



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

Civil Suit 653 of 2009

AVENUE SERVICE STATION (1977) LTD	1ST PLAINTIFF
CENTRAL RENT-A-CAR	2ND PLAINTIFF
EXECUTIVE RENTAL LIMTIED	3RD PLAINTIFF
WIGA CAR HIRE AND TOURS LIMITED	4TH PLAINTIFF
PLATIUNUM CAR HIRE AND TOURS LIMITED	5TH PLAINTIFF
ALPHA WHISKY LIMTIED (T/A CONCORDE CAR HIRE)	6TH PLAINTIFF
APOLLO TOURS AND TRAVEL LIMITED	7TH PLAINTIFF
MARKET SERVICE STATION	8TH PLAINTIFF
CROWN TORUS AND CAR HIRE LIMTIED	9TH PLAINTIFF
GLORY RENT A CAR HIRE LIMITED	10TH PLAINTIFF

VERSUS

MUSIC COPYRIGHT SOCIETY OF KENYA	1ST DEFENDANT
KENYA COPYRIGHT BOARD	2ND DEFENDANT
KENYA ASSOCIATION OF MUSIC PRODUCERS	3RD DEFENDANT

RULING

1. A brief background of the facts of this matter is that the applicants filed a chamber summons on 7th September 2009, seeking for an order that the defendants either by themselves or Agents be restrained from enforcing a notice dated 18th September 2008, in which they were demanding license fees from the plaintiffs. That application was filed under certificate of urgency. The matter was certified as urgent on 8th February 2009 and it was set down for inter parties hearing on 1st October 2009. On that day, **M/s Kibicho**, counsel for the plaintiff informed the court that there was a meeting with defendants, to negotiate a settlement whereby some arrangements were reached but the defendants reneged on their promises. She requested the matter be stood over to 17th November 2009.

2. The matter came up for hearing before **Justice Kimaru** on 13th October 2009, and it was ordered that status quo be maintained until the 17th November 2009. The matter kept coming in court and each time the court was informed there were negotiations for settlement. However on **11th February 2010** the plaintiffs filed another application by way of Chamber Summons seeking for the following orders.

“2. That orders in the nature of a mandatory injunction do issue compelling the defendants to restore the various Plaintiffs including the 3rd, 5th, 7th, 8th and 10th plaintiffs to their position prior to the Defendant’s disobedience of the orders of this court issued by the Hon. Kimaru, J on 13th October 2009 requiring that parties maintain the status quo and that the said Plaintiff’s positions be restored before the Defendants can be heard further by this Honorable Court.

3. That all the amounts paid by the Plaintiffs as a result of the defendant’s disobedience of the order of this court be paid to the Plaintiffs immediately.

4. That in the alternative, officers of the Defendants namely MR. MAURICE OKOTH, (General Manager), MR. RICHARD SERETI (Legal Department), MR. PIUS OCHIENG’ and MRS BEATRICE AWUOR (Arresting Officer) be arrested and detained in prison.

5. That in the alternative, the property of the Defendants and of the said officers of the Defendants MR. MAURICE OKOTH (General Manager) MR. RICHARD SERETI (Legal Department), MR. PIUS OCHIENG’ and MRS. BEATRICE AWUOR (Arresting Officers be attached as security for damages.

6. That general damages be assessed and paid to the Plaintiffs and to Mr. Josephat Mwangi Nzyoka.

7. That pending the interparties hearing of this application the defendants by their agents, employees and/or in any way be restrained from demanding license fees, harassing, intimidating and/or in any way interfering with the Plaintiffs’ car hire business including but not restricted the use of police force.

8. That pending the interparties hearing of this application the defendants by their agents, employees and/or in any way interfering with the Plaintiffs’ car hire business including but not restricted the use of police force.

9. That the costs of this application be borne by the Defendants.”

3. This application is supported by the affidavit of **Anne Wambui Kibicho** sworn on 11th February 2010 as well as two other affidavits by the plaintiffs Agents who claim to have been harassed by the plaintiffs contrary to the court order. According to **M/s Kibicho** the order to maintain the status quo was entered into by consent pending the hearing of the application dated

3rd September 2009. The order was made in the presence of counsel for the defendants. The meaning of the order was that the defendants would not continue to harass or intimidate the plaintiffs car hire business in the manner complained of in the application.

4. Counsel gave a chronology of events of how the plaintiff's employees were harassed by the defendants. Their motor vehicles were impounded on the grounds that they had not taken out a license under the Copyright Act. One of the drivers of the plaintiff was arrested and charged before the Chief Magistrate's Court in Makadara. He was charged with the offence of infringement of Copy right and music works contrary to Section 38(2) of the Copy Right Act. He pleaded guilty and was fined Ksh.50,000/- OR in default one year imprisonment. Counsel submitted that the defendants actions in demanding for license fees was an fragrant disobedience of the order made by **Justice Kimaru** on 13th October 2009 and 17th November 2009. Counsel also relied on the supporting affidavits of **Joseph Nzioka Mwangi** sworn on 11th February 2010 and **Nadin Balwant Singh**.

5. Although the respondents filed grounds of opposition there was no replying affidavit was filed to controvert the facts stated in the supporting affidavit. Moreover the law is clear regarding a party who disobeys a court order. Counsel made reference of the following decisions:-

HCCC NO. 4522 OF 1992 THE RIPPLES LIMITED VS KAMAU MUCUHA;

CELLULANT KENYA LTD V MUSIC COPYRIGHT SOCIETY OF KENYA LTD [2009]

eKLR;

HADKINSON V HADKINSON 1952 ALL ENGLAND LAW REPORTS VOL.2

6. On the part of the defendants, the 1st and 3rd defendants filed grounds of opposition but for some UN explained reasons they did not attend the hearing. **Mr. Sigai** for the 2nd defendant submitted that his clients are a State Corporation established by a statute. Their responsibility is to license organizations representing artists groups. It is in that exercise of their statutory mandate; they licensed the 1st defendant to represent musicians. There are no remedies sought against the 2nd defendant. The 1st and 3rd defendants were not acting as servants or agents of the 2nd defendant. The 2nd defendant wrote a letter to the 1st and 3rd defendants indicating their understanding of the ORDER of status **quo**. However the orders sought in the application dated 11th February 2010 does not affect the 2nd defendant.

7. This application as I understand it, seeks for mandatory orders for restitution of the monies paid by the plaintiffs to the defendants in the face of an order requiring the maintenance of **STATUS QUO**. The application also seeks for the persons named under paragraph 4 therein to be arrested and detained in prison and other orders with far reaching consequences. In a nutshell, this is also an

application for committal to civil jail of the persons named under paragraph 4 of the application. Under **Order 39 rule 2 of the Civil Procedure Rules** the court may punish a party for contempt:

“In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty to such disobedience or breach to be attached, and not exceeding six months unless in the meantime the court directs his release.”

8. The order issued by **Kimaru J** was for the parties to maintain **status quo**. What constituted that status quo was not explained. For a court to punish a party for contempt of a court order there must be evidence of disobedience by the party of the court order. There must also be proof that the party was served with the order and also a penal notice giving the consequences for disobedience of the court order. I have encountered several problems with this application dated 11th February 2010. Firstly, there is no evidence that the order **of status quo** (whatever it was) was served upon the defendants together with the penal notice. There is no affidavit of service to demonstrate that the order was served. The affidavit on service on record which was sworn by **Richard Maina Wachira** on 16th February 2010 shows the chamber summons dated 11th February 2010 was served upon the defendants and the cited contemnors. Moreover the parties cited as the contemnors were not parties to the suit when the orders were issued.

9. Secondly, this application presents difficulties as it seeks for mandatory orders by way of chamber summons. It is now a settled principle that an application seeking for mandatory orders of injunction can only be brought to court as provided for under **Order 50** of the **Civil Procedure Rules** which is by way of a notice of motion. See the persuasive case of **Morris & Co Ltd vs. Kenya Commercial Bank & Another [2003] eKLR Vol.2) Ringera J**, (as he then was) held that:

“where the Plaintiff sought both interlocutory prohibitive and mandatory injunctions it was incumbent on him to do so in a motion on notice, for under our procedural law it is established that where a matter partly falls within the scope of a summons in chambers and partly within a motion on notice, the large procedure, namely, the motion, is to be invoked.”

10. I think I need not say more about this application, save that it is incompetent and lacks merit, it is hereby dismissed. Costs will be in the cause.

RULING READ AND SIGNED ON 21ST MAY 2010 AT NAIROBI.

**M. K. KOOME
JUDGE**