



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.318 OF 2017**

**OCEAN FOODS LIMITED.....PLAINTIFF**

**VERSUS**

**OSOTSPA COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**OSOTSPA EUROPE LIMITED.....2<sup>ND</sup> DEFENDANT**

**EXTROPICA FOODS LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants through an application dated 12<sup>th</sup> January 2018 brought pursuant to section 27, 28 and 29 of the contempt of Court Act, 2016; order 40 Rule 3 of Civil Procedure Rules and all enabling provisions of law seek the following orders:-

1. This application be heard urgently and in priority over the plaintiff's application dated 8<sup>th</sup> December, 2017.

2. The plaintiff be and is hereby found to be in contempt of Court for willful disobedience of the order made by this Court on 31<sup>st</sup> October 2017 and ordered to pay a fine of Kshs. 200,000.

3. Messrs Ali Mohamed Sahal, Ahmed M. Mohamed, Abdi Mohamed, Hassan Mohamud Kassim, Romana Chaudhry being the directors, officers, agents and/or servants of the plaintiff be arrested under warrants of arrest to be issued by this court and committed to prison for a term not exceeding 6 months and ordered to pay a fine of Kshs.200, 000 each for failing to comply with the order of this Court made on 31<sup>st</sup> October 2017.

4. The Officer Commanding Central Police station be directed to enforce the warrants of arrest to be issued by this court.

5. The costs of this application be borne by the plaintiff.

2. The application is premised on the grounds on the face of the application to wit:-

1. On 31<sup>st</sup> October 2017, this Court made an Order allowing the 1<sup>st</sup> and 2<sup>nd</sup> defendant's application for injunction dated 26<sup>th</sup> September 2017 and dismissing the plaintiff's application for injunction dated 26<sup>th</sup> July 2017.

2. The Order was made in open court in the presence of all the parties, who were represented by advocates.

3. Notwithstanding being aware of the Order, the plaintiff and the plaintiff's directors, officers, agents or servants have willfully disobeyed the Order in, inter alia, the following ways:

a. They have continued to package, distribute, offer for wholesale or retail trade, release to the public and to make available the "Ocean Energy Drinks" including but not limited to Ocean Regular, Ocean Sugar Free, Ocean Lite, Ocean Apple & Melon and Ocean Still in packaging that is deceptively similar to or likely to cause confusion with the 1<sup>st</sup> defendant's packaging of its "Shark" energy drinks.

b. They have failed to withdraw from the market, including from distribution and wholesale and retail outlets, the "Ocean Energy Drinks" within 14 days of the Order or at all. They have, in fact, continued to manufacture, import, distribute and

supply to wholesalers and retailers the "Ocean Energy Drinks" that are packaged in a manner that is deceptively similar to the packaging of "Shark" energy drinks.

c. They have continued to use in packaging, advertisements, and websites words and marks in a manner that is deceptively similar to the 1<sup>st</sup> defendant's "Shark" trade mark No. 50628 in Class 32, and continue to advertise their "Ocean" energy drinks which are represented in a manner that is deceptively similar to the packaging of "Shark" energy drinks on their website [www.oceanfoodslimited.com](http://www.oceanfoodslimited.com).

d. They continue to suggest, on multiple platforms, that they are the manufactures and/or distributors of "Shark" energy drinks when what they manufacture and/or distribute are the "Ocean Energy Drinks" which are packaged in a manner that deceptively resembles the packaging of "Shark" energy drinks. Romana Chaudhry, for instance, states on her LinkedIn profile, that she is the Chief Sales and Marketing Manager at "Ocean Foods Limited (Shark Energy Drink)."

4. It is necessary to uphold the dignity and authority of this court and the rule of law to have the plaintiff and its directors, officers, agents or servants punished for failing to comply with the Order of 31<sup>st</sup> October, 2017.

5. It is fair and just to grant the orders sought in order to maintain public confidence in the administration of justice as administered by the Court.

3. The application is further supported by the Applicant's affidavit sworn by Krittaphat Wijitamornsakul on 12<sup>th</sup> January 2018. The application is further supported by affidavits dated 27<sup>th</sup> February 2018 and 30<sup>th</sup> July 2018 and annexures thereto.

4. The Respondent is opposed to the application and in doing so the Respondent filed Replying affidavit dated 15<sup>th</sup> February 2018 by Ali Mohamed Sahal; Hussein Mohamud Kassim and Romana Chaudhry; and further affidavit dated 3<sup>rd</sup> October 2018.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's/Applicants filed skeleton submissions with list of authorities dated 2<sup>nd</sup> February 2018 and response to the plaintiff's submissions dated 3<sup>rd</sup> July 2018; whereas Plaintiff/Respondent filed its submissions dated 27<sup>th</sup> July 2018 and list of authorities.

6. At the highlighting of the submissions Mr. Tungei, learned Advocate appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants whereas Mrs. Ahomo, learned Advocate appeared for the Plaintiff/Respondent.

7. I have very carefully considered the application; and affidavit in support as well as affidavit in opposition, and the submissions by counsel as well as the authorities thereto and the issues arising for consideration are as follows:-

**a. Whether this court issued an order on 31<sup>st</sup> October 2017 against the plaintiff on various prohibitory and mandatory injunctions?**

**b. Whether the plaintiffs are in contempt of the court order for wilful disobedience of the order made on 31<sup>st</sup> October 2017?**

**A. Whether this court issued an order on 31<sup>st</sup> October 2017 against the plaintiff on various prohibitory and mandatory injunctions?**

8. In this matter there is a court's order dated 31<sup>st</sup> October 2017, made by this court discharging the interim injunction orders on the ground that the plaintiff had not made a case for a grant of injunction and that it was guilty of non-disclosure. The court at the same time granted the 1<sup>st</sup> and 2<sup>nd</sup> defendants the various prohibitory and mandatory injunctions requested for in the application dated 22<sup>nd</sup> September 2017; on the ground that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had shown that, the 1<sup>st</sup> defendant was the registered proprietor of the trademark "Shark" and had proven that the plaintiff was passing off its Ocean Energy Drinks as those of the 1<sup>st</sup> defendant. The plaintiff was required to comply with the court's order within 14 days from the order of the ruling.

9. There is no denial that on 31<sup>st</sup> October 2017 the court issued the order in terms of what I have noted herein above. The court record reveals that the ruling was delivered in presence of counsel of the parties in open court. I am therefore satisfied that this court issued various orders of prohibitory and mandatory injunctions against the plaintiff as clearly specified in the court's ruling of 31<sup>st</sup> October 2018.

**B. Whether the plaintiffs are in contempt of the court order for wilful disobedience of the order made on 31<sup>st</sup> October 2017?**

10. The definition of contempt is defined in the Black's Law Dictionary 10<sup>th</sup> Edition at page 385 as follows:-

**"Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."**

11. The plaintiff contents the order issued on 31<sup>st</sup> October 2017 was not served upon the contemnors and that no penal notice was issued. It is further urged that personal service of a court order upon an alleged contemnor is necessary for the alleged contemnor to be found to have been in contempt of court.

12. It is now settled law that the proper test is simply whether the alleged contemnor had knowledge of the court order. The issue has been

dealt with in myriad of decisions of the Court of Appeal and High Court. In the case of **Justus Kariuki Mate & another Vs Martin Nyaga Wambora & another (2014) eKLR** the Court of Appeal held:-

**"That an applicant is required to prove that personal service of the Order was effected on the respondent or in the alternative that the respondent had knowledge of the order. The court further observed that a person will be held to have notice of a fact or condition if that person:**

- a. Has actual knowledge of it;**
- b. Has received information about it;**
- c. Has reason to know about it or**
- d. Knows about a related fact.**

**The court further observed that the law of contempt of court has since changed and as it stands today, knowledge of an order is sufficient for purpose of contempt proceedings."**

13. From the above decision, it is clear that knowledge of the existence of the order or of the order supersedes personal serve and serve of the order with endorsement of the penal notice (see the case of **Kenya Tea Growers Association Vs Francis Atwoli & 5 others (2012) eKLR**).

14. In the instant suit, the order of 31<sup>st</sup> October 2017 was delivered in open court in the presence of counsel for the parties, who represented the Respondents herein, the Respondent having been represented by the counsel when the order was given, must have received information about the ruling, and have had reason to know from their counsel of the ruling. I therefore find the Respondent had knowledge of the court's order and cannot be heard to say otherwise.

15. It is urged for the plaintiff that they fully complied with the court's order requiring them to withdraw from the market all its products; relying on copies of the credits annexure "**AMA-6**". That the products which had been laden on the store on 24<sup>th</sup> September 2017 before the courts order was in force, has been kept in storage at Director's residence. That the production of receipts alleged to proof of the plaintiff's products still on sale at various outlet do not indicate the product purported as "**Shark Energy Drink**" and not the plaintiff's energy drink. It is therefore urged of the plaintiff the Applicants have not proved, that the plaintiff has failed to comply with the Honourable Court's order of 31<sup>st</sup> October 2017.

16. The Applicant has on the other hand, insisted that the plaintiff and the plaintiff's director's, officers, agents and servants have wilfully disobeyed the order in the way set out at paragraph 4 to 8 of Applicant's affidavit sworn on 12<sup>th</sup> January 2018.

17. It is further contended by the Applicant, that the 1<sup>st</sup> and 2<sup>nd</sup> defendants through their advocates requested the plaintiff to comply with the orders of the court (see pages 7 to 8) of the exhibit to the affidavit of Krittaphat Wijitamornsakul sworn on 12<sup>th</sup> January 2018. The request fell on deaf ears as the plaintiff is still supplying its Ocean Energy drinks in packaging that is similar to the 1<sup>st</sup> and 2<sup>nd</sup> defendants Shark energy drinks. The plaintiff and its directors must be punished for wilfully disobeying of the orders of this Honourable Court.

18. In the affidavits of the Applicant they have deponed that the Respondent though being aware of the court's order to the effect that they withdraw from the market, including from its distributors; wholesaler and retail outlets all of its ocean energy drinks including but not limited to Ocean Regular, Ocean sugar free, Ocean lite, Ocean Apple & Melon and Ocean still and any other drink whatsoever, that is packaged in cans or other packaging that are the same as, similar to or likely to cause confusion with Osotspa Company Limited's packaging of its "Shark" energy drinks; that they did not comply with the court's order which required them to do so within 14 days from 31<sup>st</sup> October 2017. The Applicants contend that after the court's order the Respondents in complete disobedient of the court's order imported 6240 trays of 2 X 20 feet containers of Ocean energy drink which were cleared from port of Mombasa on 13<sup>th</sup> November 2017 (**Exhibit marked "KW1"**); that on 17/11/2017, plaintiff's products were being displayed on shelves of Total Isinya Service Station as "**Shark Energy Drinks**" retailing at price of Kshs, 200/-. That the plaintiff's drinks were also said to have been supplied at Bill Investment Limited Service Station as "**Shark Energy Drink**" retailing at a price of Kshs. 200; breach whereof the Applicant's counsel communicated to the Respondent's counsel by emails dated 22<sup>nd</sup> and 23<sup>rd</sup> November 2017 to which there was no response. Further in breach it is contended the Respondent is still advertising its products on its website [www.oceanfoodslimited.com](http://www.oceanfoodslimited.com); printouts of the website made as recently as 8<sup>th</sup> January 2018 as exhibited by the Applicants.

19. It is also deponed by the Applicants that Romana Chaudhry, the Respondent's Chief sales and marketing manager, still presents the Respondent as the manufacturer or distributor of the Applicant's "**Shark energy drink**".

20. I have perused the Respondent's affidavits of Ali Mohamed Saha, dated 15<sup>th</sup> February 2018; Hassan Mohamud Kassim dated 15<sup>th</sup> February 2018 and Romana Chaudhry dated 15<sup>th</sup> February 2018 and the annexures thereto and its clear from the aforesaid affidavits 6240 trays of energy drink were imported after the order was made in this matter (**AMA-2**); that the Respondent has not specifically responded nor denied the matters deponed upon by the Applicants. The Respondent's has made a general response that they had complied with the court's order without specifying when they did so. They have not in my view controverted the contents of the Applicants affidavit; to the affect that the Ocean energy drinks were cleared from the port of Mombasa on 13<sup>th</sup> November 2017 (*as per exhibit "KW-1"*); that on 17<sup>th</sup> November 2017 plaintiff's products were being displayed on shelves of Total Isinya Service Station as "**Shark Energy Drink**" retailing at price of Kshs.200/- (*as per copy of receipt attached in the application*) and that the plaintiff's products were being supplied at Bill Investment Limited station as shark energy drink retailing at a price of Kshs. 200/-. The email dated 22<sup>nd</sup> and 23<sup>rd</sup> November 2017 raising the issue of

breach of the court's order to the Respondent's counsel were not responded to. Romana Chaudhry in her affidavit dated 15<sup>th</sup> February 2018 did not specifically deny the breach attributed to her by the Applicants.

21. In view of the above I am satisfied that the Applicants have demonstrated that the Respondent being aware of the court's order and being under obligation to comply with the aforesaid order, issued by the court and which order has not been set aside, deliberately disobeyed the court's order. In case of **Hadkinson Vs Hadkinson, [1952] 2 ALL ER 567**, Romer, L.J. stated as follow:-

**"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."**

22. I am alive to the fact, that the Plaintiff/Respondent filed an application to set aside the orders of 31<sup>st</sup> October 2017; which application is yet to be determined; a pending application is not a stay of the court's orders nor does it arrest the court's order unless the same is set aside. The Respondents are under obligation pending determination of their application to obey and comply with the court's order as the pending application cannot be used as justification to disobeying the valid existing court's order.

23. Having said so much, I find the Plaintiffs/Respondent's disobeying the orders issued on 31<sup>st</sup> October 2017 has brought the authority of the court into question notwithstanding causing irreparable damage to the Applicants.

24. **Section 28(1) and (6) of the contempt of Court Act; No. 46 of 2016** provides for punishment for contempt *inter-alia* as follows:-

**"(1) Save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both..."**

**(6) Notwithstanding anything contained in this section, where a person is found guilty of civil contempt, the court may if it considers that the fine will not meet the ends of justice and that imprisonment is necessary direct that the person be detained in civil jail for such period not exceeding six months as the court may deem fit."**

25. **Section 29 of the Contempt of Court Act No. 46 of 2016** provides for punishment for contempt *inter-alia* as follows:-

**"(1) Where a company is guilty of court in respect of any undertaking given to a court by the company, every person who, at the time the contempt was committed, was in charge of and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and such person may with the leave of the court be committed to civil jail:**

**Provided that nothing in this subsection shall render any such person liable to punishment if the person proves to the satisfaction of the court that the contempt was committed without his or her knowledge or that he or she exercised all due diligence to prevent its commission.**

**(2) Where the contempt of court is committed by a company and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and may, with the leave of the court be committed to civil jail and in addition, be liable to a fine not exceeding two hundred thousand shillings."**

26. In view of the above I am satisfied the terms of injunction issued against the Respondents were clear and unambiguous; the contemnor had proper notice of the terms and the breach of the injunction has been proved beyond reasonable doubt.

27. Having come to the conclusion that I have and in order to maintain the rule of law and in order that the authority and dignity of our courts are upheld at all times and to stamp the authority of the court and ensure the value, and principles of governance enshrined in Article 10 of the Constitution 2010 are adhered to always, I direct the plaintiff's directors/officers/agents or servants mentioned in Applicants' application dated 12<sup>th</sup> January 2018 to personally appear before this court to explain why appropriate sanctions ought not to be taken against them in their disapproving conduct.

**Dated, signed and delivered at Nairobi this 6<sup>th</sup> day of December, 2018.**

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**J .A. MAKAU**

**JUDGE**