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

Civil Case 218 of 2006

GROUP FOUR SECURITY LIMITED……………………PLAINTIFF

-VERSUS-

G4S SECURITY SERVICES (K) LIMTED……….…..….DEFENDANT

R U L I N G

By ruling dated, and delivered on, 13th November, 2006 this court (Azangalala, J.) allowed the Plaintiff's application by chamber summons dated 24th April, 2006 for temporary prohibitory injunctions pending hearing and disposal of the suit. In the suit the Plaintiff has claimed that the Defendant is in breach of two trade marks belonging to it (number 30034 registered in class 12 (Schedule iii) consisting of the words "Group Four Security" - in respect of letter-heads in addition to a logo - and trade mark No. 30035 registered in class 16 (Schedule iii) consisting of the words "Group 4 Security" - in respect of motor vehicles), and sought various reliefs, including an order for an inquiry into damages.

The Defendant has now come to court by notice of motion dated 24th November, 2006, brought under Order 41, rule 4 of the Civil Procedure Rules ("the Rules"), seeking a stay of those temporary injunctions pending hearing and determination of an appeal there from. A stay of further proceedings pending determination of the appeal is also sought. The grounds for the application appearing on the face thereof are essentially:-

1. That the Defendant's appeal, which raises valid grounds with prospects of success, will be rendered nugatory if the orders sought are not granted.

2. That the Defendant will suffer substantial loss and irreparable damage, which will not be limited to financial loss if it is to comply with the temporary injunctions.

3. That further proceedings will substantially increase costs.

There is a lengthy supporting affidavit sworn by one JOSEPH DOWD, who describes himself as the Defendant's Regional Transport Consultant and a senior member of the Defendant's management.

The Plaintiff has opposed the application upon the grounds appearing in the equally lengthy replying affidavit sworn by one NIKLAS BRIAN ROGERS who describes himself as the General Manager of the Plaintiff. Those grounds are, *inter alia:-*

1. That the orders sought are intended to cause more damage to the Plaintiff.

2. That the orders sought would negate the temporary injunctions granted.

3. That the Plaintiff stands to suffer greater loss than the Defendant if the temporary injunctions are stayed.

4. That the Defendant is in any case protected by the undertaking as to damages given by the Plaintiff when granted the temporary injunctions.

5. That the Defendant has brought onto itself the losses it claims it will suffer unless the orders sought are granted.

6. That the Defendant is in essence seeking retrial of the Plaintiff's application for temporary injunctions.

7. That the Defendant has come to court in bad faith and does not deserve the orders sought.

8. That the balance of convenience is in favour of refusing the application.

9. That the application otherwise lacks merit.

I have considered the submissions of the learned counsels appearing, including the many authorities cited. I must state that I heard this application only because Azangalala, J. was not available to hear it as he was on leave. He would have been best-suited to hear the application, having granted the temporary injunctions now sought to be stayed.

I have read the ruling of Azangalala, J. dated 13th November, 2006. I have no intention whatsoever of deciding issues litigated before, and decided by, Azangalala, J. The court has jurisdiction to grant the orders sought under rule 4 of Order 41 aforesaid should the following conditions be met by the Defendant:-

1. There must be an appeal pending (sub-rule (1) of rule 4 aforesaid).

2. There must be sufficient cause (sub-rule (1)).

3. The court must be satisfied that substantial loss may result to the Defendant unless the orders sought are made (sub-rule (2)).

4. The application must have been made without unreasonable delay (sub-rule (2)).

5. The Defendant must give such security as the court might order for the due performance of any order as may ultimately be binding on it (sub-rule (2)).

<u>Is there a pending appeal?</u>

Notice of appeal appears to have been lodged within time as provided by the Court of Appeal Rules. Therefore, under sub-rule (4) of rule 4 aforesaid, an appeal to the Court of Appeal is deemed to have been filed for the purposes of this application.

<u>Is there sufficient cause?</u>

It is the Defendant's case that its intended appeal will be rendered nugatory unless the orders sought are granted. It is its further case that the intended appeal raises valid grounds with good prospects of success. I have seen the intended grounds of appeal set out in paragraph 24 of the supporting affidavit. They all appear to me to be serious and arguable grounds. But would the appeal be rendered nugatory if the present application is refused? I hardly think so. The temporary injunctions were granted pending hearing and determination of the suit. It appears that at least three years might pass before the intended appeal is heard. There is all probability that the suit itself could be heard and determined much sooner than that. If anything, it is hearing of the suit that may render the appeal nugatory. Of course if the

Defendant satisfies the other conditions for grant of stay, sufficient cause shall have been satisfied.

<u>Does the Defendant stand to suffer substantial loss unless the orders sought are granted?</u>

In paragraph 29 of the supporting affidavit the Defendant has quantified its probable monetary loss at an estimated KShs. 60,095,168/00 should it comply with the temporary injunctions. There is an undertaking as to damages by the Plaintiff given upon order of the court. There is no suggestion that the Plaintiff, itself also a substantial company, may not meet these damages. I cannot find in the supporting affidavit any complaint that the Defendant stands to lose any of its present customers or future business on account of compliance with the temporary injunctions. But it is not necessary for the Defendant to demonstrate irreparable loss; substantial loss is sufficient. The term "substantial" is relative. The Defendant's substantial loss must be balanced with the Plaintiff's likely potential loss, should the temporary injunctions be stayed. I will so balance them elsewhere below. I shall therefore give my decision as to whether or not the Defendant has demonstrated substantial loss sufficient to justify the granting of the orders sought elsewhere below in this ruling.

<u>Has the application been made without unreasonable delay?</u>

The temporary injunctions were granted on 13th November, 2006. The present application was filed on 27th November, 2006, within the fourteen (14) days of temporary stay granted on 13th November, 2006. I consider that there has not been any unreasonable delay in bringing the application.

<u>Security</u>

Security will ordinarily be imposed by the court as a condition precedent or antecedent to the grant of stay. Where such security is not given by the applicant, the stay will normally lapse. I will say no more about this.

In the circumstances of this case I must also consider the following issues:-

1. Is the application brought in bad faith?

2. Where does the balance of convenience lie?

3. Will further proceedings substantially increase the costs?

<u>Is the application brought in bad faith?</u>

The Defendant was entitled to bring the application to try and safeguard its interests. The fact that if the application is granted, it may result in grave losses to the Plaintiff, does not of itself demonstrate bad faith. It will be the decision of the court and not the Defendant's to grant or refuse the application. I therefore do not find any bad faith on the part of the Defendant in bringing the application.

<u>Where does the balance of convenience lie?</u>

Azangalala, J. in his ruling said as follows, *inter alia:-*

"-----*The Plaintiff's apprehension that it will suffer irreparable loss and damage unless the Defendant is restrained is not all together without basis. In my view actual loss need not be proved at this stage. In* Pharmaceutical Manufacturing Company –vs- Novelty Manufacturing Limited: HCCC No. 746 of 1998 (UR), *Ringera J., as he then was, observed as follows at page 14 of his judgment:*

'*Registration of a trademark confers the right to exclusive use of the mark. Infringement of the trade mark is a tort of strict liability. Intention and motive are irrelevant considerations. And as the right is a statutory one, acquiescence cannot constitute an estoppel or any other defence which the statute itself does not recognize.'…….*"

Azangalala, J. was alive to the fact that the Plaintiff sought in the plaint the same prayers as in the application, *inter alia*, and was quick to add that in finding that the Plaintiff had established a *prima facie* case with a probability of success and had demonstrated that it stood to suffer irreparable loss, it did not amount to a determination of the suit at that interlocutory stage. The main thing here is that Azangalala J. found that the Plaintiff might suffer irreparable loss unless the temporary injunctions sought were granted. That irreparable loss is certainly a much more serious thing than the substantial loss that the Defendant might suffer unless the temporary injunctions are stayed. It is deponed in the replying affidavit that the Plaintiff will not only loose financially, but will also loose goodwill, clientele, and the market control that it now enjoys and there will be great confusion as between the two companies. It is further deponed that the Plaintiff might lose its corporate identity to the Defendant before its suit is heard. I accept all these as distinct possibilities with high probability. On the other hand, the injury that the Defendant might suffer is readily quantifiable, and has in fact been quantified, albeit a large sum of money. Clearly, the balance of convenience tilts in favour of the Plaintiff.

<u>Will further proceedings substantially increase the costs?</u>

I have already observed that it is probable that the suit herein may be heard and determined before the Defendant's intended appeal is heard. In that event, the respective rights and obligations of the parties in the suit will have been finally adjudicated, subject of course to the right of appeal. It would then be unnecessary to prosecute the Defendant's intended appeal. All that can only reduce rather than increase costs. I therefore do not accept that further proceedings in this suit will substantially increase costs. On the contrary, it can only reduce them.

Having decided as I have on all the matters set out above, I do not find that there is sufficient cause to grant the stays sought. I decline to exercise my discretion in favour of the Defendant. In the event, I will refuse the application. It is hereby dismissed with costs to the Plaintiff. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JANUARY, 2007.

H.P.G. WAWERU

<u>JUDGE</u>

DELIVERED THIS 26TH DAY OF JANUARY, 2007.