



**Royal ENT Head and Neck Hospital Ltd v Blue Whale Meditacla t/a Royal Eye and Ear Hospital (Civil Case 16 of 2022) [2023] KEHC 3400 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3400 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 16 OF 2022  
RN NYAKUNDI, J  
APRIL 24, 2023**

**BETWEEN**

**ROYAL ENT HEAD AND NECK HOSPITAL LTD ..... PLAINTIFF**

**AND**

**BLUE WHALE MEDITACLA T/A ROYAL EYE AND EAR  
HOSPITAL ..... DEFENDANT**

**RULING**

1. Before me for determination is the Applicant's Notice of Motion dated November 29, 2022. The Applicant seeks the following orders: -
  1. Spent.
  2. That pending the hearing and determination of this application, an order of temporary injunction do issue restraining the Defendant/Respondent either by itself, its directors, servants, agents, officers/employees from using (including but not limited to posting on its social media pages to wit- Facebook, twitter, Instagram, tik tok and WhatsApp page the name Royal Eye And Ear Hospital with its bio scripted as Ent Ophthalmology.
  3. That pending the hearing and determination of this application, an order of temporary injunction do issue restraining the Defendant/Respondent either by itself, its directors, servants, agents, officers/employees from using (including but limited to posting on the page) the name Royal Eye And Ear Hospital with its bio scripted as Ent Ophthalmology.
2. The application is premised on the grounds therein and it is further supported by the affidavit of Owen Pyeko Menach, dated on November 29, 2022.



## **Applicant's Case**

3. The Applicant's case is that it is a limited liability company duly registered and incorporated in the Republic of Kenya pursuant to the dictates of the *Companies Act, 2015*.
4. The Applicant deposed that it was registered and incorporated in the year 2019 and has been running a hospital business since then, offering specialized treatment for eye, ear, neck, throat and head.
5. The Applicant maintains that it has built a reputation for itself by marketing its services and offering satisfactory services to clients which has led to the exponential growth of the company.
6. The Applicant further deposed that it has a national wide client base seeking its services.
7. The Applicant further deposed that it has recently been brought to its attention that there is Facebook page by the name Royal Eye and Ear Hospital with its bio scripted as ENT Ophthalmology which was recently created by the Respondent herein.
8. The Applicant maintains that the Respondent is in the same field with it, offering specialized treatment for areas which are convergent with those that it offers. Further that the Respondent also shares some names with it which makes it easy for a client to mistake the Respondent for the Applicant. The Applicant further contends that the two names are almost similar and thus cause confusion among the members of the general public.
9. According to the Applicant, the Respondent has been tactical in creating a Facebook page that almost resembles its page.
10. The Applicant is apprehensive that in view of the general public not being concerned about the nitty gritty of the names of the said entities then there is likelihood that they believe that the Respondent's facility is a branch of the Applicant as the services being offered are similar. This the Applicant contends will have a negative impact on his business.
11. The Applicant further deposed that although, the Respondent trades using a totally different name it the Facebook page that has the inclusion of the words ENT which is arguably malicious and has the intent of causing deception to the general public.
12. The Applicant contends that it has been losing clients and will continue losing clients based the said misrepresentation. Further, the Applicant contends that it has extended massive resources towards building its reputation and it will be unfair to allow the Respondent to reap from it.
13. The Applicant contends that the Facebook page was only created recently whose intent to cause confusion to members of the general public.
14. According to the Applicant, the Respondents actions are in utter disregard and breach of business etiquette and trade practice.
15. The application is unopposed. There is an affidavit of service on record dated December 19, 2022.

## **Determination**

16. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules 2010* which provides that: -

“Where in any suit it is proved by affidavit or otherwise: -



- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

17. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

18. An injunction usually is not an independent cause of action and cannot stand without a substantive claim alleging a violation or an infringement of a right. Typically, a remedy for interlocutory injunction comes in as an ancillary to support the substantive claim. In broader sense the court applies the above three pronged-tier approach to determine whether a claim is ripe for grant of an injunction but as Lord Diplock noted in *American Cyanamide Co vs Ethicon Limited* [1975] AC 396; [1975] 2 W L R 316

“The whole point of temporary injunction is to keep matters in status quo until the main issue in the case can properly be heard.”

19. It is against this background I should consider whether the averment from the affidavit of the Applicant presents a claim that is ripe for a preliminary injunction to issue pending a final Judgment in the case. The relief sought by the Applicant is to restrain the Respondent from using including but not limited to posting on its social media pages to wit- Facebook, twitter, Instagram, tik tok and WhatsApp page the name Royal Eye And Ear Hospital with its bio scripted as Ent Ophthalmology.

20. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd V First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C Mubia Njoroge & 2 others V Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a *prima facie* case as: -

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

21. The Applicant’s main contention is that the Respondent herein is using a similar name as it to conduct business on a social media platform being Facebook. The Applicant is apprehensive that in light of the said similarities, members of the general public will be confused as to what entity to seek services from and thus causing it irreparable loss.



22. The key ingredients at be borne in mind as it adverts to the merits and demerits of injunctive orders are as illustrated in the case of Reckitt and Colman products Limited vs Borden Inc and Others (1990) 1 All ER 873 at page 880 examined the elements of the tort of passing off as follows:

"...The law of passing off can be summarised in one short general proposition, no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognized by the public as distinctive specifically of the plaintiff's goods or services. Second, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff. For example, if the public is accustomed to rely on a particular brand name in purchasing goods of a particular description, it matters not at all that there is little or no public awareness of the identity of the proprietor of the brand name. Third, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff."

23. I have carefully read the Applicant's Notice of Motion together with the supporting affidavit. The Applicant save for mentioning that due to the similarities in the names between it and the Respondent, there is a likelihood of confusion, the Applicant has not tendered any evidence to support the said assertions. To my mind there is nothing that has been tabled before this Court to show that the Respondent is trading with a similar name as that of the Applicant herein on Facebook.
24. Having found so, am satisfied that the Applicant has not established a *prima facie* case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in Nguruman Limited Jan Bonde Nielsen & 2 Others, CA No 77 of 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction 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) ally 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.” (Emphasis added).

25. For the above reasons, I find that the application for injunction is not merited and I therefore dismiss it.

28. There shall be no orders as to costs.

It is so ordered.

**DATED AND DELIVERED VIA –EMAIL AT ELDORET THIS 24<sup>TH</sup> DAY OF APRIL 2023.**

.....

**R.NYAKUNDI**

**JUDGE**

kcandkigenllp@gmail.com

