



**Ezeetile Kenya Limited v DG Services Limited (Civil Suit
E034 of 2023) [2024] KEHC 16986 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 16986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E034 OF 2023
F WANGARI, J
MARCH 1, 2024**

BETWEEN

EZEETILE KENYA LIMITED PLAINTIFF

AND

DG SERVICES LIMITED DEFENDANT

RULING

1. This ruling relates to a Notice of Motion dated 24/4/2023 which sought for the following orders: -
 - a. Prayer 1, Spent;
 - b. Pending the hearing and determination of this application, a temporary order of injunction be issued against the Defendant to restrain them from either by themselves, their servants, agents, associates, assigns, affiliates or partners from infringing on the Plaintiff/ Applicant's Registered Trademark No. 103302 "TILEFIX" and or any confusing or deceptive mark that directly or substantially is similar to that of the Plaintiff/ Applicant.
 - c. Pending the hearing and determination of this suit, a temporary order of injunction be issued against the Defendant to restrain them from either by themselves, their servants, agents, associates, assigns, affiliates or partners from infringing on the Plaintiff/ Applicant's Registered Trademark No. 103302 "TILEFIX" and or any confusing or deceptive mark that directly or substantially is similar to that of the Plaintiff/ Applicant.
 - d. That the Defendant/ Respondent do allow the Plaintiff/ Applicant by itself or agents to access the Defendants premises to take inventory of all such products bearing the name "Tilefix" and take away such samples as may be necessary and keep the rest properly preserved at the Defendant's premises until the hearing and determination of this suit.
 - e. That costs of this application be provided for.



2. The application, orders and the directions issued by this court on 26/4/2023 were served upon the Defendants via registered post, as per the Affidavit of service dated 20/6/2023. When the matter came up for inter-partes hearing on 23/5/2023, the court was informed that the Defendant's physical location could not be traced, and leave was sought for service via substituted service, and the same was granted.
3. I do confirm from the e-filing platform that the various dates fixed for hearing or mention, the Defendant was duly served. I have also confirmed that the Defendants have not filed any response, hence the application stands unopposed. However, this being a court of record, the Plaintiff's application must be determined on merits.

Analysis and Determination

4. I have considered the application, supporting affidavit and the annexures thereto. The following are the issues for determination
 - a. Whether the Applicant has made out a case for grant of orders of injunction;
 - b. If the answer to (a) above is in the affirmative, what orders should issue?
 - c. Who bears the costs of the application?
5. On the first issue, this being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

“...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant



if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted...” (Underlying for emphasis)

6. While considering the above principles, I take caution that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002) However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.
7. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity.
8. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.
9. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions.
10. On whether the Applicant has established prima facie case, in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, prima facie case was defined as follows: -

“...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter...”
11. The Applicant being the proprietor of the trademark no. 103302 “TILEFIX” has the exclusive rights to the use of the said trademark. Having developed unique products under the trademark name and for over 4 years, the Applicant states that it has “cultivated goodwill amongst customers, gained a substantial market share and developed brand loyalty over its operations in the country”.
12. The Applicants states that he Defendant has infringed and continues to infringe the said trademark by passing off their products as the Plaintiff’s as their products have a striking similarity to that of the Plaintiff, hence deceiving the members of public that it is the Plaintiff’s.
13. From the above, I find that the Applicant has established a prima facie case.
14. On whether the Applicant shall suffer irreparable damage which cannot be compensated by an award of damages, the Applicant has established that from the confusion created by the Defendants to the consumers due to the similarity of the products, they are suffering irreparable damages and continues to suffer the same, by way of massive financial losses due to reduced sales.
15. On the balance of convenience, I note that the Applicant is still suffering due the acts of the Defendants. The Defendants are not suffering any damages but benefiting at the expense of the Applicant.



16. In *Chebii Kipkoech vs. Barnabas Tuitoek Bargarora & Another* [2019] eKLR, balance of convenience was defined as follows: -

“...the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed...”

17. Putting all the facts into perspective, I note that if the orders for injunction are not granted at this stage, the Applicant continues to suffer irreparable harm. Further, for purposes of taking inventory and securing the substratum of the suit, the prayer for access to the Defendant’s property is hereby granted.

18. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. The Defendant having not defended the application, costs are awarded to the plaintiff.

19. From the above, the court orders as follows;

- a. The application dated 24/4/2023 is allowed as hereunder;
 - i. Temporary order of injunction is granted as per prayer no. 3 of the application.
 - ii. Order of access to the Defendant’s premises is hereby granted as per prayer no. 4 of the application.
- b. Costs of this application awarded to the Applicant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF MARCH, 2024.

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F. WANGARI
JUDGE

In the presence of;

M/S Osewe Advocate for the Plaintiff

N/A by the Defendant

Barile, Court Assistant

