



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E214 OF 2021

NAIROBI OUTPATIENT CENTRE LIMITED.....PLAINTIFF

-VERSUS-

NAIROBI OUTPATIENT GULF LIMITED.....1ST DEFENDANT

GRACE WANGARI MUTHUMA.....2ND DEFENDANT

THE KENYA MEDICAL PRACTITIONERS & DENTIST COUNCIL.....3RD DEFENDANT

RULING

1. This ruling is with respect to the Notice of Motion application dated 3/09/2021 and a Preliminary Objection (P.O) filed on 15/10/2021. The application taken out by the plaintiff seeking the following orders;

i. Spent

ii. Spent

iii. THAT pending the hearing and determination of this suit an order of temporary injunction do issue restraining the 1st and 2nd Defendants either by themselves, directors, assigns, representatives, employees, associates ,affiliates ,partners or agents from trading, advertising, marketing and or in any other way dealing in the provision of medical services or the provision from any other entity using the word “NAIROBI OUTPATIENT “or otherwise dealing in any service alike and /or similar and/or confusingly similar in get up to the health care or health products or medical matters generally as practiced by the plaintiff under its registered name;

iv. THAT pending the hearing and determination of this suit an order of temporary injunction do issue restraining the 3rd Defendants either by themselves, directors, assigns, representatives, employees, associates ,affiliates ,partners or agents from registering the 1st Defendant as a medical services or otherwise the provision from any other entity using the word “NAIROBI OUTPATIENT “or otherwise dealing in any service alike and /or similar and/or confusingly similar in get up to the health care or health products or medical matters generally as practiced by the Plaintiff under its registered name;

v. THAT the Plaintiff be permitted to enter the 1st Defendant premises situated in Nairobi and elsewhere within the Republic wherein the 1st and 2nd Defendants, their ,assigns, representatives, employees, associates ,affiliates ,partners or agents are storing products infringing on the Plaintiff’s trademark and passing off their products as belonging to the Plaintiff trademark and passing off their products as belonging to the Plaintiff, for the purposes of entering and seizing branded stationery bearing the marks similar and/or confusingly similar in get up to the marks owned by the Plaintiff, all purchases and sales record invoices for the past month touching on the aforementioned infringement and such documents, copies of any items of whatever nature which constitute or could constitute evidence necessary to substantiate its cause of action and preserve the same.

vi. THAT the Officer Commanding Station Central Police Station be directed to enforce the said Order.

vii. THAT the Plaintiff immediately on seizing the items in Order No. (vi) hereinabove shall file an affidavit within 14 days after such seizing wherein the Plaintiff will give details of all the 1st Defendants items it has taken into custody and in Plaintiff shall give an undertaking not to use the items seized other than in the proper conduct of this action.

viii. Costs and further incidentals to this Application be provided for; and

ix. Such further or other relief as the Honourable Court may deem just and expedient to grant.

2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of Dr. Mary Mupa Madumadu, a Managing Director of the Plaintiff/applicant.
3. In opposing the said Motion, the 2nd Defendant/respondent filed the replying affidavit of the sole director of the 1st Defendant Grace Wangari Muthuma, to which Dr. Mary Mupa Madumadu rejoined with her supplementary affidavit sworn on 1st October 2021 followed by the further affidavit sworn by Grace Wangari Muthuma on 15th October, 2021.
4. The 1st and 2nd Defendants/respondents similarly filed a notice of preliminary objection dated 15th October, 2021 and raised the grounds that there was no resolution or valid resolution of the plaintiff company approving the institution of the suit that therefore this court has no jurisdiction to hear and determine the dispute between the Plaintiff and Defendants thereof.
5. The plaintiff/applicant opposed the preliminary objection by filing the Grounds of Opposition dated 28th October, 2021 and put forward the following grounds:

a) That the Notice of Preliminary Objection as drawn and filed is bad in law, incompetent, misconceived and is an abuse of the process of the court.

b) That the objection is only intended to delay the suit and divert the courts attention from hearing and determining the main issue at hand which is the obtaining of a fake /illegal operating license by the 2nd Defendant and using the same to operate a medical facility.

c) That there is no requirement by the Plaintiff Company to have a resolution passed by the directors who hold half of the shareholding of the company.

d) That the suit was filed with the authority of the directors who hold half of the shareholding of the company.

e) That the verifying and supporting affidavits were sworn by one of the directors of the Plaintiff Company who is competent to do so.

f) That the court should treat the issues raised in the Preliminary Objection as technicalities which the Constitution of Kenya at Article 159 provides that the court should pay undue regards.

g) That the 1st & 2nd Defendant has not demonstrated sufficient cause for the grounds upon which the Court can grant the orders sought.

h) That the 1st and 2nd Defendants objection is only calculated to delay the proceedings in this long standing matter.

i) That for the above reasons, the 1st and 2nd Defendant's Notice of Preliminary Objection ought to be dismissed with costs.

6. When the parties attended court, directions were given that the preliminary objection and the instant Motion be heard and determined together. Consequently, the parties put in written submissions apart from the 3rd defendant who had indicated that he was not going file any submissions.

7. I have considered the grounds featuring on the face of the Motion;

the facts deponed in the supporting and replying affidavits respectively; the preliminary objection and Grounds of opposition in response thereto; and the rival written submissions placed before me.

8. A brief background of the matter is that the applicant instituted a suit against the respondents by way of the plaint dated 3rd September, 2021 and sought for *inter alia*, various forms of damages and an order for permanent injunctions against the respondents, arising out of the Defendants infringement of the Plaintiff's marks, name, style and brand contrary to the law. The plaint was filed together with the instant Motion.

9. Returning to the case at hand, I will first rule on the preliminary objection, which claims that the complaint was brought without the Plaintiff's company's permission and that this Court lacks jurisdiction to hear and decide this disagreement between the Plaintiff and the Defendant.

10. The 1st and 2nd defendants argue in their submissions that the board of directors did not convene as required to deliberate on the filing of this lawsuit and that Mary Mupa Madumadu was not lawfully authorized to swear the affidavit on behalf of the Plaintiff's business.

11. Reference is made to the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** cited in the submissions by the respondent, where the court defined the term 'preliminary objection' in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

12. The Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** offered the following interpretation on the legal term ‘res judicata’ in the manner hereunder:

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the Civil Procedure Act, 2010;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.**
- (b) That former suit was between the same parties or parties under whom they or any of them claim.**
- (c) Those parties were litigating under the same title.**
- (d) The issue was heard and finally determined in the former suit.**
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”**

13. The plaintiff in their submissions, stated that the Defendants has not denied the fact that Dr. Mary Mupa Madumadu is a shareholder/director thereby allowing the suit herein to stand by virtue of her undisputed capacity to sue.

14. The plaintiff cited Section 238 of the Companies Act Section 238 provides *inter alia* that;

A derivative claim may be brought

(3) A derivative claim under this part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

15. On the other hand the Defendants stated that there was no resolution or valid resolution of the plaintiff company approving the institution of the suit.

16. I am persuaded by the decision of Kimaru, J in **Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** that such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.

17. From my study of the Motion, it is clear that the applicant is seeking the orders of a temporary injunction pending the hearing and determination of this suit.

18. In view of the foregoing, I am satisfied that there is nothing to preclude me from entertaining the instant Motion. Consequently, the preliminary objection dated 15th October, 2021 is hereby dismissed with costs to the 1st and 2nd defendants.

19. It is clear that the sole issue now pending for determination is whether the grant of an interlocutory injunction.

20. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA** as follows:

- a) The applicant must first establish a prima facie case with a probability of success.**
- b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.**
- c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.**

21. The above principles were restated in the case of **Micah Cheserem v Immediate Media Services & 4 others [2000] eKLR** cited by the respondents and in respect to defamatory claims, thus:

Firstly, the applicant must establish a prima facie case with a probability of success. Secondly, the applicant must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages. Thirdly, where the court is in doubt, then the balance of convenience should tilt in favour of the applicant.

22. Under the first principle, it is the position of the applicant that a comparison of the Plaintiff's brand name, colors, business situation, and contacts with the 1st Defendant's reveals apparent and striking similarities, which they believe are deliberate and intended to cause misunderstanding and unfairly usurp the Plaintiff's market.

23. The Plaintiff also submits that the 2nd defendant was a marketer who was recently promoted to be the Plaintiff's director, and that an official search of the 1st Defendant's firm at the company register indicated that Grace Wangari Muthuma, the 2nd Defendant, is the company's director.

24. The plaintiff claims that the average consumer of health products or medical matters would not be as keen as to pick out similarities or differences between the Plaintiff's and the 1st Defendant's products and services, and would instead go by the most striking features, resulting in the average consumer of the Plaintiff's product picking the 1st Defendant's product thinking it is the Plaintiff's, especially since these are products that can be found lying side by side on store shelves.

25. In response, the 2nd defendant states in his replying affidavit that the orders issued have rendered the 1st Defendant's operations indefinitely paralyzed because it cannot function without using a name because no receipts, appointments, or tests can be done or results given without using the facility name.

26. According to the 2nd defendant, the directives have violated his fundamental right to be heard and to present evidence, as indicated by this Court in **SM v HE (2019) eKLR**.

27. In respect to the second principle on irreparable damage/loss, the plaintiff stated that the 1st and 2nd Defendants are misleading members of the public by leading them to believe that the offending product and or service is, in fact, a product and or service of the Plaintiff, which is harmful to the Plaintiff's business and clearly indicative of the 1st and 2nd Defendants' bad faith and intent to profit from the Plaintiff's long-established goodwill.

28. The Plaintiff asserts that unless the injunctive orders requested are granted, the defendants will continue to infringe on the Plaintiff's trademark and pass off their medical services as the Plaintiff's, inflicting great harm that cannot be sufficiently compensated by an award of damages.

29. On their part, the respondents are of the view that should the application be allowed the ramifications would be dire for the 1st Defendant as business would be paralyzed as causing irreparable damage to which an award for damages would not suffice.

30. *Due to the serious nature of the difficulties, the damages test will not be an acceptable measure here. I am governed by the fundamental principle of law that the court should follow the option that appears to pose the least danger of injustice if it turns out to be "wrong." And, rather than imposing an injunction at this time, the balance of convenience will favor advancing with the case on a more fundamental examination of the facts and the law. See the case of **Pastificio Lucio Garofalo S.P.A v Debenham & Fear Limited (2013) eKLR**. Accordingly, I decline to issue an injunction and dismiss the Plaintiff's Notice of Motion dated 3rd September, 2021.*

31. In the end, the defendant's preliminary objection dated 15.10.2021 and the plaintiff's motion dated 3rd September 2021 are both found to be without merit. The same are dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent