

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISC. APPLICATION NO. 722 OF 2013
(ARISING FROM CIVIL SUIT NO 479 OF 2013)

BRITANIA ALLIED INDUSTRIES..... APPLICANT/PLAINTIFF

VERSUS

COGEF IMPEX LIMITEDRESPONDENTS/DEFENDANTS

BEFORE: LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

By this application, the Applicant/Plaintiff sought a temporary injunction restraining the Respondent / Defendant from selling, dealing or trading in products under the trade name of “**BRITANNIA**” until the disposal of the main suit. Costs of the application were also applied for.

The application was made under 0.36 rules 1 (a) (b) and 12 C.P.R and S. 101 C.P.A.

The grounds for the application as set out in the chamber summons are that:-

- The Applicant is the proprietor of the registered trade mark of Britannia and has acquired substantial goodwill in the said trademark by trading in Biscuits over the last decades in Uganda and East Africa.
- That the Respondent without any form of authority is infringing on their trademark of “Britannia” and passing off the said trade name.
- That the Applicant’s good will is in danger of being wasted and irreparably damaged by the Respondent.
- That it is in the interest of justice and equity that the said interim order be granted.
- The Applicant has matters to raise involving substantial questions of law and in the interests of justice the application should be granted.

The application was supported by the affidavit of Vinay Dawda which was read and relied upon at the hearing.

In their affidavit in reply, the Respondent/Defendant claimed that their biscuits and other confectionaries are imported from Britannia Industries of India, a Company established in 1892 and has since been manufacturing and selling biscuits all over the world.

Further that the Applicant’s trademark is distinct and different from that Britannia Industries Ltd, and all allegations of passing off or infringement of trade mark were denied.

It was also the contention of the Respondent that the application was misconceived.

When the application was called for hearing on 23.04.14, Counsel for the Applicant was present but Counsel for the Respondent was absent.

Since there was an affidavit of service dated 22nd April, indicating that Respondent’s Counsel was served and accepted service, and there being no reason advanced for their absence, hearing proceeded without them.

Counsel for the Applicant went through the grounds of the application and the affidavit in support. Thereafter he recited the principles for grant of an injunction to wit: To preserve the

status quo, till the question to be investigated is disposed of; Likelihood of irreparable injury not capable of being atoned for by award of damages.

And where court is in doubt, the application will be granted on the balance of convenience.

The following cases were cited in support – **Napro Industries Ltd Vs. Five Star Industries Ltd and Another Misc. Appl. 772/2004**; where the case of **Kiyimba Kaggwa Vs. Hajji Nasser Katende [1985] HCB 43** was cited. And the case of **Britannia Allied Industries Ltd Vs Sunrise Confectionaries Ltd Misc. Appl. 0288/2005**.

It was then submitted for the Applicant that the serious question before court is **whether the Applicant's trademark is being infringed**. Counsel relied on the affidavit in support and Annexure A & B there to. – The Trademark and the certificate of renewal respectively.

Court was urged to look at S.36 of the Trade Mark Act that grants exclusive rights for use where the Trade Mark is registered.

Counsel argued that since the Applicant's trade mark is valid, the Applicant was entitled to the exclusive use of the name "Britannia". **The Principles of Intellectual Property Law** by Catherine Colston was relied upon to emphasize that **"Trade Marks are protected by registration as trademarks; Registration confers a monopoly over use of a trade mark as long as registration is maintained. Trademarks fall within the sphere of intellectual property because the marketing of new creations is often supported by the development and maintenance of a commercial reputation"**.

Commenting about the Respondent's affidavit in reply where it is contended that their Trade Mark is different and distinct from that of the Applicant, Counsel stated that the case of **Arcadian Tobacco Co. Ltd. Vs. John Sinclair Ltd. (1938) EA CA** disposes of the Respondent's argument. The Court of Appeal held in that case that **".... such registration connotes and exclusive right that cannot be vested in two entities having conflicting interests."**

Court was also beseeched to rely on the **Napro Case (Supra)** to find that since it would be difficult to prove damages, then Applicant was likely to suffer irreparable damages.

And also that since the Trade Mark has been in use since 1991 and the Respondent's products came to the market in 2013, the balance of convenience is in favor of the Applicant.

It was then prayed that application be allowed.

After carefully listening to the submissions of Counsel for the Applicant and taking into consideration the reply of the Respondent, I wish to point out that the principles for grant of probability injunctions are well settled in a number of decided cases, some of which have been relied upon by Counsel for the Applicant.

It is generally accepted that for a temporary injunction to issue, the court must be satisfied that the Applicant has a prima facie case with a probability of success; that the Applicant might otherwise suffer irreparable injury. And if the court is in doubt, on any of the two issues, then it will decide the application on a balance of convenience – See **Uganda Law Society & Another Vs Attorney General [2003] 2 EA 694 (CAU)**; where the case of **Giella Vs Casman Brown & CO. Ltd [1973] EA 358** was cited.

The Court of Appeal clearly stated in that case that “ **According to the those 3 principles stated, the burden of the Applicants is to satisfy court, that there are serious questions to be tried in the suit, and secondly, that on the evidence before the court, there is a probability of the applicants being entitled to the relief asked for.... At this stage proof of the facts deponed in the affidavit evidence is not required. What is required at this stage is to show prima facie case and probability of success, not success.**”

In the present case, Counsel for the Applicant submitted that the question before court is whether the Applicant's Trade Mark is being infringed and passed off by the Respondent. And whether selling products under the Applicant's Trade Mark is calculated to cause and perpetuate confusion in the market and will cause irreparable damage and loss to the Applicant.

The trade name on the copies of the products presented to court look similar although the spelling is different.

The Applicant's Trade Mark is registered in Uganda and therefore they have exclusive use under S.36 Trade Mark Act and The Principles of Intellectual Property Law (Supra)

Court therefore has to look into the question as to whether the Respondents trade mark is distinct and different from that of the Applicant and whether it causes confusion to the public.

It has also been established by decided cases that it is usually difficult to assess the level of irreparable loss in such cases and determine the amount of appropriate damages to award. And Counsel for the Applicant insists that it is the same in the present case.

It is on record that the Applicant's trade mark has been in use since 1991 while the Respondents contend that they import the biscuits and other confectioneries from a Company in India. There is nothing to indicate that the same trade mark of the company in India is registered in Uganda.

For those reasons, I find that the Applicant has met the standards required for issue of an injunction and justice requires that the injunction issue restraining the Respondents from dealing, selling or trading in products of the name "Britannia" until the disposal of the main suit – See **Hassan Vs Adam [2007] 2 EA 178 CAK.**

The main suit C.S. 479/13 should be fixed for hearing.

The costs will abide the outcome of the main suit.

Flavia Senoga Anglin

JUDGE

14.05.14

