



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 88 of 2009

MICHELL COTTS FREIGHT KENYA LTD.....PLAINTIFF

VERSUS

MOHAMED SWALE HASSAN ALI.....DEFENDANT

RULING

This is an application expressed to have been brought under the provisions of Order XXXIX Rule 4, Order L Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The application is by the defendant and it seeks one primary order namely that the order of injunction granted on 2nd September, 2009 be discharged. The application is predicated upon one main ground namely that the plaintiff has not met the conditions upon which the injunction was given.

The application is supported by an affidavit of the defendant sworn on 21st June, 2010. The affidavit elaborates the above ground. The application is opposed and there is an affidavit in opposition sworn by one, Mark Mbua, the plaintiff's Finance Manager. It is deponed in the affidavit, *inter alia*, that the terms of the injunction have been complied with.

The application was canvassed before me on 5th July, 2010 by Mr. Asige, and Mr. Munyao, Learned counsel for the defendant and Mr. Omondi, Learned counsel for the plaintiff. Counsel reiterated their clients' stand-points taken in their respective affidavits.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. On 2nd September, 2009, I granted to the plaintiff a temporary injunction restraining the defendant by himself, agents, servants, representatives or otherwise howsoever, from entering into any agreement for sale, transferring, sub-letting, leasing, charging, alienating or making any disposition over the suit property pending the hearing and disposal of this suit. The injunction was granted on the condition that the plaintiff files an undertaking as to damages within five (5) days from the 2nd September, 2009. The undertaking was to be under the seal of the plaintiff. The said undertaking was to be fortified by a separate and similar undertaking under oath by Daniel K. Tanui, the plaintiff's Managing Director. In the event, the record shows that undertakings were filed by both the plaintiff and Mr. Tanui on 8th September, 2009. The defendant contends that that was too late. The plaintiff has demonstrated that 5th and 6th September, 2009 fell on a Saturday and a Sunday respectively. To my mind therefore the last day to file the undertakings was 9th September, 2009. I therefore find and hold that the undertakings were filed within the period appointed in the order of 2nd September, 2009.

The defendant further complains that, the undertaking filed by Mr. Daniel K. Tanui was not in compliance with the order of 2nd September, 2009. The material part of the said undertaking reads as follows:-

“4. That I hereby undertake that in the event that upon the hearing and determination of the suit herein it is found that MITCHELL COTTS FREIGHT KENYA LIMITED of Post Office Box Number 42485-

80100, Mombasa being the plaintiff herein was not entitled to the interlocutory injunction granted to it by this Honourable Court on 2nd September, 2009, MITCHELL COTTS FREIGHT KENYA LIMITED will pay to the defendant such amount in damages as the court may determine upon inquiry as being sufficient to make amends for the loss that will have been shown to have been suffered by the said defendant by reason of the grant of such orders.”

It is plain beyond peradventure that Mr. Daniel K. Tanui in the said undertaking does not undertake to pay anything. All he states in the said document is that the plaintiff will pay the damages in the event that it is found at the trial that the injunction ought not to have been issued. He makes no separate undertaking as ordered. In the premises the defendant's complaint is not frivolous. Daniel K. Tanui, the plaintiff's Managing Director has not filed an undertaking as to damages as ordered. It is clear therefore that one of the conditions for which the temporary injunction was granted has not been met. On the failure to file an appropriate undertaking in terms of the order of 2nd September, 2009 the injunction stood discharged at the expiry of five (5) days after the order of 2nd September, 2009.

In the end the defendant's application dated 21st June, 2010 and filed on the same date is allowed in terms of prayer 2 thereof.

The defendant shall have the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 30TH DAY OF AUGUST 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Munyao for the Applicant and Mr. Omondi for the Respondent.

F. AZANGALALA

JUDGE

30TH AUGUST 2010