



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 370 of 2008

KENYA BUS SERVICE MANAGEMENT LTD. PLAINTIFF

VERSUS

BTC ELECTRIC FENCE BUILDING &

ALARM SYSTEMS

FAMILY BANK LIMITED DEFENDANTS

RULING

Chamber Summons dated and filed on 3/7/08 is brought under **Order XXXIX Rule 1, 2 and 3, Civil Procedure Code** and **Section 3A of Cap. 21** Laws of Kenya. Application seeks orders the first and third of which have been dealt with. The outstanding application is numbered 2 in respect of an injunction to restrain the defendants' servants and agents and employees in any way from infringing on and passing off the plaintiff's service mark numbers 59664 and 59665 in classes 39 and 42 pending full hearing of this suit.

The grounds upon which the application is based are stated in the application which is supported by affidavit of Edwins M. Mukabanah which exhibits certificate of registration of TRADE MARK under **Rule 63** numbers 59664, 59665. The plaintiff has been carrying on transport business and has acquired goodwill. The plaintiff noticed the motor vehicle registered in the names of the defendants registration number KAX 040 U Isuzu bus was bearing confusing and deceptively similar get up, shape and colours, configuration design and appearance as the plaintiff's registered marks (Orders have already been made

for the removal of those marks). The plaintiff has not authorized the defendants to carry on business using the trade mark.

In replying affidavit sworn by Florence Muthoni, the second defendant states it is a financial institution which financed the first defendant to purchase the vehicle. The bank has not part in the day to day management of the first defendants' transport business or the above mentioned bus. The first defendant has caused an affidavit to be sworn by John Maina Ndonga described as Managing Director. He admits that the plaintiff and first defendant had an agreement of franchise which has been terminated. He has exhibited a photograph of the bus for the court to see. He denies that the colours of the motor vehicle are confusing members of the public.

I have considered the evidence contained in the affidavit. I notice the parties were having an agreement prior to this dispute and matters as to the infringement of trademark are denied. This is a matter that calls for a trial before final orders can be made. I do not find that an interlocutory injunction can be made in respect of the application made under prayer 2 of the application. Such an order would bring the suit to an end without hearing evidence of the parties at trial.

I therefore do not grant orders sought and I dismiss that prayer with costs in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 3rd day of November, 2009.

JOYCE N. KHAMINWA

JUDGE