services as the services of the Plaintiffs under the registered name “Martinair Global Freight Services”.**
- c) **Parting with possession, power custody (other than to the Plaintiffs or its agents) of or in any way altering, defacing or destroying the following articles or any of them: All documents, files, invoices, receipts under the name “Martinair Global Freight Service” which are being passed off as the services of the Plaintiff.**

2. That the costs of this application be awarded to the Plaintiff.

The application is supported by the annexed affidavit of **Bob Bover**, the Applicant’s **Vice President, Cargo Sales Africa**. It is predicated on the grounds that:-

- (i) **The Repondent’s business name is visually and phonetically similar to the Plaintiff’s corporate name.**

- (ii) **The Applicant's customers are likely to associate the Respondent's services as being provided by the Applicant or by the Applicant's licensees hence unfairly free riding on and diluting the Applicant's goodwill and reputation in the Applicant's corporate name.**
- (iii) **The Respondent has previously received a cheque drawn to the order of the Applicant and attempted to encash the same and there is a pending criminal case in relation to that matter.**
- (iv) **During its 19 years of existence, the Applicant has heavily invested in the services offered in its corporate name and has established a goodwill and reputation attached to the services which it supplies.**
- (v) **The Applicant's goodwill and reputation are likely to be eroded by the confusion engendered by the erroneous belief that the Respondent's business or services are those of the Applicant.**
- (vi) **Despite issuing a cease and desist letter to the Respondent, the Respondent has ignored the same thereby necessitating the intervention of this court.**
- (vii) **Unless the Respondent is restrained by an injunction from passing of its trade name as that of the Applicant, the Applicant will suffer irreparable harm, loss and damage.**

The application is also supported by a second affidavit sworn by Peter Mwangela, the Chief Finance Officer of DHL Global Forwarding Kenya Ltd. In that affidavit, Mr. Mwangela avers that his organization uses the Applicant's business called Martinair to transport its customers' merchandise to Europe, and further that the Applicant provides cargo and freight services to DHL. In consideration, payments are made to the Applicant on a monthly basis and the parties have transacted for more than 4 years. Around September, 2009, DHL unearthed a scam involving some of its staff and other people outside the company who had stolen and forged 7 of DHL's cheques. One of those intercepted was for US\$ 165,200 made out in favour of Martinair Global Freight Services, the Respondent herein. Mr. Mwangela avers that DHL had never had any business relationship with the Respondent.

At the oral canvassing of the application, Mrs Opiyo appeared for the Applicant but there was no representation of the Respondent in spite of its having been served by substituted service. Indeed, the Respondent did not file any replying affidavit or grounds of opposition. After considering the pleadings and Mrs. Opiyo's submissions, I find that the issues for determination are whether there is any similarity in the names of the Applicant and the Respondent Companies; if so, whether this is likely to cause confusion; and if so, whether the Applicant should be granted the injunction sought.

It is noteworthy that whereas the Applicant's name is "**Martinair Africa Limited**", the Respondent uses the name of "**Martinair Global Freight Services**". A copy of the Applicant's Certificate of Incorporation shows that it was incorporated on 10th February, 1999. In his supporting affidavit, Mr. Mwangela states that the Respondent was registered in September, 2009. Although there is no evidence in support, the Applicant's Vice President, Bob Bover, attests that the Respondent procured registration of its business name under the **Registration of Business Names Act** on or about 8th September, 2009. That was ten years after the Applicant's incorporation. The first names of both companies are visually and phonetically similar. The spelling and sound of those names are also similar. That similarity is bound to cause confusion to the Applicant's customers as well as to the public at large into thinking that the two businesses are interrelated. As a result, one could easily think that one was dealing with the Applicant whereas in fact and in truth he was dealing with the Respondent.

Consequent upon these observations, I find that the answers to the first two issues lie in the affirmative. There is a similarity in the trade names of the two parties. This similarity is not only likely to cause confusion, but has also led to money intended to be paid to the Applicant being diverted to the Respondent. In that context, the final issue is whether the Applicant should be granted an injunction as prayed. To my mind, the answer is an unqualified "**yes**". Let it suffice to observe that in the case of **EWING v. BUTTERCUP MARGARINE COMPANY LIMITED** [1917 E. 42], it was held that the

court has jurisdiction to restrain a Defendant from using a trade name colourably resembling that of the Plaintiff, if the Defendant's trade name, though innocently adopted, is calculated to deceive either (a) by diverting customers from the Plaintiff to the Defendant, or (b) by occasioning a confusion between the two businesses, e.g. by suggesting that the Defendant's business is an extension, branch, or agency of or otherwise connected with the Plaintiff's business. *Prima facie*, that is exactly what appears to have happened in this case.

For above reasons, I am satisfied that the continued usage by the Respondent of a trade name similar to that of the Applicant may subject the Applicant to suffering irreparable damage, if only because it will not be possible for the Applicant to compute in monetary terms the loss it will suffer. As a result, the Respondent may be unable to compensate the Applicant for the damage that will be suffered between now and the trial and determination of the suit. In sum, I hereby grant prayers 1(a), (b) and (c) of the application by Chamber Summons dated 16th December, 2010 as prayed. As the Respondent did not even bother to enter appearance as an intimation of its intention to defend the suit, it will also bear the costs of this application.

Orders accordingly

DATED and DELIVERED at NAIROBI this 14th day of December, 2011

L. NJAGI
JUDGE