



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 108 of 2006

HACO INDUSTRIES LIMITED 1ST PLAINTIFF

SOLIETE BIC 2ND PLAINTIFF

- Versus -

DOSHI IRON MONGERS LTD. 1ST DEFENDANT

KENYA BUREAU OF STANDARDS 2ND DEFENDANT

Coram: Before Hon. Mr. Justice L. Njagi

Mr. Ndegwa for Plaintiff/Applicant

Mr. Khanna for Defendant/Respondent

Court clerk – Kinyua

RULING

This action was commenced by a plaint dated 23rd May, 2006, and filed in court on 24th May, 2006. Filed contemporaneously with the plaint was an interlocutory application of the same date seeking an assortment of injunctions and that the costs thereof be provided for. The application was filed under a certificate of urgency. After hearing it on the same date, the court granted a temporary injunction for 14 days as prayed in prayer (b) of the application.

On 2nd June, 2006, the plaint and chamber summons dated 23rd May, 2006, together with the court order dated 24th May, 2006, were served on the defendants. The first defendant entered appearance through its advocates on 5th June, 2006. On 6th June, 2006, the first defendant filed a notice of preliminary objection in respect of the chamber summons application, as well as its grounds of opposition. The preliminary objection is based on the ground that the plaintiffs have failed to comply with the mandatory provisions of order XXXIX rule 3(3) of the Civil Procedure Rules upon having obtained an ex parte injunction. It is that preliminary objection which is the subject matter of this ruling.

At the hearing of this objection, Mr. Khanna appeared for the first defendant who has raised the objection. The plaintiff was represented by Mr. Ndegwa. Mr. Khanna submitted that under order XXXIX rule 3(3) a party who obtains an ex parte injunction is under an obligation to serve the order, on the party sought to be restrained, within three days. In the instant case, the order was obtained on 24th

May, 2006 but was not served until 2nd June, 2006. This was eight days after the date of the order. In those circumstances, he prayed that the preliminary objection be upheld and that the main application be struck out or dismissed.

In his response, Mr. Ndegwa argued that although the order was made on 24th May, 2006, it was not sealed and issued by the Deputy Registrar until 29th May, 2006. He submitted that, therefore, time started running from 29th May, 2006, and that his client should not be punished because of the Deputy Registrar. Secondly, the order itself and prayer (b) under which it was issued were overtaken by events and became superfluous as the goods were released before the Deputy Registrar released the order. Thirdly, a preliminary objection should not be raised where the facts are disputed as in this matter in which the plaintiff disputes the date of issue of the order, and also where the matter touches on the discretion of the court. In this matter, the defendant will have to file another application for dismissal of the suit and both striking out and dismissing of suits are at the discretion of the court. Finally, Mr. Ndegwa submitted that the application at hand has eight prayers, and when the matter first came before the court, only one prayer was canvassed leaving the other prayers intact. The plaintiff has still other prayers which were not affected by the order and should be allowed to pursue those other orders. He asked the court to dismiss the preliminary objection with costs.

Replying to the above response, Mr. Khanna submitted that the rule was very clear, and relates to the date of the order and not when the order was issued. He further submitted that the rule was mandatory and there was no scope for discretion. He urged the court to strike out the application.

I have considered the application and submissions of counsel. The difference between the parties lies in the interpretation to be given to order XXXIX rule 3(3) of the Civil Procedure Rules. That subrule is in the following words –

“In any case where the court grants an ex parte injunction the applicant shall within three days from the date of the order, serve the order, the application and the pleading on the party sought to be restrained.”

Arising from these words, what is the date of the order – is it when it was made by the judge, or when it was issued by the Deputy Registrar? In order to shed some more light on the matter, it is advisable to take some steps back to order XXXIX rule 1. This rule provides that where the matters set out in paragraphs (a) and (b) thereof are proved by affidavit, “... the court may by order grant a temporary injunction ... Is it the judge or the Deputy Registrar who grants the temporary injunction? It is the judge. Under order XXXIX rule 3(1) where the court is satisfied that the object of granting the object would be defeated by the delay, it may hear the application ex parte. It is the judge, and not the Deputy Registrar, who decides to hear a matter ex parte when he is satisfied that the object of granting the injunction would be defeated by delay. Then we come to rule 3(3), which requires that where the court grants an ex parte injunction, the applicant shall within three days of the order, serve that order, among other documents, on the party sought to be restrained.

I think that it is beyond peradventure that the judge who decides to hear a matter ex parte is the same one who grants an ex parte injunction. The rule requires that the party sought to be affected be served within three days of the order. In my view, the order in this context means the order granting the injunction and, therefore, the date means the date on which the order was granted. Applying this interpretation to the matter before the court therefore, the operative date is 24th May, 2006, when the order of injunction was made, and not 29th May, 2006, when the order was sealed by the Registrar. The order should have been served, therefore, within three days from 24th May, 2006.

To the extent that the subrule requires that the applicant shall serve the order within three days, I agree with Mr. Khanna that it is couched in very clear language and in mandatory terms. The applicant did not obey the dictates of the subrule. So, what penalty does he invite? Mr. Khanna asked the court to strike out the application, while Mr. Ndegwa asked the court to find that this is not a preliminary objection within the definition of this term in MUKISA BISCUIT MANUFACTURING CO. LTD. Vs WEST END DISTRIBUTORS LTD. [1969] E.A. 696. I don't think it is necessary to revisit MUKISAS CASE

for the purposes of this matter. The simple fact is that whether the point raised by Mr. Khanna falls within **MUKISAS CASE** or not, rule 3(3) requires an order of injunction granted ex parte to be served within three days. This requirement is mandatory and should be honoured in observance. In the instant matter it has been dishonoured. The rule in question does not prescribe any penalty for its own breach. Mr. Khanna asked the court to strike out the application altogether.

I agree with Mr. Ndegwa that the court has a discretion in the matter. And then I ask myself, if after obtaining the order of injunction the plaintiff did not serve the defendant at all, would the defendant insist on being served with that order of injunction? I doubt. If the application had not been filed under a certificate, it would still have been served and heard in the normal way. But because it came under a certificate, it thereby invoked the ex parte procedure which led to the granting ex parte of the injunction order. Of the three documents referred to in subrule 3(3), i.e. the order, the application and the pleading, it is only the order which is prejudicial to the defendant.

Being of that persuasion, I think that the interests of justice will be served by discharging and setting aside the ex parte order of injunction. I accordingly make the following orders –

- 1. The ex parte order of injunction granted on 24th May, 2006 is hereby discharged and set aside.**
- 2. The application by chamber summons dated 23rd May, 2006 will proceed in the normal way and a hearing date in respect thereof be taken at the Registry in that normal way**
- 3. Costs in the cause.**

Dated and delivered at Mombasa this 7th day of July, 2006.

L. NJAGI

JUDGE