



REPUBLIC OF KENYA
HIGH COURT AT NAKURU
CIVIL CASE 231 OF 2009

SAFARI LUXURY SHUTTLE LIMITED.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT

RULING

By Chamber Summons dated 11th August, 2009, the applicant has sought that the respondent be ordered to return its trade licences and release its motor vehicle No.KAB 819C confiscated by the respondent pending the hearing of the suit herein. It has also sought restraining orders to stop the respondent from interfering with the applicant's business. It is the applicant's case that it had previously operated under the name of Safari Luxury Shuttle Ltd. along Kenyatta Lane on Plot No.9/75 before being registered as Safari Luxury Shuttle Ltd. and moving to new office on CIGMA BUSINESS CENTRE along Mburu Gichua Road at the main Nakuru town roundabout.

That while operating along Kenyatta Lane, the respondent had allocated to it two parking slots. The applicant further avers that it applied to and obtained from the respondent, a booking office at their new CIGMA BUSINESS CENTRE offices.

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On 5th August, 2009 the clerk to the respondent went to the applicant's office and took away the trade licence, returned the following day and confiscated motor vehicle KBA 819C which was at the parking.

The respondent has responded to the application maintaining that its action of withdrawing the trade licence and confiscating the motor vehicle were justified. That the two slots allocated to the applicants in their erstwhile offices along Kenyatta Lane were not transferable to CIGMA BUSINESS CENTRE, that the application for trade licence and parking space was granted only in respect of the trade licence; that by parking their motor vehicles at CIGMA BUSINESS CENTRE, the applicant acted in contravention of the Municipal By Laws and the letter of offer/acceptance dated 15th July, 2009; that the applicant's driver has been charged in Nakuru Criminal Case No.121 of 2009, slated for hearing on 4th September, 2009.

I have considered all these averments and hold the following view on the matter. Although not specifically stated in the application, which is expressed to be brought under Order 39 rules 1, 2, 3 and 9 of the Civil Procedure Rules, the first relief sought is infact an order of mandatory injunction. It seeks that the respondent be directed by an order of this court to release the confiscated motor vehicle and restore the withdrawn licence. The applicant is relying on the case of **Locabail International**

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Finance Ltd. V. Agroexport & Others (The Sea Hawk), (1986) 1 All ER 901.

It is now settled on the authority of the above cited case and along line of others that -

- (i) there is a distinction between prohibitory and mandatory injunction
- (ii) there is no general rule of law that final orders (read mandatory) cannot be granted in an interlocutory application
- (iii) a mandatory order can only be granted at an interlocutory stage where there are no serious disputations of fact which can only be resolved after hearing the parties.

Order 39 rules 1 and 2 of the Civil Procedure Rules has been cited, I believe, in relation to prayer 3 of the chamber summons for prohibitory injunction pending the hearing of the suit. I will start with the prayer for mandatory injunction. There is no specific provision under the Civil Procedure Rules or anywhere else for an order of mandatory injunction. Such application therefore involves the exercise of a judicial discretion and ought to have been brought pursuant to sections 3 and 3A of the Civil Procedure Act. Regarding the distinction between a prohibitory and mandatory injunction, the Court of Appeal in a recent

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decision in the case of **Kenya Railways Corporation V. Thomas M. Nguti and 6 others**, Civil Appeal No.210 of 2004 has extensively quoted useful passages from the case of **Shepherd Homes Ltd. V. Sandham** (1971) 1 Ch.340 at P.348. It will suffice for me to quote part of that passage.

“.....if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done, and the plaintiff has at motion, obtained, once and for all, the demolition or destruction that he seeks. Where the injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or continued.....”

Nevertheless, it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually

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strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual; obligation”

Applying these principles to the application before me, there is no doubt that the issues involved are contested. The motor vehicle has been impounded over a case pending before the subordinate court. The issue as to whether or not the applicant had authority or licence to park at the parking from where the motor vehicle was impounded will certainly be the subject of that case. Similarly in this suit, the applicant seek permanent orders against the respondent with regard to its vehicles, which orders can only be granted after hearing the parties. Secondly, regarding the trade licence, the respondent has maintained that the applicant was in violation of the By Laws and the contract between them. That again cannot be resolved from the contested affidavit evidence. The applicant has not, at this stage, persuaded me that it has an exceptionally strong and clear case to deserve the grant of an interlocutory mandatory injunction whose effect is to pre-empt the trial before the subordinate court and to decide definitely the issues in the main suit. For the same reasons, prohibitory injunction is also not available as the applicants have not shown a *prima facie* case.

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In the result the application is dismissed with costs to the respondent.

Dated and Delivered this 25th day of September, 2009 at Nakuru

W. OUKO

JUDGE