



**Wainaina t/a City Eye Advertising Agency v Shop and Deliver Limited t/a Betika (Civil Case E020 of 2025) [2025] KEHC 3278 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3278 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E020 OF 2025  
F GIKONYO, J  
MARCH 13, 2025**

**BETWEEN**

**ZAKAYO MUCHAI WAINAINA T/A CITY EYE ADVERTISING  
AGENCY ..... APPLICANT**

**AND**

**SHOP AND DELIVER LIMITED T/A BETIKA ..... DEFENDANT**

**RULING**

1. Before me is the Notice of Motion dated 10<sup>th</sup> January 2025 under Order 40 Rule 2 of *Civil Procedure Rules* and Sections 3A and 63(C) of the *Civil Procedure Act*, seeking interlocutory injunctions to restrain the respondents from infringing, trading, promoting, advertising, marketing/carrying a business, Trademark registration or any other trade document of any nature in any form with its T.M NO 98164 Magic Numbers, in class 41 (Gambling/Betting by use of one or more numbers through Electronic Media i.e. Radio, Television, Internet and mobile Phones, Print media i.e. Newspapers, Magazines, Posters, Flyers and through Consumer Goods, Products and services).
2. The application is based on the grounds on its body, the supporting and supplementary affidavits sworn by Zakayo Muchai Wainaina on 10<sup>th</sup> and 27<sup>th</sup> January 2025. The applicant also filed written submissions.
3. The central grounds are that the respondent is interfering with a registered trademark; that the respondent have refused to honour the content of a cease and desist letter sent to them and that the respondent has refused liability.



## Response

4. The respondent filed grounds of opposition dated 21<sup>st</sup> January 2025, a replying affidavit sworn by Paul Mutegei on 23<sup>rd</sup> January 2025 and written submissions dated 31<sup>st</sup> January 2025. The respondent asserted that the applicant has not sufficiently established a cause of action with their application. It also asserted that the applicant claims that the respondent has infringed upon its intellectual property rights, yet has failed to provide evidence to support this claim at every stage. That therefore, the claim is unfounded and without merit.
5. The respondent further argued that the application does not meet the legal threshold for grant of interlocutory injunction established in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.

## Analysis and Determination

6. Before going into the merits of the application, I will consider a preliminary issue that was alluded to by the respondent about the appropriateness of the application; not sufficiently establishing itself before the court.
7. I do note from the record that the applicant commenced these proceedings by way of Notice of Motion.
8. Whereas it may be argued that a Notice of Motion may originate a suit, nevertheless, the Notice of Motion herein is seeking only interlocutory injunctions under order 40 of the [Civil Procedure Rules](#). Making it extremely difficult to entertain the application as an interlocutory application yet disposing of the entire suit which is raising fundamental question of infringement of intellectual property rights from both parties. Both parties claim breach of their intellectual rights; plenary hearing thus becomes the only appropriate method of resolving the dispute. The applicant shall decide whether to file a plaint and seek interlocutory relief or list the Notice of Motion for trial.
9. Orders accordingly.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

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**F. GIKONYO M**

**JUDGE**

In the presence of: -

Gatwiri for Wairoto for defendant

Zakayo for Plaintiff

CA - Kinyua

