

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

Civil Case 540 of 2007

AUTO RESCUE LIMITEDPLAINTIF

VERSUS

AUTO RESCUE LIMITED.....DEFENDANT

RULING

The plaintiff company was registered on 7th November, 2005 whereas the defendant was registered under a similar name on 28th June, 2007. On 26th July, 2007 the plaintiff wrote to the registrar of companies protesting about the continued use of his name by the defendant. And on 14th August, 2007 the Registrar of Companies wrote to the defendant and gave them six weeks to cease using the plaintiff's name failure to which the Registrar shall take the necessary steps towards removing Auto Rescue Limited through registration number C141138 from the Registrar of companies. But the defendant is adamant and has continued using the plaintiff's name.

It is the contention of the plaintiff that as a result of continued use of its name by the defendant after expiry of the six weeks given by the Registrar of Companies, the defendant has unjustly enriched itself from the use of the plaintiff's well known name and goodwill. It is also further contended that the plaintiff has suffered loss and damage and hold the defendant wholly liable for the same and as a result the plaintiff states unless a permanent injunction is issued against the defendant, the defendant intend to continue using and trading the name of the plaintiff, thus confusing the plaintiff's clients and misrepresenting that the defendant is carrying on business of the plaintiff. Based on the above proposition the plaintiff has made an application dated 17th October, 2007 seeking that;

“THAT a temporary injunction be issued restraining the Defendant/Respondent whether by itself, officers, directors, servants and/or it's agents or whomsoever is acting on it's behalf from trading, carrying out business, misrepresenting to the Public or howsoever in any manner dealing under the Plaintiff's/Applicant's name “Auto Rescue Limited” pending the hearing and determination of this suit”.

The reply of the defendant is that it is a stranger to the plaintiff company's existence and he confirms it was registered by the registrar of companies on 28th day of June, 2007 and issued with a certificate of incorporation. It states that on 22nd October, 2007 when the plaintiff's present application was served upon it, the defendant noted that the plaintiff's company was registered and issued with a certificate of incorporation bearing a similar name under registration no.C120377. It also states that having carried out a search it has confirmed that the plaintiff was initially registered as a business name by one **Mohamed Ashraf Sadique**.

I have considered the application and all the relevant documents in support and opposition to the same. It is clear beyond doubt that the plaintiff's company was the first one to be registered and issued with a certificate of registration number C120377. In fact the defendant do admit to the existence of the plaintiff in paragraph 19 of its replying affidavit. The Registrar of companies has also admitted that an error of judgement was made in that the defendant's company was registered under the same name of the plaintiff on 28th June, 2007.

In my humble view the existence of the two companies bearing identical names is likely to cause

confusion among the members of public. The first registration on 7th November, 2005 allocated the name **Auto Rescue Limited** to the plaintiff. I think the subsequent registration of the same name in favour of the defendant is a fundamental error on the part of the registrar of companies. That error has been admitted and acknowledged by the Registrar of Companies and I think that resolves the status and legality of the defendant company. Through a letter dated 14th August, 2007, the Directors of Defendant Company were required to change its name within six weeks from the date of that letter. The Registrar of Companies also intimated to the defendant that its registration as a limited liability company with identical name as that of the plaintiff is contrary to the provisions of section 20 of the Companies Act Cap 486. Section 20(2)(a) states;

“If through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which in the opinion of the registrar, is too likely the name by which a company is previously registered, the first mentioned company may change its name with the sanction of the registrar and if he so directs within six (6) weeks of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow”.

The law guards against double registration and existence of two companies with similar or identical names. The purpose is to protect the owners of the first registered company and the members of the public against confusion and contradiction. It therefore follows that the defendant following directions from the registrar of companies that it was registered wrongly or inadvertently then it must await a full determination of this dispute before it can legitimately trade or carry business under **Auto Rescue Limited**. The plaintiff contends that it has been operational and has managed to get good clientele with substantial goodwill from the time of its registration. It alleges that the defendant by using the plaintiff's name by way of advertising has managed to confuse the plaintiff's client and general public that they are dealing with the plaintiff. That may be justified and that the defendant may reap financial benefits causing substantial loss and damage to plaintiff. In essence the right of the plaintiff's first registration to the name in contest must be respected until the dispute is resolved through an oral hearing of evidence from both parties.

I am therefore satisfied that the plaintiff has disclosed and/or demonstrated the existence of prima facie case with a probability of success at the trial. I am also satisfied that the plaintiff would suffer substantial loss and damages if the defendant is allowed to trade under the name Auto Rescue Limited such loss or damages cannot be quantified and cannot in my view be adequately compensated by way of damages. The balance of convenience tilts in favour of plaintiff as the first registered proprietor of the name in dispute and the fact that the registrar of companies has confirmed the plaintiff's name was wrongly allotted and/or allocated to the directors of the defendant through an inadvertent registration. At the time the defendant was registered as a limited liability company, the plaintiff was in existence for a period of two years. The contention that the plaintiff has invested and managed to bring goodwill and enormous amount of capital may be justified. That is an issue which has to be determined upon hearing of oral evidence from the parties. At this juncture I am satisfied the balance of convenience is in favour of the plaintiff.

In the premises I am minded and persuaded to grant the orders sought which is hereby granted. Costs shall be in the cause.

Dated and delivered at Nairobi this 7th day of April, 2008.

M. A. WARSAME

JUDGE