



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO.109 OF 2003**

**ORANGE STYLES (EPZ) LIMITED ..... PLAINTIFF**

**VERSUS**

**BANK OF BARODA ..... 1ST DEFENDANT**

**BINDI (EPZ) KENYA LIMITED ..... 2ND DEFENDANT**

**R U L I N G**

On the 23rd May 2003 Mr. Khanna Advocate appeared before Mr. Justice Ouna under Certificate of Urgency Ex-parte for orders that a Chamber Summons application he had filed on behalf of the Plaintiff in this suit was urgent as the defendants intended to enforce an invalid guarantee against the plaintiff which is payable on demand.

Mr. Justice Ouna, after perusing the pleadings and hearing Mr. Khanna certified the said application as urgent and proceeded to issue temporary orders of injunction in terms of prayers (1) and (2) in the said application and fixed the matter to be heard inter-partes on the 5th June 2003. The Deputy Registrar proceeded to extract and sign an order on the same 23rd May 2003 which was served at 4.55 p.m. upon Mr. Valia, Chief Accountant of the 1st Defendant by a process Server Mr. Fred Mangoli. An affidavit of Service has been filed.

On the 26th May 2003 at about 3.00 p.m. the same process server Fred Mangoli served the Chamber summons dated 22nd May 2003 upon Mr. Valia and the General Manager of the 1st Defendant. He proceeded at 3.15 p.m. to the offices of the 2nd Defendant and served the same Chamber Summons upon the Managing Director Mr. K.M. Shah.

The cumulative effect of that evidence is that the defendants were served with the Chamber summons dated 22nd May 2003 on the 26th May 2003. They were required, under Order 50 Rule 16 of the Civil Procedure Rules, if they wished to oppose it, to file and serve on the applicant/plaintiff a replying affidavit or a statement of Grounds of Opposition not less than three clear days before the date of hearing (5th June 2003)

From the pleadings filed, the law firm of M/s Sachdeva & Co. advocates entered an appearance for the 1st Defendant on 4th June 2003 and filed an affidavit sworn by Mr. Anil Kumar Sodhi (1st Defendant's Branch Manager- Mombasa) also on 4th June 2003 opposing this application.

The law firm of A.B. Patel & Patel Advocates acting for the second defendant entered an appearance

on 3rd June 2003, proceeded to file the 2nd defendant's written statement of defence on the same 3rd of June 2003 but have not filed any affidavit or any grounds of opposition to the application of 22nd May 2003. Instead they filed a separate application, being a Notice of Motion dated 3rd June 2003, seeking essentially the following order:

*"2. That the Ex -parte Order issued by this Honourable Court against the first and second defendants herein on 23rd May 2003 be set aside and the injunctions discharged."*

The grounds endorsed and in support of this motion are that the Plaintiff has failed to make a full and frank disclosure of all material facts; the Plaintiff has deliberately misled the court by the said material non-disclosure and has obtained an unfair advantage in the process; the court would in all likelihood have declined to issue the ex-parte orders issued herein on 23rd May 2003 had it been aware of all the material facts pertaining to this matter. It is further supported by an affidavit sworn by Mr. Kirti Shah, Managing Director of the second defendant.

This motion was fixed for hearing before me today. The record of the court shows that the hearing date was given in the Registry on the 3rd June 2003. Only a clerk called Josephat in the firm of A.B. Patel & Patel Advocates was present. There is no return of service of both the Motion and hearing Notice on the Plaintiff or Plaintiff's advocates, though Mr. Khanna stated from the bar that he was served on 3rd June 2003 after 4 p.m. Both Mr. Khanna Advocate and Mr. Khagram Advocate, the latter being from M/s A.B. Patel & Patel advocates, have conceded that both applications can be heard together, with Mr. Khagram insisting that there should be no adjournment, while Mr. Khanna submits that he requires to take instructions from his instructing client.

I have pointed out that there is no proof on record that the notice of Motion dated 3rd June 2003 has been served upon the Plaintiff though there is this admission by Mr. Khanna from the bar. But even accepting that Mr. Khanna was served at 4 p.m. on 3rd June 2003 he was entitled to get three clear days from the date of hearing for purposes of taking instructions, filing either replying affidavit or grounds in opposition. He has not had sufficient time to do that.

I have recorded Mr. Khagram's submissions. I have taken into consideration his strong feelings that this matter ought to proceed. But despite them, I still am of the view that justice demands that the plaintiff should be given an opportunity to defend.

Besides, I have pointed out that the 2nd defendant equally has not filed an affidavit or grounds of opposition of the application dated 22nd May 2003, and it cannot be said that the Motion dated 3rd June 2003 is in opposition of the same. This motion is a separate and independent application. In effect therefore the 2nd defendant requires leave to file a replying affidavit and grounds of opposition to the summons dated 22nd May 2003.

For the above reasons I exercise my discretion in favour of an adjournment and do direct as follows:

*(a) Chamber Summons dated 22 nd May 2003 and Notice of Motion dated 3 rd June 2003 are fixed for joint hearing on the 19 th June 2003.*

*(b) Leave is granted to the plaintiff to file and serve replying affidavit and/or grounds of opposition to the Notice of Motion dated 3 rd June 2003 within seven days from today.*

*(c) Leave is granted to the 2 nd defendant to file and serve replying affidavit and/or grounds of opposition to the Chamber Summons dated 22 nd May 2003 witin seven days from today.*

*(d) Temporary orders issued on the 23 rd May 2003 are extended to the 19 th June 2003. (e) Costs be in the cause.*

*Dated and Delivered at Mombasa this 5th June 2003.*

A.G.A. ETYANG

JUDGE

In the presence of Mr. Khanna for the Plaintiff, Mr. Khagram for the 2nd

**Defendant and Mr. Omolo for the 1st Defendant, Mr. Furaaha - court clerk.**

A.G.A. ETYANG

JUDGE