



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 214 OF 2005

THOMPSON KENYA LTD.....PLAINTIFF

VERSUS

AIR KENYA AVIATION LIMITED T/A REGIONAL AIR.....DEFENDANT

RULING

On 21st April, 2005, the Plaintiff filed suit against the Defendant claiming Kshs 7,485,568.90 for advertising work done performed and rendered by the Plaintiff to the Defendant at its request and for monies paid out for expenses incurred to various third parties by the Plaintiff for the Defendant at its request in the course of providing the advertising and marketing services.

Simultaneously with the Plaintiff the Plaintiff filed a Chamber Summons in which it sought a temporary injunction to restrain the Defendant from wasting, damaging, alienating, selling, removing or disposing any of the movable and immovable assets of the Defendant of a value sufficient to cover the Plaintiff's claim pending the disposal of the suit or other order of the Court. The Plaintiff further sought an order that the Defendant does show cause why it should not furnish security in such sum sufficient to satisfy the decree that may be passed against it. In the alternative the Plaintiff sought an order that the Defendant's movable assets be attached should it fail to show cause and/or furnish security.

The Application was certified urgent by Waweru J. and fixed for hearing inter partes on 29th April, 2005. On this date, the Application was by consent listed for hearing on 6.5.2005. It again was not heard on this date and parties agreed to adjourn the Application to 13th May 2005. On this latter date Counsel for the Defendant raised a Preliminary Objection to the Plaintiff's Application as per his notice thereof dated 28th April, 2005. The Notice reads:-

“The Defendant will contend that the Plaintiff's Application dated 21st April, 2005 should be dismissed in limine as it is misconceived and not within the confines of Order 39 Rule 1 or Order 38 Rule 5 of the Civil Procedure Rules.”

In his oral submissions in Court Counsel for the Defendant was brief and to the point. He submitted that the Affidavit in Support of the Application does not have material upon which an order can be made in favour of the Plaintiff under both Order 39 Rule 1 (b) or Order 38 Rule 5. The basis of Counsel's submission was that the said Affidavit in support does not allege that the Defendant threatens or intends to remove or dispose of its property or that the Defendant with intend to obstruct or delay the execution of any decree that may be passed against it, is about to remove the same from the local limits of the jurisdiction of the Court. Counsel also submitted that the Plaintiff has not specified the property to be

attached nor has it given its estimation of its value as required under Order 38 Rule 5(2). Counsel relied on the case of Ryan Investments Ltd and Another –v- The United States of America (1970) E.A.675. in which the Court of Appeal held that:-

“(iv) it is only where there is a specific remedy provided by the law that the inherent jurisdiction of the Court cannot be invoked.”

Counsel argued that on that authority the Plaintiff was not entitled to invoke the inherent jurisdiction of the Court as the Plaintiff’s Application comes within the purview of specific orders under the Civil Procedure Rules.

Responding to the Preliminary Objection, Counsel for the Applicant submitted that the Preliminary Objection was misconceived. He placed reliance upon the decision of the Court of Appeal in Mukisa Biscuit Manufacturing Co. Ltd –v West End Distributors Ltd for the proposition that a Preliminary Objection ought not to be raised if what is sought is the exercise of judicial discretion as is the case in this Application. Counsel further submitted that under Order 39 Rule 1 and Order 38 Rule 5 the court can grant the orders sought on the basis of other material besides affidavits. The Applicant cannot therefore be prevented from canvassing its Application on the grounds argued in the Preliminary Objection.

The above are the rival submissions made for each side. I have considered them. I have also carefully considered the Application and the affidavit in support thereof. Having done so, I take the following view of the matter. Under Order 39 Rule (1) a party may show by affidavit or otherwise that he is entitled to a temporary injunction and under Order 38 Rule 5 Rule (1) a Plaintiff may show by affidavit or otherwise that he is entitled to an order for security. Invariably Applications under the two rules are accompanied by affidavits. But the rules make provision for satisfying the Court in more ways than by affidavit. The Plaintiff’s Application is supported by an affidavit sworn by one Sunder Venkataraman. The challenge made by the Defendant is that the said affidavit is so inadequate that it cannot form the basis of the exercise of the Court’s discretion. No challenge is made against the validity of the said affidavit or the Application itself. The decision I am being asked to make in this Preliminary Objection is one of discretion. Even if I were to agree with Counsel for the Defendant, that would not be the end of the story as the rules allow the Applicant to show that it is otherwise entitled to the orders sought.

In the case of Mukisa Biscuit Manufacturing Company Limited –v- West End Distributors Limited (1969) E.A. 696, Sir Charles Newbold J.A. delivered himself at page 701 as follows:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice should stop.”

That was in 1969. The warning issued by Sir Charles Newbold fell on deaf ears. It is unfortunate that Courts still have to caution parties on improper raising of Preliminary Objections in the year 2005.

In the Application, at hand, the Defendant’s notice of Preliminary Objection dated 28th April, 2005 and as argued on 13th May 2005 cannot dispose of the Plaintiff’s Application. It is not a proper Preliminary Objection. The same is overruled with costs to the Plaintiff. Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-