



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

Civil Case 390 of 2008

STRATEGIC INDUSTRIES LIMITED PLAINTIFF
VERSUS
SANA INDUSTRIES COMPANY LIMITED DEFENDANT

RULING

1. On 6th May 2010 **Kimaru J** delivered a ruling and granted the following orders:

(i) THAT the defendant be and is hereby restrained whether by itself, its directors, employees, agents and/or servants or any body or entity whatsoever deriving authority under it form manufacturing, distributing and/or selling products bearing the Plaintiff's trade mark 'ABUJA LINES' or the name "ABUJA" or any other mark which is similar to the plaintiff's registered trade mark number 61515 until the hearing and determination of this suit.

(ii) THAT until the hearing and determination of this suit or until further orders of the court, the defendant whether by itself, its directors, employees, agents and/or servants or any body or entity whatsoever deriving authority under it BE AND IS HEREBY restrained by injunction from dealing in, manufacturing, distributing and/or selling hair additions, hair pieces and braids bearing the trade names "Abuja" or "Abuja short" or "Abuja long" or any other name, mark or impression resembling or bearing close resemblance to the plaintiff's trade mark "Abuja Lines" registered at Trade Mark number 61515.

iii) THAT the plaintiff be and is hereby allowed by itself or agents to access the defendant's premises to take inventory of all the products bearing the names "Abuja short" and "Abuja long" and to take away such samples as may be until the hearing and determination of this suit.

(iv) THAT the plaintiff shall have the costs of this application."

The plaintiff filed a chamber summons under Order 39 Rule 2(2) of the Civil Procedure Rules, seeking for one Fadhun Mohamed, a director of the defendant company, be detained in prison for a term of six (6) months. Secondly, the property of the defendant be attached by an order of this court or the defendant be fined accordingly.

2. While this application was pending, the defendant also filed a notice of motion under **Section 5 of the Judicature Act and order 52 Rule 2 of the Supreme Court of England**

Rules seeking for orders that **Fuad Allie Sasso** a director of the plaintiff be committed to civil jail for a maximum period of six months for contemptuously eroding the authority and dignity of this court. Secondly, the court does commit **Mr. Joshua Nyawara**, an advocate representing the plaintiff to prison for a maximum period of six months for deliberately eroding the authority and dignity of this court.

3. These applications were argued simultaneously and this ruling will determine both of them. The first application, by the defendant is based on the grounds that the defendant has flagrantly and contemptuously disobeyed the order of this court by refusing the plaintiff to access its premises to enforce the order and also by questioning the credibility of the order of the court. This application is supported by the affidavit of **Gradus Oluoch Adis** sworn on 28th May 2010. It is contended that on 21st May 2010, the deponent in the company of several other people and a process server served the order upon Ms Fadhlun Mohamed a director of the defendant. She signed and rubber stamped the order in acknowledgment. The deponent and the process server asked to be allowed into the premises of the defendant to take samples of the stocks as per the court order but he was sternly denied access to the factory.

4. Following this denial, counsel for the plaintiff wrote to the defendant requesting that they should allow the enforcement of the order. On 24th May 2010, Mr. Nyawara accompanied the process server and requested to be allowed to gain access to the premises of the defendant, for the enforcement of the order but they were denied access by the defendant's director. This exchange between the Advocate, in the company of the process server and the Director of the defendant was captured on video camera and the clip was played in court. According to Mr. Nyawara learned counsel for the plaintiff, the defendant was restrained from infringing upon the plaintiff's Trade mark called "**Abuja**". The court also directed the plaintiff be allowed to take an inventory of the goods and to preserve the offending material otherwise known as the **Aton Pillar orders**.

5. The plaintiff contends that the order with the penal notice was served upon the director of the defendant. They were notified of the consequences of disobeying a court order but the defendant adamantly refused to allow the plaintiff's advocates access to the premises. The plaintiff's advocate also addressed a letter to the defendant notifying them of the consequences of disobeying a court order but that letter was never acknowledged. The footage of this episode when the order was served upon the director of the defendant depicts a defiant defendant who questioned the authority and legality of the court order. This undermines the dignity and

authority of this court. Counsel urged the court to find the defendant is in contempt of the court order and commit the director of the defendant Ms Fadhlun Mohammed to Civil jail.

6. In response to the notice of motion seeking the committal of Fuad Allie Sasso and Mr. Nyawara Advocate, he relied on his own affidavit sworn on 11th June 2010. He submitted that after an attempt on 21st May 2010 and 25th May 2010 was made by the plaintiff to enforce the order of the court was unsuccessful, the plaintiff was frustrated and sought the advise of Mr. Nyawara on how to mitigate the loses in view of the continued breach by the defendant. Mr. Nyawara advised the plaintiff to publish the court order. He prepared the footnote noted as (N/B) which according to Mr. Nyawara is like a penal notice which appeared on the advertisement. It is not until the 8th June 2010, when it was brought to his attention that the advertisement carried by the plaintiff was construed as contempt of this court order.

7. Apart from the words imposed on the order there was a picture of the packaging impression of the **“ABUJA Long and Short”** brand . Mr. Nyawara apologized for this oversight. He confirmed that he tirelessly pursued the orders made by Kimaru J for one year and there is no way he could undermine the authority of the court. He submitted that he did not authorize the printing of the picture which was done by the plaintiff without his knowledge. The plaintiff's did not intend to undermine the authority of this court they were merely trying to emphasize the product called **ABUJA**. Mr. Oluoch also apologized to the court if the picture on the court order was construed as a commercial advertisement. He regretted the disrespect and sought for an apology on behalf of the plaintiff.

8. On the part of the defendant the plaintiff's application was opposed; the footage captured under the CD was played in court, Mrs. Ondieki, learned counsel for the defendant urged the court to find that Ms Fadhlun Mohammed the director of the defendant was visibly unwell. She was suffering from serious bout of flu and indeed she was on her way to hospital. That is when she was served with **the Anton Piller** order requiring the plaintiff to gain access to the defendant's factory with a view of taking an inventory. Ms. Fadhlun Mohamed explained in her replying affidavit that when the plaintiff tried to execute the **Anton Piller** order, they visited her premises at 3.30 p.m. without a court bailiff. The respondent told them to notify her lawyer and arrange a mutually convenient time and date when the inspection could be carried out. They went back on 24th May 2010 with a lawyer and a police officer when the respondent told them that she was unwell and requested that it will not be prudent to inspect her premises

without the presence of her lawyers. She gave the telephone number of her lawyers to Mr. Nyawara and advised him to call Mrs. Ondieki. Counsel submitted that it was wrong for the plaintiff to attempt to execute the order without a court bailiff. She confirmed that the defendant is willing to have the order executed in an orderly manner.

9. On the notice of motion dated 9th June 2010, counsel submitted that the advertisement which carried the order was prominently published in the Daily Nation and the Standard Newspapers of 2nd June 2010. It purportedly advised members of the public of the court order as a commercial advertisement. That misled the members of the public, the footnote drawn by Mr. Nyawara was a usurpation of the Judicial powers because that is not the order that was issued by the Deputy Registrar. The picture imposed on the order was also not issued by the court. The incorporation of the footnote and the picture was to distort the court order which was a mischievous and deliberate distortion of the court order. The impression created to the members of the public is that the court removed itself from the seat of judgment and became party to advertising the plaintiff's products against the defendant.

10. Further the impression created by the advertisement was that anybody buying the products from the defendant was committing contempt against the orders of the court. Counsel urged the court to find that no apology has been offered by Mr. Nyawara to redeem the dignity and the authority of the court especially because this was committed by an officer of the court. The advertisement brought the judiciary into disrepute. The directors of the plaintiff have not offered any apology and counsel cannot purport to apologize on their behalf.

11. I will analyze the applications seriatim, beginning with the notice of motion dated 25th May 2010 which is brought under the provisions of order 39 Rule 4 of the Civil Procedure Rules. The court is asked to determine whether the defendant committed contempt of court by disobeying a court order. Firstly, the defendant does not deny that she was served with the court order which was first served on 21st and the second time on 24th of May 2010. The episode of the attempt to serve and implement the order on 24th May 2010 was also captured on video camera and it was played by consent of both parties before the court. The elements to consider when dealing with contempt of court are well settled in a long line of authorities by the Court of Appeal. The case of **Mutitika v Baharini Farm Ltd [1985] KLR** in addition to setting out what constitutes contempt of court also set out the standard of proof in contempt of court proceedings. The court inter-alia made the following order:-

“A person one, who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.

12. An act in contempt of court undermines the authority of the court and if allowed to persist erodes the rule of law which in effect is replaced by the rule of the jungle. That is why the court is given powers to punish for contempt. See the English case of **Hadkinson v Hadkinson ALL**

England Reports Vol.2 1952 page 569 where it was held:-

“It was the plain and unqualified obligations of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged on its due observance, for such an order was made in the interest of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction; in the present case the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction”.

13. It is trite that an order of the court must be obeyed with utmost obedience. Disobedience of a court order is taken seriously. The court is the custodian and guardian of the law. Thus disobedience of a court order strikes at the very root of the rule of the law. It undermines the authority of the court and also the rule of the law which would otherwise allow the rule of the jungle to reign in place of the rule of the law. The courts have always punished swiftly and severely persons or bodies found to have willfully disobeyed the court orders.

14. The defendant through its director Ms Fadhulun Mohamed was served with a court order together with a penal notice. The response the defendant gives for failing to obey the court order is one, it was not served in good time, she needed to notify her lawyers and she refused its implementation because it was not served by a court bailiff but by a process server. It is common ground that on 24th when the order was served with an intention of enforcing it, this was done by an Advocate, an officer of the court who is supposed to take an inventory. The video footage shows M/s Mohammed adamantly refusing the execution of the court order and

questioning the legality of the order which she claims was not even issued after a full hearing. I do not know what that means. The defendant ought to have obeyed the court order and if she had issues with its legality she ought to have filed an application in court to challenge it.

15. After considering the replying affidavit and watching the video footage that captured the service of the court order, I am satisfied that the defendant defied the court orders through its director Ms Fadhurun Mohammed. That defiance undermined the dignity and the authority of the court that issued the orders. For that reasons I find the defendant is in contempt of the court order which was served upon Fadhulun Momahed. She is hereby ordered to pay a fine of Kenya shillings three hundred thousand (Ksh.300,000/-) and in default to committed to civil jail for a period of three months. The defendant is also ordered to pay a fine of Kenya shillings three hundred thousand (Ksh.300,000/-) for failing to comply with the court order within thirty (30) days. In default attachment of the defendant's property be effected in accordance with the Civil Procedure Rules. The defendant will also pay the costs of this application.

16. On the defendant's application which is brought under the Supreme Court of England Rules it is obvious from the order that was advertised by the plaintiff on the Daily Nation and the Standard carried footage and was decorated with a picture of the plaintiff's products which were not part of the court order. This was a deliberate distortion of the court order which was capable of misleading the public. The court is not in the business of advertising products of the parties and this kind of advertisement is to be deprecated. The plaintiff explained that after they desperately tried to execute the order by **Kimaru J** and the defendants adamantly declined to allow them access to implement the **Anton Piller Orders**, they decide to notify the public through advertising the court order. Mr. Nyawara apologies for drawing the words stated in the footage as follows:

“The High Court sitting at Milimani Commercial Courts issued the above orders. The defendant which is associated with the products named “ANGEL” has been ordered to stop manufacturing, selling distributing or in any way whatsoever dealing in hair products named “ABUJA” or its derivatives until the hearing and determination of the suit. TAKE NOTICE therefore that any person breaching the Order by selling handling, manufacturing and/or distributing any hair products chastened “ABUJA” or its derivatives, other than from Strategic Industries Limited, shall be guilty of contempt of Court.

***Drawn by:
Nyawara & Co. Advocates, Old Mutual Building
2nd Floor, Room 203,
P.O. Box 15839-00100, NAIROBI”***

17. Mr. Nyawara apologized for advising his client to include the footnote. He also apologized for his client who imposed the picture of their products on the court order. As far as the apology by Mr. Nyawara is concerned, this court will accept it but admonish Mr. Nyawara, an Advocate of the High Court to boot, for lack of proper judgment. As regards the apology on behalf of the plaintiff offered by Mr. Nyawara, I find it inadequate. There is no apology by the plaintiff themselves. I find the plaintiffs are in contempt of the court order by purporting to decorate a court order with their products. This advertisement depicted the court as part of the plaintiff's products. The plaintiff is ordered to publish an appropriate apology bearing the same prominence in the two daily newspapers. The words of that apology should be approved by the Deputy Registrar; this should be done within 30 days. In addition, the plaintiff is also ordered to pay a fine of Kenya shillings one hundred thousand (Ksh.100,000/-). , failure to which the plaintiff's assets may be attached in accordance with the Civil Procedure Rules.

RULING READ AND SIGNED ON 23RD JULY 2010 AT NAIROBI.

M.K. KOOME
JUDGE