



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 664 of 2009

STRATEGIC INDUSTRIES LIMITED PLAINTIFF

VERSUS

SANA INDUSTRIES COMPANY LTD.....APPLICANTS

RULING

Coram: Mwera J.

M/s Thongori for the Plaintiff

Mrs Ondieki for the Defendant

By the chamber summons dated 25/11/09 which was brought under Order 39 Rule 1, 2, 3, 9 Civil Procedure Rules and Section 3A Civil Procedure Act the plaintiff company sought an injunction against the defendant company:

- 1) That the defendant company with its agents be restrained from defacing or interfering with branding or eventual branding on a wall of a property called Mareba Enterprises Ltd, hereinafter, Mareba, bearing the plaintiff's product brand.

The grounds in the body of the summons stated that the two litigants were business competitors manufacturing synthetic hair products. To market its products, the plaintiff entered into an agreement with Mareba so that it could brand the latter's perimeter wall with its product name – "Darling" along Lungalunga Road, Nairobi.

But then on 15.10.09 the defendant defaced that wall with paints blackening out all the plaintiff's product name and in its place scribbling its own brand – "Angel". The plaintiff's took this to be an unethical practice on the part of the defendant which act was meant to undermine its brand – hence this application for injunction. And that the agreement period in favour of the plaintiff is still running. Then there was a supporting affidavit with annexures. The exhibits included the agreement with Mareba, at a fee for 2 years wef 1-9-09 to advertise the product brand "Darling", on the wall of Mareba. Also exhibited were documents of payment to M/s Maslow's Enterprise, Kenya to put up the brand advertisement on the said wall. There were also annexed two affidavits by people from Mareba and Maslows to authenticate the plaintiff's stated facts, then photographs of the defaced wall with words "Angels" scribbled over. This is what the plaintiff complained of and thus sought this court's intervention.

The replying affidavit sworn by the Administrator of the defendant, began by denying all that was alleged against it but added that early 2009 it expressed an interest to purchase the subject property from Mareba. A letter dated 15/9/09 was exhibited in that regard and that on 13.10.09 Mareba permitted the defendant to brand on the wall of the property its brand for 3 years and

payment was made. But then Mareba disregarded all that and instead authorized the plaintiff to brand the wall as claimed. However, all the 3 parties entered into some pact to compensate the plaintiff. But then the defendant later learned that the plaintiff's branding had been defaced and a report made to the police. The defendant's staff denied executing such acts and police investigations were still going on. To the defendants, this suit is meant to harass it even as criminal investigations were still under way. And finally that the contract between the plaintiff and Mareba was inadmissible in evidence because no stamp duty had been paid on it.

Both sides submitted. On behalf of the plaintiff it was said that with the earlier agreement of 31.7.09 with Mareba to use the wall for advertising its product, and then along the way in September/October 2009, the defendant coming along also to advertise on the same wall, it could not be doubted that its agents did the defacing complained of. And that Mareba had supported the plaintiff's case even at the police station.

It was further submitted that the damages resulting from the defacing acts would be difficult to quantify and the balance of convenience tipped in favour of the plaintiff who had not only taken possession but also done the needful advertisement after the arrangements/payments.

On its part the defendant responded by submissions which were not signed or dated, that the plaintiff had quantified damages allegedly suffered and pleaded the same as special damages – sh. 575,734/= . It denied the alleged acts of defacing. That the land or wall in issue belonged to Mareba – and not the plaintiff. Mareba was not a party to these proceedings and thus the plaintiff had no locus standi to sue. In any event the plaintiff had not established that indeed the defacing was done by the agents of the defendant. And it had quantified its loss/damage. It did not deserve the injunction and has in fact not even undertaken as to damages in the event its case failed.

From all the above it is not in dispute that the plaintiff and Mareba entered in the agreement of branding on the latter's perimeter wall on 31.7.09. If that agreement was not duly stamped nonetheless it bound the two parties. The plaintiff is not seeking that it bind the defendant also. And the defendant itself similarly exhibited the communication of 1.9.09 desiring to purchase the Mareba property concerned with a note of 13.10.09 alluding to:

“..... as per agreement on 13th October 2009,”

between itself and Mareba to advertise on the same wall. This too did not have stamp duty assessed and paid! Yet it admits that Mareba apparently executed 2 agreements each with either of the litigants to advertise on its (Mareba) wall.

In the circumstances of this case even as it does not squarely fall within the ambit of 039 Civil Procedure Rules, at this juncture this court is of the mind that the plaintiff was the first to secure rights to advertise on the subject wall. For whatever reason Mareba (not a party here) gave similar opportunity to the defendant later. Then the defacing took place with the defendant's brand name - “Angel” being scribbled on the wall in issue. The defendant denies doing that, though, and these are neighbouring and apparently serious (or is it bitter?) business competitors. As for now the plaintiff gets the orders sought. It will undertake in writing as to damages although this court wonders, for what since the defendant is denying the act complained of. Perhaps it means getting damages from Mareba (not a party here) who agreed and got paid for the same wall advertisement when it had earlier given the same rights to the plaintiff. For now the plaintiff's earlier rights are preserved until this suit is finally determined or further court orders.

Orders accordingly 9.3.10.

Delivered on 9.3.10

J. W. MWERA

JUDGE