



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 94 of 2008

ANWAR MAHENDRA PANDYAPLAINTIFF

VERSUS

ALOWIYAH MAHENDRA PANDYA1ST DEFENDANT

BUSINESS FORMS AND SYSTEMS LTD 2ND DEFENDANT

RULING

By a notice of motion dated 7th March, 2008, the defendants seek to have the order granted by the court on **25th February, 2008** discharged. The application is made on the grounds that the order is null and void and that the court lacks jurisdiction to give such an order. The application is supported by an affidavit sworn by the two defendants.

It is contended that the order contravenes **Order XXXIX Rule 3(2)** of the Civil Procedure Rules. Relying on the case of Omega Enterprise (K) Ltd vs. Kenya Tourist Development Corporation & 2 Others, **Civil Appeal No.59 of 1993**, it was submitted that the order being null and void, cannot have any legal effect. The court was urged to exercise powers under **Order XXXIX Rule 4** of the Civil Procedure Rules and set aside the invalid order as the plaintiff has already served the bank with the order thereby having the defendants' accounts frozen.

The plaintiff objects to the application through grounds of opposition filed on **12th March, 2008**, in which it is contended that the application lacks merit, and that it is fatally defective and is an abuse of the process of the court. The plaintiff has also filed a replying affidavit reiterating his position that the defendants' application is mischievous and fatally defective.

The plaintiff's counsel submitted that the application can only be canvassed before the Court of Appeal since it is alleged that the court acted without jurisdiction. It was contended that the application was an afterthought, the parties having appeared before the court on at least two occasions since the making of the order and the defendants not having raised the issue. It was maintained that the application lacks merit as the orders issued were only restraining orders pending the hearing and determination of the application.

From the court record, it is evident that on the **25th February, 2008**, the plaintiff appeared before the court *ex-parte* and had his chamber summons dated **25th February, 2008** certified as urgent. Although the court ordered for the application to be served for *interparte* hearing on the **5th March, 2008**, the court granted "an interim order of injunction in terms of prayer 3 on condition that the plaintiff files within

three days an undertaking as to damages.” Prayer no.3 of the chambers summons stated as follows:

“that this honourable court be pleased to issue a temporary injunction restraining the defendants, by themselves or their servants or agents or otherwise howsoever from drawing or otherwise dealing with the bank account number 0150022002, at Commercial Bank of Africa Ltd, Westlands Branch, Nairobi and/or any other of the 2nd defendant’s bank accounts in any banking or similar institutions within the jurisdiction of this court pending the hearing and determination of this application.”

The extracted order which was duly signed by the Deputy Registrar was in the following terms:

“It is hereby ordered:

1. That the application be and is hereby certified as urgent.
2. That the application to be served for *inter parte* hearing on **5th March, 2008**.
3. That temporary injunction restraining the defendants by themselves, or by their servants, agents, or otherwise howsoever from withdrawing or otherwise dealing with bank account No.015022002 at Commercial Bank of Africa Ltd, Westlands Branch, Nairobi and/or any other of the 2nd Defendant’s bank account in any banking or similar institution within the jurisdiction of this court, pending the hearing and determination **of this suit** on condition the plaintiff files within 3 days an undertaking as to damages.”

It is evident from the above, that the extracted order was not consistent with the order given by the court as the order of the court was for a temporary injunction pending the hearing and determination **“of the application”** and not pending the hearing and determination **“of the suit”** as extracted. To this extent, the order extracted and signed by the Deputy Registrar was a nullity.

Order XXXIX Rule 3 of the Civil Procedure Rules states as follows:

“(1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application *ex parte*.

(2) An *ex parte* injunction may be granted only once for not more than 14 days and shall not be renewable.”

It is apparent that the orders issued on the **25th February, 2008** were issued pursuant to the above rules. This means that the *ex parte* order of injunction could not last for more than 14 days. Indeed, the court ordered for the application to be served and heard *inter partes* on the **5th March, 2008**. If for any reason, the court could not hear and dispose off the application within 14 days, the court had to deal with the issue of temporary injunction by hearing both parties. In this case, it is evident that due to the irregular extraction of the order, the *ex parte* order of injunction granted by the court remained in force for a period far in excess of the 14 days provided under **Order XXXIX Rule 3 (2)** of the Civil Procedure Rules.

The extracted order issued on the 28th February, 2008 was therefore, null and void as it contravened the express provisions of the law and was also inconsistent with the order issued by the court.

Under Order XXXIX Rule 4 of the Civil Procedure Rules any order for an injunction may be discharged or varied or set aside by the court on application by any party dissatisfied with such an order. Contrary to the submissions of the plaintiff’s counsel, the order of interim injunction which was made on **25th February, 2008** was not made without jurisdiction. It is the extracted order issued by the Deputy Registrar on **28th February, 2008**, which was made without jurisdiction. The plaintiff has satisfied this court that there is justification to set aside the interim order of injunction issued *ex parte* on **25th February, 2008** and irregularly extracted on **28th February, 2008**.

The *ex parte* orders having been in force for more than 14 days are not renewable. Accordingly, I allow the plaintiff's application dated **7th March, 2008** and issue orders discharging the *ex parte* orders. Costs of this application to the applicant.

Orders accordingly.

Dated, signed and delivered this 2nd day of April, 2008.

H. M. OKWENGU

JUDGE