



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MALINDI
CIVIL SUIT 48 OF 2009

NOTTING HILL LIMITED.....PLAINTIFF

VERSUS

HAJILA BAJILA GUYO1ST DEFENDANT

WESTERN SUNSHINE CO. LTD.....2ND DEFENDANT

MAISHA BORA LTD.....3RD DEFENDANT

RULING

This matter came up for mention on 21-5-09 for purposes of taking a hearing date for the chamber summons application dated 7-5-09 wherein the applicant had obtained *ex parte* injunction orders on 8-5-09. The respondents objected to these orders being extended beyond the initial fourteen days given *ex parte* on grounds that the said orders were served in violation of Order XXXIX Rule 3(3)

That provision states that:

“In any case where the court grants an *ex parte* injunction, the applicant shall within three days from the date of the order, serve the order, the application and the pleading on the party sought to be restrained”

All the respondents’ counsel stated that they were served beyond three days after obtaining the orders – service of the order was effected on the 1st defendant on 19th May, on 2nd defendant on 11th May and 3rd defendant on 15th May – obviously that was outside the three days envisaged by Order XXXIX Rule 3(3). All the three counsels for respondents submit that Rule 3 (3) is couched in mandatory terms and gives no room or discretion or any other form of indulgence. Mr. Mouko disagrees, arguing that the provision cannot be mandatory as it does not carry any sanctions with it. To my mind in legal parlance and jurisprudence, the word **shall** denotes a mandatory requirement and is distinct from the word **may**, which gives a party an option or choice. It matters not that no sanction is given, the legal position is that a party must comply with the requirements set out – certainly this was not done – irrespective of whatever explanation the applicant might have. I have been referred to the decision in **Haco Industries Ltd and Anor. V Doshi Ironmongers and Anor. HCCC 108 of 2006** where a similar issue regarding service of *ex parte* injunction orders arose and the court had to consider the date applicable in the order – was it the date when the judge made the order or was it the date when the Deputy Registrar signed it? Hon. Justice

Njagi held that:

“...the date means the date on which the order was granted”

I have keenly read through the reasoning of Hon. Justice Njagi and I concur with Mr. Maosa that the date runs from 7th May 2009 when the orders were given. The consequence then is that since the Orders violated the provisions of Order XXXIX Rule 3 (3) they cannot be given an extended life, as that will be compounding the violation – they therefore expire at their initial given lifespan.

What then for the Applicant? Mr. Mouko states that the need for the injunction was so as to contain the situation where applicant’s interests are at a risk of being greatly compromised. Incidentally there are two other matters related to this one where injunctions have been issued against some of the parties in this suit – one is an injunction in favour of the first respondent against the second and third respondents i.e HCCC No. 12 of 2009.

There is JR Misc. Appl. 31 of 2008 where the applicant is seeking to join as an interested party, but Mr. Mouko explains that if the orders for preserving the property are not given then the applicant will be greatly prejudiced and he urges the court not to allow this by dint of rules of procedure which should not take away the court’s powers under section 3A of the Civil Procedure Act. True section 3A gives this court powers to make orders that would prevent an injustice, but from the multiplicity of injunctions and counter injunctions being obtained in relation to the same property, my perception is that a total circus is being made of the justice system and parties are simply obtaining exparte injunctive orders to back stab each other. I therefore decline to invoke the provisions of section 3A. The exparte orders are hereby discharged and application be listed for hearing on 13-7-09 at 11.00am in Malindi.

Delivered and dated this 26th day of **May 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Kilonzo present

Mr. Mosa absent

Mr. Ghalia present

No appearance for applicant

Court clerk – Sango