



ditorial Note

Inherent Powers of Court S 3A, S 63 of Civil Procedure Act

Court can grant a temporary injunction in situations not covered by the Rules in order to have an application heard on merit and inter partes by invoking its inherent powers.

“Hand of justice never too short or too long.

It adjusts to all situations.

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 694 OF 2003**

**GIANT HOLDINGS LIMITED ..... PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY ..... DEFENDANT**

**RULING**

This is an application dated 2nd February 2004 grounded on Order 44 Rule 1 Order 39 rule (7) 1(a) Order 50 rule 1 and sections, 3, 3A, 63 (e) and S 80 of the Civil procedure Act and all other enabling Powers and Provisions of the Law. It is supported by an affidavit of the plaintiff’s counsel Mr Ahmed Isaach Hassan sworn on 2nd February 2004. The thirteen grounds relied on are set out in the body of application but the main one is that on 20th January 2004 this court did adjourn generally the injunction application dated 9th July 2003 without allocating a date and without extending an interim order granted on 9th July 2003 and which has been extended by Counsels of the parties concerned from time to time since 23rd July 2003. Between October 2003 and 20th January 2004 there were attempts by parties to negotiate an out of court settlement and when the court was informed on 20th January 2004 that the negotiations had not resulted in a final agreement the court adjourned the injunction application generally without extending the interim order. The interim order when it was in existence had the effect of restraining the defendant from terminating a Concession Agreement entered into by the parties until the hearing of the injunction interparties.

The thrust of the application is for the court to review the order of 20th January 2004 and grant an interim order which had hitherto been extended by consent of the parties.

In opposition the respondent relies on the affidavit of Tito sworn on 3rd February 2004 and Tobiko’s affidavit sworn on 3rd February 2004. Basically the opposition asserts that there was no mistake on the part of the court because the counsels holding brief for the principal counsels in the matter did not request the court to extend the interim order on the material day or remind the court of its existence as is the practice in such matters.

In addition the order having lapsed on 20th January 2004 it cannot be resurrected. There is therefore nothing to review. Moreover, no formal order has been extracted and exhibited and failure to do so is fatal to an application for review. Finally, on 30th January 2004 the Concession Agreement was terminated by

the respondent by a letter.

The plaintiff's counsel argument is that the court has the inherent power to grant any and all of the prayers sought to prevent the ends of justice being defeated and to avoid gross miscarriage of justice and prevent abuse of the court process. The failure to rectify, vary or review the order of the court as prayed will justify the defendant's illegal action of purporting to terminate the plaintiff contract and this would be tantamount to dismissing its chamber summons application dated 9th July 2003 before any hearing. All this is captured by ground 13.

From the record of proceedings it is clear that the parties intentions are reflected by the frequent and consistent extensions of the order by consent and the intention was that the status quo shall stay until the injunction application is heard on merit.

By a letter dated 19th January 2003 Ex B written by the respondent to its advocate the respondent stated:-

**“This is further to our letter of 3rd December, 2003. As parties appear to maintain diametrically opposed standpoints negotiations may not yield quick resolutions of the matter. You may therefore proceed to prosecute the case to finality”**

It is quite evident that the respondent is informing its counsel that it appreciates that negotiations have failed and the only option is to have the matter prosecuted to its finality!

On 20th January 2004, that is one day after the quoted letter by the respondent to their counsel the court recorded the following order.

**“Counsels “No agreement reached. We seek a hearing”  
“Matter Stood over Generally”**

On 23rd January 2004 very timeously the plaintiff's counsel filed an application under certificate of urgency under S 3, 3A and S63 inter alia – seeking extension of the order and allocation of a hearing date in respect of the injunction application. On the same date Ransley J declined to give any orders but directed that a hearing date be allocated within 30 days.

On 2nd February 2004 the application was filed and on the same date his lordship acting Judge Lenaola then the Duty Judge did grant an order maintaining the status quo until inter parties hearing before this court on 4th February 2004. On 4th February 2004 this court was not able to hear the matter and the order by Mr Justice Lenaola was extended until 19th January 2004.

The first question which arises is whether on 20th January 2004 there was a mistake on the part of the court which is apparent on the face of the record. The answer is an emphatic “NO”. The court after being informed that there was no settlement out of court and the matter had initially come to court under a certificate of urgency deliberately stood over the application generally. The court understood the urgency to have disappeared.

There is nothing reviewable under the provisions of order 44 whatsoever.

In addition the order having lapsed on the same day I cannot retroactively purport to extend a non-existent order. For these two reasons the application is so far as it seeks a review is on the facts as outlined, misconceived and the court holds that a review application does not lie and no grounds exists for review. The respondents counsels objections on review are well grounded and are upheld. Reliefs b to d are therefore refused.

This application cannot however be wished away entirely in that following Judge Ransley's order the injunction application was subsequently given a hearing date of 19th February 2004. From what I was able to gather from counsels they would be willing to put off the hearing of the injunction application dated 9th July 2003 until a final determination is made in this application.

It is therefore anticipated that counsels will be adjourning the application when it comes up for hearing on 19th February 2004. This court is also aware that the applicant has invoked other provisions namely Sections 3, 3A and S 63 (e) of the Civil Procedure Act and Order 39 of the Civil Procedure Rules. Following amendments by LN 36/2000 O 39 rule 2 reads as under:-

**2 “ In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”**

The respondent's counsel has argued that preservation orders under O 39 rule 7 would only apply to property and not to contractual rights but it is clear that they also would apply to rights where appropriate. The use of the word “right” contemplate other rights including contractual rights.

The marginal note in Rule 7 makes it clear that the court can be moved to preserve suit. Contractual rights are in the view of the court capable of being preserved. A suit under the order contemplates violation of legal rights or other injury of any kind or breach of contract. Contractual rights have not been excluded.

I therefore hold that the court would have powers to give the relief sought in prayer (e) if merited. However in the light of what has happened it is for the court hearing the injunction on merit or the trial court to deal with this point ie what if anything is to be preserved in view of the purported termination.

As regards prayers (f) and (g) they seek declaratory orders which cannot in law be granted at this stage and I do uphold the learned counsel's for respondent objections and submissions on this as well. However should this court fold its hands in the circumstances of this case where it has been challenged under S 3A and S 63(e) of the Civil procedure Act to do justice to ensure that its process is not abused and justice is done by having issues ventilated on merit. Where an injunction application is being pursued diligently and without delay, it would not be an act of good faith for one of the parties to derail the process by failing to preserve the status quo. This is a court of equity and is bound to frown upon such an unilateral act regardless of its validity in law. Can this court grant a fresh injunction on the basis of this application to ensure that the status quo is preserved until the injunction application dated 9th July 2003 is heard inter parties and on merit.

The answer is a clear “Yes” for the reason that the situation as has arisen in this matter is not specifically provided for under the Act or the Civil procedure Rules. Where a party is aware of a pending injunction application and an interim order which has been extended several times by consent to pave way for negotiations pending hearing inter parties the procedural law did not contemplate that one party can unilaterally act within days in the matter and ignore the need to preserve the status quo and to have the application set down for hearing on merit by acting in a manner which negates the intention of the parties prior to embarking on the out of court negotiations – ie the need to have the application heard on merit.

Indeed the letter dated 19th January 2004 written by the respondents to its counsel reflects the intention of the parties to have the matter concluded in court and not outside court. The letter clearly contemplates the hearing of the injunction application on merit after the breakdown of negotiations.

Failure to preserve the status quo until the earlier application is heard would in the circumstances described defeat the cause of justice and the intention of the parties. The maximum equity regards that as done which ought to have been done comes in handy in this situation, The situation is not provided for and therefore this court is clearly entitled to invoke its inherent powers and S 63 (c) and (e) of the Civil

Procedure Act in order to meet the ends of justice. Failure to do so would render the injunction application superfluous. Courts of law and equity should never agree to be moved in vain or its process defeated by a step of one party which conveniently tries to take advantage of a mistake in the court process. The hand of justice is never too short or too long. It adjusts to all situations.

Section 63 (e) of the Civil Procedure Act is aimed at supplementing court's power to do justice.

Take the example of the court machinery failing to list an injunction application interpartes on the due date, in such a situation in the view of the court the applicant should be able to move the Duty Judge or any other Judge to grant a temporary injunction under the inherent powers of court. This court therefore invokes its inherent powers, and hereby grants a temporary injunction order the applicant until the hearing of the injunction application dated 9th July 2003 or until further orders of this court. I make no order as to costs in the circumstances. There shall be liberty to apply.

DATED at Nairobi this 2nd day of March 2004.

**J G NYAMU**

**JUDGE**