



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT 122 & 119 OF 2006

JOSEPH WAINAINA IRAYA

T/A QUEEN CHIC INN PLAINTIFF

VERSUS

H. E. DANIEL ARAP MOI 1ST DEFENDANT

SHADRACK NGUGI KAMAU

T/A BLACKIE AUTO SPARES..... 2ND DEFENDANT

RULING / ORDERS

I have considered the request by the Second Defendant's Counsel for dismissal of the application herein on the ground of non-attendance by the Applicant's Counsel, Mr. Ngigi Mbugua in Court. This Court is truly taken aback by the absence and non-attendance of the said Counsel in Court.

The Applicants through Counsel came to this Court under a certificate of urgency and after very persuasive arguments, convinced the Court that the matter should be certified as urgent. Despite this Court's express and clear decision that, this Court did not have the right or jurisdiction to grant Interim Injunctive Orders pending appeal after dismissal of an application under Order 39 of the Civil Procedure Rules, this Court went ahead to grant Interim Orders pending the inter partes hearing today. The Applicant's Counsel had cited the Court of Appeal decision in MADHU PAPER INTERNATIONAL LTD –V- KERR (1985) KLR 840 and I found obliged to reconsider my earlier view.

The matter was to be heard today on merit. In the absence of the Applicant's Counsel and considering that once again the Applicant has enjoyed ex parte orders at the expense of the Second Defendant, I do

hereby dismiss the application dated 25th January, 2007 with costs to the 1st Defendant/Respondent.

In case that it is possible that I have not exercised the Court's discretion and power properly, and had I considered the application on its merits as suggested by Mr. Karira Advocate for the 2nd Respondent, irrespective of the absence of the Applicant's Counsel, I would have held as follows:-

I have considered the application on record, the supportive submissions by Mr. Karira for the 2nd Defendant, and the grounds of opposition.

I have also taken into account the submissions by all Counsel during the hearing of the oral application for interim orders pending appeal. This Court has already dismissed the application for Interlocutory Injunction under the provisions of Order 39 of the Civil Procedure Rules. The Applicant has filed a Notice of Appeal and seeks an order of Interim Injunction pending appeal. I have considered the decision in the Madhu Paper case. This Court of course stands by its decision in dismissing the application. It would be insincere if I were to hold that merely because a right of appeal exists, then the Applicant has an arguable case. I do not think the Applicant has any arguable case and his intended appeal is frivolous and intended to vex to Second Defendant. Any intended appeal has no chance of success in my view. The grant of any injunctive orders at this stage would inflict greater hardship than it would avoid.

In the premises, I hereby dismiss the application with costs to the First Defendant. The Second Defendant has not filed any Notice of Appeal and is a mere speculator and joy-rider in the present application.

DATED AND DELIVERED AT ELDORET ON THIS 7TH DAY OF FEBRUARY, 2007.

M. K. IBRAHIM

JUDGE

FURTHER ORDERS

For the avoidance of doubt, the Interim Orders granted on 26th January, 2007 are hereby discharged and lifted forthwith.

M. K. IBRAHIM

JUDGE