REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 318 OF 2005

KINGFISHER RESTAURANT LTD. ……..…..….PLAINTIFF/APPLICANT

VERSUS

NAIROBI CITY COUNCIL ……...DEFENDANT/RESPONDENT

RULING

The plaintiff's Chamber Summons application dated and filed on 18th March, 2005 was brought under Order XXXIX, rules 1,2,3,5 and 9 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21). The application carried one substantive prayer:

> *"THAT a temporary injunction be issued restraining the defendant/respondent whether by itself, its directors, officers, servants and/or agents or any of them from harassing, interfering with or stopping the operations in any manner howsoever or enforcing the "Notice Not to Use the Food Plant" effective 16th March, 2005 or any other Notice of like effect requiring the plaintiff/applicant to close its restaurant known as "Kingfisher Restaurant" situated at shops Nos. 11 and 12 on First Floor, Nginyo Towers, L.R. No. 209/2439/7, pending the hearing and final determination of this suit."*

The premise of this application is set out in detailed grounds which may be summarised as follows. The plaintiff operates two restaurants in Nairobi, under the name "Kingfisher Restaurant," one being situated at Forodha House, Upper Hill while the other is situated at shops Nos. 11 and 12 on the 1st Floor, Nginyo Towers, L.R. No. 209/2439/7 off Koinange Street in Nairobi. On 15th March, 2005 the defendant served notice on the plaintiff at the Forodha House premises, this to expire after 5 days, requiring closure of the business until certain stipulations enumerated in the notice had been complied with, failing which the plaintiff could be prosecuted under the Public Health Act (Cap.242). The plaintiff immediately complied by closing the Kingfisher Restaurant at Forodha House.

On 16th March, 2005 the defendant's servants, agents, officers and/or employees served a notice an the Kingfisher Restaurant situated at Nginyo Towers, requiring the plaintiff to close this particular restaurant "until certain conditions mentioned in the 'Notice Not to Use the Food Plant' have been fulfilled." This notice, however, referred to "Kingfisher Restaurant," Upper Hill Road, i.e. the restaurant at Forodha House. It is asserted that the application of a notice meant for the restaurant at Forodha House to the plaintiff's restaurant at Nginyo Towers, was illegal, unjustified and wanting in due authority.

Evidence in support of the application is in the supporting affidavit sworn by ***Kulthum El Kindy Ismaily***, a director of the plaintiff company, on 18th March, 2005. He avers that the plaintiff has been operating *two different restaurants* in different locations in Nairobi. On 16th March, 2005 a notice "Not to Use the Food Plant" which referred to the plaintiff's restaurant at Forodha House, was served upon the deponent at the Nginyo Towers premises. This notice required closure from 16th March, 2005; but at that time the Forodha House restaurant premises had already been closed. The defendant's servants or agents insisted

on closure of the Kingfisher Restaurant at Nginyo Towers, even though their demand document had clearly meant only the Forodha House site. It is deponed that the plaintiff's restaurant situated at Nginyo Towers is duly registered and licensed by the respondent. The deponent annexes to his affidavit a copy of the receipt issued by the defendant on 17th February, 2005 — being payment for the said restaurant's licence certificate for 2005. It is further averred that all the employees of the plaintiff whose responsibilities include the handling of food are periodically examined to ensure they are medically fit to render such service. The deponent annexes to his affidavit copy of a letter dated 15th March, 2005, issued by the Mediplan Clinic, confirming that the plaintiff's employees have duly undergone medical examination.

The deponent avers that the restaurant at Nginyo Towers has now been running for some two years, in the course of which it has come to enjoy substantial goodwill, and any disruption of its operations is bound to cause considerable damage and financial loss to the plaintiff.

The deponent avers that the defendant's actions in relation to the restaurant at Nginyo Towers, have provoked in him reasonable apprehension that the defendant, unless restrained by the Court, will proceed to enforce the said "Notice not to use the Food Plant" against the applicant, and capriciously and without colour of right or authority which action will greatly inconvenience the applicant and occasion it much harm, financial loss and damage.

Geoffrey C.K. Katsoleh, the Assistant Town Clerk (Legal) of the defendant swore a relying affidavit on 20th April, 2005 in which he avers that he has information from the defendant's Medical Officer of Health, that the said Medical Officer of Health had, on 15th March, 2005 inspected the plaintiff's restaurant at Forodha House, and found that the said restaurant was "used for storage, preparation and cooking of food which [was] thereafter being transported to the plaintiff's restaurant situated at shops No.11 and 12 at Nginyo Towers." The said Medical Officer of Health had visited the restaurant at Forodha House for the purpose of inspecting the sanitary and hygienic conditions. It is deponed that the "Notice not to Use the Food Plant" served upon the plaintiff was valid and was issued "in furtherance of the defendant's public duty of ensuring the safety of its inhabitants."

It is deponed, in the matter of the distinction between the two Kingfisher Restaurants, "THAT the Notice not to use the Food Plant was served on Kingfisher Restaurant as an entity and the plaintiff's attempt to distinguish the same by branches is merely to justify their action of endangering the lives and health of the residents of Nairobi by continued provision of unsanitary and unhygienic food…" It is deponed that the statement in paragraph 3 of the plaintiff's supporting affidavit, that the restaurant at Forodha House is used only for preparation of food, is an indication that the food is then transported to the restaurant at Nginyo Towers. It is averred that information believed to be true has emanated from the defendant's advocates, that the plaintiff failed to disclose material facts on the relationship between the two restaurants it owns.

Geoffrey C.K. Katsoleh swore a further affidavit on 25th May, 2005 in which he depones that the Court had ordered the defendant on 27th April, 2005 to "carry out an inspection on the plaintiff's restaurants being 'Kingfisher Restaurant' shops 11 and 12, 1st Floor, Nginyo Towers, Koinange Street to ascertain their sanitary and hygienic conditions." He depones that its Medical Officer of Health has since inspected the plaintiff's premises, and the inspection report dated 13th May, 2005 shows that the restaurant is operating without a ***Food Hygiene Licence***. The deponent avers too that the plaintiff has not disclosed a certain fact in its operations: that it prepares food at the estate of Kariokor and then "later transports to their restaurant". It is averred "THAT it is clear from the report that the plaintiff is operating a very unhygienic and unsanitary restaurant which is putting the health and lives of Nairobi residents at great risk." It is further deponed:

> "THAT the defendant's Medical Officer of Health has given its recommendations as contained in the Inspection Report and which recommendations are supposed to be satisfied by the plaintiff. The same has not been satisfied and it is incumbent upon the plaintiff to take remedial measures."

Kulthum El Kindy Ismaily the plaintiff's director, responded by filing a further affidavit, dated 30th June,

2005. He depones that the Court had, on 28th April, 2005 ordered that the defendant do visit the restaurant at Nginyo Towers, for the purpose of carrying out an inspection to ascertain the sanitary and hygienic conditions of the premises. He denies the content of the report prepared after the said inspection, by the defendant's Medical Officer of Health. It is deposed that the plaintiff had on 30th March, 2005 applied for the renewal of its ***Food Hygiene Licence***, and had paid a fee to accompany the applicant, and a receipt was duly issued. But the defendant's Medical Officer of Health had on several occasions declined to issue the licence certificate, "on the ground that this suit is still pending in Court and as such he cannot issue the same." The deponent avers that all the food storage and food preparation takes place at the restaurant at Nginyo Towers and no food is made elsewhere and then transported to the said restaurant. The deponent avers that the restaurant premises at Nginyo Towers has always been clean, sanitary and hygienic and all catering employees at the restaurant are periodically examined and are medically fit. The deponent annexed to his affidavit copies of medical certificates from the Ministry of Health in respect of the plaintiff's catering staff. It is deposed that the plaintiff's sanitary facilities at Nginyo Towers are shared with a Chinese Restaurant also located in the same building, about which no complaint in respect of hygiene and sanitation has ever emanated from the defendant.

This matter first came before me ex parte and under the vacation rules, under certificate of urgency, on 18th March, 2005. I made, on that occasion, a short ruling and gave interim orders in the following terms:

> **"What is sought is interlocutory relief, pending the hearing of substantive matters lying at the centre of the entire dispute. The dispute itself will be dealt with in the future, in the normal manner; but the Court is empowered to give short-term relief where necessary.**
>
> **"Counsel for the applicant has made a clear and eloquent case, that as the applicant runs a food business which is sensitive and one which has gathered some goodwill, there be no interruption to the same by the respondent without justification.**
>
> **"The prima facie state of affairs, particularly the public health aspect of the plaintiff's operations, would appear to raise serious questions as to the grounds for the restrictive measures that the respondent is attempting to impose on the applicant's food outlets. "Taking into account this prima facie position, I now make the following orders:**
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> **(1) Prayers No.1 and No.2 are allowed, subject to order No.2.**
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> **(2) The plaintiff/applicant shall move to set down for inter partes hearing the present application within 14 days of the date hereof, and a date shall be given on the basis of priority."**

Hearing ***inter partes*** took place first on 28th September, 2005 when learned counsel Mr. Oseko, represented the plaintiff while learned counsel ***Mr. Koceyo***, represented the defendant.

Mr. Oseko remarked the apparent irregularity of imposing, by the defendant, restrictive orders meant of the Forodha House Kingfisher Restaurant on the Nginyo Towers Kingfisher Restaurant. Notwithstanding this irregularity, counsel submitted, the defendant had continued, without any justification, to threaten the restaurant at Nginyo Towers with closure. Counsel submitted that there was no basis for threatening the restaurant at Nginyo Towers with closure, since it had complied with all the sanitary and hygienic requirements and had done everything possible to secure the required certification, quite the contrary to the claims being made by the defendant. This restaurant, counsel submitted, had attained a significant degree of goodwill which should not be put at risk by arbitrary decisions of the Nairobi City Council.

Learned counsel submitted that even though the defendant had on 16th March, 2005 served what appeared as an irregular "Notice Not To Use the Food Plant" on the plaintiff's restaurant at Nginyo Towers, at that stage there had been no inspection of that restaurant, and so there was no reason to seek to close it; for it was not until ***Ransley, J***, on 28th April, 2005 ordered inspection, that the defendant's Medical Officer of Health now visited the restaurant at Nginyo Towers for the purpose of conducting an inspection. The outcome of this inspection was negative, and counsel submitted it to have been rendered

in bad faith, merely to validate the arbitrary decision to close this restaurant which in any case, previously, had been taken entirely capriciously. When the defendant caused an inspection of the restaurant at Nginyo Towers to be done on 13th May, 2005 entirely new grounds were now being raised for sustaining the earlier "Notice Not to Use the Food Plant." One of these new grounds was: the plaintiff does not have a Food Hygiene Licence. On 13th May, 2005 the defendant would not take into account the fact that as early as 30th March, 2005 the plaintiff had made payment (duly receipted) to the defendant for issuance of the Food Hygiene Licence certificate. To-date, as at the time of this ruling on 21st October, 2005 the defendant has not yet released the Food Hygiene Licence to the plaintiff — and the reason stated by the defendant is that the defendant's hands are tied, so long as a dispute is pending in Court.

Counsel remarked the further evidence to support the "Notice Not To Use the Food Outlet" being belatedly generated by the defendant, though without specific evidence in support: that the plaintiff lacks adequate food storage; no food-preparation space; contamination. Counsel observed that no evidence had been tendered to show an inspection by the defendant of those particular matters, at the plaintiff's premises on Nginyo Towers. Moreover, the outstanding Food Hygiene Licence which is the bone of contention, is not the original one, it is a renewal one. Counsel argues, and with eminent justification in my view, that the original Food Hygiene Licence could not have been issued if the shortcomings now invoked by the City Council (the defendant) had indeed been there as alleged. Lack of candour is here apparent, and counsel rightly observes, I think, that the defendant merely wants "to correct the effect of an earlier, void notice."

Learned counsel submitted that the facts of the case justified the issue of orders of *temporary injunction*, as it had been proved by affidavit, in the terms contemplated in Order XXXIX of the Civil Procedure Rules, that the property in dispute "is in danger of being wasted, damaged …" Counsel cited in support of his submission the Court of Appeal decision in Shitakha v. Mwamodo & 4 Others [1986] KLR 445 in which it had been held (p.445):

> **"The principles applicable in deciding whether or not to grant a temporary injunction are as stated in Giella v. Cassman Brown & Co. [1973] E.A. 358. The principles are that the applicant must establish a prima facie case with a probability of success, show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages and if the court is in doubt it should decide the application on a balance of convenience."**

It was wrongful on the part of the defendant, counsel submitted, to arbitrarily close a business which had been running for as much as two years, and the balance of convenience should be held to lie in favour of the applicant.

Learned counsel for the defendant, ***Mr. Koceyo***, made his submissions on the basis of the replying affidavit of 20th April, 2005 and the further replying affidavit of 25th May, 2005. He was of the view that even though the defendant's "Notice Not to Use the Food Outlet" had been designed with reference to the plaintiff's restaurant at Forodha House, nevertheless its service upon the Nginyo Towers-based restaurant took place at a *different time*, and both restaurants passed by the name "Kingfisher Restaurant" and so, formed one chain, and so, therefore, the notice was equally aimed at the two restaurants. Consequently, the plaintiff at his Nginyo Towers restaurant was obligated to comply and no excuses would come the plaintiff's way. Counsel saw another link between the two restaurants in the fact (raised but not substantiated or detailed out) that food cooked at Forodha House "was then consumed at Nginyo Towers." It is to be noted that this claim is squarely denied in the further affidavit sworn by ***Kulthum El Kindy Ismaily*** dated 30th June, 2005; and so the claim remains a contested one which cannot be proved in interlocutory proceedings, and must await full trial. But at this stage it may be observed that the defendant's cursory manner of making the claim would deprive it of any *prima facie* weight such as would be held to justify the impugned actions.

Learned counsel submitted that while it was true that the plaintiff had paid for the Food Hygiene Licence on 30th March, 2005, the suit had been filed earlier; and so, in counsel's perception: "This means they paid after filing suit — so as to claim they have conformed to standards, and this is bad faith." The basis for such an inference is not obvious; but more important, it is not contested that the declared reason for

not giving to the plaintiff the Food Hygiene Licence is that there is a *suit pending in Court.*

Learned counsel did not say much about the cursory claim of the defendant, that the plaintiff had been using the Forodha House Restaurant to make food to be transported to the restaurant at Nginyo Towers; but he now based his case on a new allegation: that the plaintiff was making food at a *Kariokor* location, and then transporting it to the restaurant at Nginyo Towers. The transportation-of-food claim, being so random, unfocussed and unproven, would not, in my view, carry much credibility at this stage; and I hold it to be an unreliable basis for ordering the plaintiff's restaurant at Nginyo Towers to be closed.

In his rejoinder, learned counsel ***Mr. Oseko*** stated that it was not correct that the plaintiff had made payments to the defendant only after the suit had been filed; for this was not a new business, the payments were being made only for renewals. Thus payments had indeed been made before, and in this respect the plaintiff was not in default and was now rectifying such default, for any ulterior motive connected with the pending suit. At the time the plaintiff filed suit, no *duty to make payment* to the defendant had yet fallen due, and so it had not been necessary to make any payment prior to the date of filing suit. There are, no doubt, important facts in these proceedings which cannot be ascertained at this interlocutory stage, and which must await proof in full trial. However, there is affidavit evidence sufficient to lead the Court to take prima facie positions and to make orders, if need be, at this interlocutory stage.

It emerges clearly, at this stage, that the plaintiff had duly complied with the defendant's notice directed at the restaurant at Forodha House, and that restaurant was promptly closed. It emerges, too, that the notice issued by the defendant for the Forodha House restaurant was not intended for the Nginyo Towers restaurant. It, was, therefore, plainly irregular for the defendant to attempt to apply that notice as a basis for having the Nginyo Towers restaurant closed.

Attempts to represent the Nginyo Towers restaurant as one and the same with the one at Forodha House, has, in my view, failed. These are two different units, and shortfalls in one cannot be automatically attributed to the other. The attempt to establish such a linkage through the "transportation-of-food-hypothesis" has also failed. It is not positively shown that there was any food being transported from Forodha House to Nginyo Towers. The attempt, indeed, even more emphatically fails when transportation of food is now claimed to be from Kariokor, rather than from Forodha House.

The reason given to the plaintiff by the defendant, that the Food Hygiene Licence cannot be issued because of the pendency in Court of this case, is not a good reason, I think, and cannot be relied upon by the defendant as grounds for closing down the plaintiff's Nginyo Towers restaurant.

It is not controverted, that in the last two years or so the plaintiff has built up a substantial clientele at its Nginyo Towers business; and consequently it will have to be acknowledged that much harm would befall the plaintiff if the said business were closed down, without justification, and in a capricious manner that pays no heed to the law relating to the rights to conduct business in leased premises.

I am in agreement with learned counsel for the plaintiff that closure of the plaintiff's business, as the defendant intends to do, would cause irreparable harm which could not be easily recompensed in damages. Besides, I will take into account, by way of judicial notice, the delicate and sensitive nature of catering business, and on that basis draw the conclusion that the balance of convenience lies in favour of the plaintiff and not the defendant.

On that basis I hereby ***order*** as follows:

(1) That a temporary injunction be and is hereby issued, retraining the defendant whether by itself, its directors, officers, servants or agents, or any of them, from harassing, interfering with or stopping the operations in any manner howsoever or enforcing the "Notice Not to Use the Food Plant" effective 16th March, 2005 or any other Notice of like effect requiring the plaintiff to close its restaurant known as "Kingfisher Restaurant" situated at Shops Nos. 11 and 12 on the 1st Floor, Nginyo Towers, L.R. No. 209/2439/7 pending the hearing and final determination of this suit.

(2) The costs of the instant application shall be in cause.

DATED and DELIVERED at Nairobi this 21st day of October, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Oseko, instructed by M/s. Oseko & Co. Advocates

For the Defendant/Respondent: Mr. Koceyo, instructed by M/s. Kenta Moitalel & Co. Advocates