



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURT, NAIROBI
Civil Case 566 of 2003

ALBERT GACHERU KIARIE

T/A WAMAITU PRODUCTIONS.....PLAINTIFF

-V E R S U S

SIMON MUIRURI KIREHU

T/A ONE STEP NDUTI MUSIC STORE.....DEFENDANT

R U L I N G

This application is brought by way of a chamber summons dated 13th October, 2004 and filed in court on 19th October, 2004. It is expressed to be brought under the inherent powers of the court and all enabling provisions of the law, and the applicant seeks from the court the following orders-

1. That this matter be certified urgent and be heard ex parte in the first instance
2. That this honourable court be pleased to reinstate interim orders it issued in favour of the plaintiff/applicant on 6th April, 2004 which technically expired when the matter was stood over generally when it came up for hearing on 29th September, 2004.
3. That the honourable court reaffirms its orders of direction of 4th May, 2004, that the injunction application be heard inter parties on merits before the application

for consolidation of this suit with another.

4. That the honourable court be pleased to give the inter partes hearing date of the injunction application and extend the interim order to that date.

5. That costs of this application be provided for

6. Any other orders or directions that the court may deem fit in the circumstances.

The application is based on the grounds-

(a) That on 6th April, 2004, this Honourable Court granted orders in favour of the plaintiff/applicant against the defendant/respondent inter alia, restraining the defendant/respondent, his servants and agents from reproducing and/or allowing others to reproduce, distribute and/or allow others to stock, display for sale and/or allow others to display for sale the CDs listed therein which are marketed and distributed by ONE STOP NDUTI MUSIC STORE.

(b) That these interim orders technically expired when the matter was stood over generally on 29th September, 2004, when it came up for hearing before the court.

(c) That the applicant is likely to suffer irreparable loss and damage if these orders are not reinstated and defeat the very purpose and intention they were meant to serve.

(d) That the defence misled the court on 29th September, 2004, that it was its application for consolidation of this suit with another which was coming for hearing on that day while on 4th May, 2004, the court had given orders directing that the injunction application be heard inter partes on merits before the application for consolidation of the two suits.

(e) That it is in the interest of justice that court orders and directions are obeyed to ensure that they serve the very purpose and intentions for which they are issued.

The application is also supported by the annexed affidavit of ALBERT GACHERU KIARIE, the applicant himself.

In opposition to the application, the defendant/respondent has filed the following grounds-

- (i) The application is incurably defective in law and if the orders sought are granted it will be contrary to the provisions of Order 39 Rule 3 (2) of the Civil Procedure Rules.
- (ii) It will be unjust to reinstate and/or extend old ex parte orders
- (iii) The matter is res judicata Honourable Ibrahim J. having refused to extend the subject ex parte orders on 6th October, 2004.
- (iv) No reasons justifiable or otherwise are being advanced to show the prejudice likely to be suffered if the expired orders are not reinstated.
- (v) Third parties should be served with the current application
- (vi) There is pending an application dated 28th April, 2004 for consolidation of this suit with HCCC No.2072 of 2000

At the oral canvassing of this application, Mr. Kiarie, the plaintiff/applicant appeared in person while the defendant/respondent was represented by Mr. Ng'ang'a. As order 1 was already spent, the applicant told the court that he would be urging prayers 2,3, 4, 5, and 6. He then said that when this matter came for hearing on 29th September, 2004, it was stood over generally and the interim orders which were in force were not extended and therefore they expired on that day. The matter thereafter came before Ibrahim J. on 6th October, 2004 when the applicant applied for an extension of the orders but the learned judge declined to do so on the ground that he didn't wish to be involved in a file from Milimani any longer. It was then that he filed this formal application on 19th October, 2004. On 3rd November, the interim orders were reinstated to 9th December, 2004. Unfortunately the matter was not listed on that day. It was next fixed for hearing on 20th December, 2004. On that day, the defendant/respondent was not ready to proceed and the matter was stood over to 21st December, 2004.

The applicant then urged the court to re-visit the ruling made on 4th May, 2004 when the court ordered that the application for contempt would be heard first, followed by the hearing inter partes of the application on which the interim orders given inter partes are based and this would be followed by the hearing of the application for consolidation.

Referring to the grounds of opposition, Mr. Kiarie submitted that ground 1 thereof is taken care of by S.3A of the Civil Procedure Act under which the application is brought and that Justice Ibrahim did not hear the application but left it for hearing before any judge at Milimani. Even though the court granted leave to serve 3rd parties, such 3rd parties are not parties to this suit. He urged the court to do justice in the matter.

In response, Mr. Ng'ang'a for the respondent submitted that the orders sought to be reinstated have already expired. He referred to O.XXXIX Rule 3 (2) of the Civil Procedure Rules which he further submitted prohibits an ex parte order from being extended after 14 days except by consent of the parties. He then submitted that the application for reinstatement was dismissed, and that the orders sought to be reinstated expired long before 6th October, 2004. Counsel then suggested that the best the applicant should do is to fix the main application for hearing. He also argued that on 28th November, 2004, some third parties were joined to the suit and will be prejudiced if they are not served and if the orders are reinstated. He therefore objected to the application and requested that it be dismissed.

In a short reply, Mr. Kiarie said that it was not true that any third parties had been joined. He also submitted that he had not filed many applications as alleged, but if he had done so, it was quite lawful.

Having considered the rival submissions between both parties, it is common ground that at one point in time, the plaintiff/applicant did indeed enjoy some interim orders. These were first granted by the court ex parte on 6th April, 2004, pending the inter partes hearing of the application on 20th April, 2004. The orders seem to have travelled a hard and bumpy road, lapsing and being reinstated. The application before the

court right now seeks their reinstatement after lapsing on 29th September, 2004, when this matter was stood over generally and the orders were not extended. Prior to that, they had been reinstated on 6th August, 2004, after yet another lapse. The turbulent life of these orders will be revisited shortly hereunder.

In his treatise on Civil Procedure, 13th edition, at pages 1512 to 1513, Mulla observes that **“it is only when a claim is made in a suit which, if established, would entitle the plaintiff to relief by way of injunction that interim relief could be granted by way of temporary injunction, so that relief in the suit might not be rendered infructuous.”** He further notes that **“the real point, upon an application for a temporary injunction, is not how the question ought to be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in status quo until that question can be disposed of.”** By granting the interim orders in the first place, I take it that the court found it prudent to preserve the status quo pending the hearing of the injunction application inter partes. Since the application has not yet been heard inter partes, I would further take it that the reasons which prompted the court to grant the interim orders are still alive. Unless such reasons have ceased to exist, and there is no evidence that they have so ceased, I would find it proper and logical to reinstate the orders. I am fortified in this view by the Ruling delivered in this matter by the Hon. Justice Ibrahim on 6th August, 2004, in a similar application for reinstatement of those orders. The learned judge outlined the history of the orders, the subject matter of this application, in these words-

“On the 6th April, 2004 the application for temporary injunction orders was heard by Justice Emukule ex parte. The court granted the ex parte orders restraining the respondent from carrying out various acts as particularised in the said order. The orders were to be in force until the hearing of the application inter partes on 20th April, 2004.

The application was not heard on 20th April, 2004 and it was extended by consent or at the court's instance from time to time until 22.6.04 During the said intervening period, the applicant prosecuted an application to commit to civil jail the respondent for contempt of court. I reserved the ruling to 9th July, 2004, and extended the interim orders. On 9th July, 2004, the court did not sit if I can recall. At the very least, the ruling was not delivered. It was delivered on 23rd July, 2004. As a result the interim orders were not extended.

I am of the view that the omission or failure to extend the interim orders was on the court's part and the applicant should not be disentitled to the benefit of the interim orders.

I have no doubt the court has the power and authority to extend and/or reinstate the said order to the next hearing date. To do otherwise would be improper and unjust to the applicant particularly considering the effect of my ruling on the application for contempt. I do hereby reinstate the interim orders granted on 6th April, 2004 and extended from time to time and shall remain in force until the inter partes hearing of the injunction application. This shall be on 29th September, 2004 before ANY JUDGE."

I wish to adopt the learned judge's reasoning in toto. The court saw it fit, from the very beginning, to grant those interim orders pending the hearing of the injunction application inter partes. That application has not yet been heard. The hearing is still pending. The rationale for granting those orders therefore remains as valid today as it was on 6th April, 2004. It is in the interest of justice that they be reinstated.

Counsel for the respondent argued that this matter is res judicata as Justice Ibrahim dismissed an earlier application for reinstatement on 6th October, 2004. With respect, that is not the correct position. The true position is as postulated by the applicant, which is to say that the court declined to consider the issue of the subject ex parte orders. After dismissing an application for committing the respondent to civil jail for contempt, the learned judge said-

“I hereby direct that any further applications be heard by any judge in the Commercial Court. The said court is capable of interpreting and enforcing any court order herein.”

Against that background, it can hardly be said that the matter is res judicata. The judge left the matter to the rest of us in the Commercial Division to interpret the court orders herein. And that is what I have humbly attempted to do.

For the totality of the foregoing-

1. I hereby reinstate the interim orders granted to the applicant on 6th April, 2004, in terms of prayer No.2 of the application.
2. I also re affirm the court’s orders of direction of 4th May, 2004 and order that the injunction application be heard inter partes before the consolidation of this suit with another
3. I further order that the said application be heard on 8th February, 2005. The interim orders are extended to that date.
4. Each party will bear its costs of this application.

Dated and delivered at Nairobi this 27th day of January 2005

L. NJAGI

JUDGE