



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CIVIL CASE NO. 1 OF 2020**

**KUKENA CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD**

**& 31 OTHERS.....PLAINTIFF (S)**

**VERSUS**

**RURAL SHUTTLES LIMITED.....1<sup>ST</sup> RESPONDENT**

**KUKENA TRAVELLERS SHUTTLES LTD.....2<sup>ND</sup> RESPONDENT**

**MICHAEL KINYUA KIMARU & 5 OTHERS.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant ruling filed a Notice of Motion under Section 3 A of the Civil Procedure Act Order 40 rules 1, 2 and 3 and 10 of the Civil Procedure Rules and all enabling provisions of law seeking the following orders;

a) Spent.

b) **THAT** this Honourable Court be pleased to order that a temporary injunction do issue restraining the Defendants/ Respondents whether by itself, its directors, officers, employees, servants or agents or otherwise howsoever from trading in the name “KUKENA” or any other closely related name to KUKENA in the transport sector/industry or any other name or designation bearing a close resemblance thereto pending hearing and determination of this suit.

c) **THAT** this Honourable court issues an order of injunction pending the hearing and determination of this application inter alia, to restrain the 1<sup>st</sup> to 8<sup>th</sup> Defendants by themselves, agents, representatives or any other persons acting on their behalf and instructions or claiming through them from holding out as shareholders and directors of KUKENA SACCO under Registration certificate number. CS/8051 or at all.

d) **THAT** pending the hearing and determination of the application inter-partes, this Honourable Court be pleased to issue an order of injunction restraining the 1<sup>st</sup> to 8<sup>th</sup> Defendants/ Respondent from interfering with the affairs of the 1<sup>st</sup> plaintiff and to only engage in all the affairs regarding the operations of the plaintiff within the provisions of the Co-operative Societies Act, Companies Act 2015 and the Bylaws of the 1<sup>st</sup> plaintiff.

e) **THAT** this Honourable Court be pleased to issue an order of injunction pending the hearing and determination of this application inter alia, restraining the 1<sup>st</sup> to 8<sup>th</sup> Defendants from trespassing onto or taking over or dealing in any manner with the 1<sup>st</sup> Plaintiffs Transport Company, including but not limited to use of Kerugoya Bus Park.

f) **THAT** this Honourable Court be pleased to issue a declaration that the Registration and incorporation of KUKENA TRAVELLERS SHUTTLE LIMITED under certificate Number PVT -5JUP6AE in favour of the 6<sup>th</sup> to 8<sup>th</sup> Defendants was unlawful, illegal, null and void ab initio.

g) **THAT** the Honourable Court be pleased to order an enquiry as to damages or alternatively at the Plaintiff/ Applicant's option an account of profits made by the Defendants/ Respondents as a result of the aforesaid passing off by the Defendants/ respondents and an order for payment of any sums found due together with interest thereon at court rates.

h) **THAT** this Honourable court grants any other relief that may be deemed appropriate to grant.

i) THAT costs be provided for.

2. **WHICH APPLICATION** is based on the facts deponed in the annexed Affidavit in support sworn by **DAVID MURIITHI KABABI** on behalf of himself as well as the 1<sup>st</sup> Plaintiff and that of **BENSON MURIUKI NGURU** on behalf of himself and on behalf of the 4<sup>th</sup> - 32<sup>nd</sup> Plaintiffs on the grounds THAT;

a) On the 19<sup>th</sup> February, 1997 ( 23 years ago) the 1<sup>st</sup> Plaintiff/ applicant was issued with a Certificate of Registration by the Ministry of Co-operative Development and it henceforth commenced its operations of rendering quality transport services to the residents of Kirinyaga County.

b) Since its inception, and prior to the devolved units, the 1<sup>st</sup> plaintiff conducted its operations at what is popularly known as Kerugoya Bus park and it grew its operations to extend various destinations which included Nairobi, Thika, Embu, Mwea, Kagio, Nakuru, Kutus, Sagana, Makutano, Nyahururu, Nyeri, and Karatina. As at 31<sup>st</sup> December, 2019.

c) On or about 25<sup>th</sup> November, 2013 the 3<sup>rd</sup> -6<sup>th</sup> Defendants/ respondents registered a Company by the name RURAL SHUTTLES LIMITED with the utmost intention of acting and operating contrary to the interests of the 1<sup>st</sup> plaintiff/applicant.

d) That on 3<sup>rd</sup> March, 2015, the 1<sup>st</sup> Defendant/ applicant in complete disregard to the interests and welfare of the Plaintiff/ applicants (jointly), overstepped its mandate and fraudulently registered KUKENA SACCO as a Trademark under its name.

e) That on 11<sup>th</sup> October, 2019 the 6<sup>th</sup> -8<sup>th</sup> Defendants/ Respondents under the guise of the 1<sup>st</sup> Defendant further entrenched their illegalities by registering KUKENA TRAVELLERS SHUTTLE LIMITED in a selfish bid to completely take over the trade and operations of the 1<sup>st</sup> plaintiff/applicant.

f) That it is absurdly an unnecessarily coincidence that the 3<sup>rd</sup> -6<sup>th</sup> Defendants/ Respondents had since April, 2013, 22<sup>nd</sup> August, 2019 been involved in the management of the 1<sup>st</sup> Plaintiff and they were hence intensely involved in its trade secrets and management.

g) On the 31<sup>st</sup> day of December, 2019, 2<sup>nd</sup> Defendant without an iota of any legal right, and in utter violation of the Plaintiff's rights mishandled and molested the 1<sup>st</sup> Plaintiff, its agents and servants and completely paralyzed is operations in the feigned right that they have been dismissed from operating in the Kerugoya Bay.

h) The 1<sup>st</sup> Plaintiff in extension learnt that a suit had been instituted against itself with the sole intention of paralyzing its operations while working under the guise of 'law and order' through incomplete presentation of facts and law before the court proceedings in Kerugoya Chief Magistrate's court number 183 of 2019.

i) It has currently, emerged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is largely if not wholly comprised of members who deserted the 1<sup>st</sup> plaintiff after crippling its business socially and economically/ financially. In particular, the 2<sup>nd</sup> Defendant/ Respondent's Chairman is known Wilson Gathumbi Mbogo and he ranks highly among members who have defaulted in payment of the 1<sup>st</sup> Plaintiff's funds.

j) The totality of the actions of the Defendants/Respondents are only aimed at paralyzing the entire operations of the 1<sup>st</sup> Plaintiff/ Applicants and in extension these illegal and capricious actions will only serve to deny 500 families of their only source of livelihood.

k) The 3<sup>rd</sup> -8<sup>th</sup> Defendants/ respondents have acted illegally, fraudulently and in complete disregard of the law by colluding and causing the registration of the 1<sup>st</sup> Defendant/ Respondent and further causing the registration of trademark "KUKENA SACCO" under Trademark No. 84534 Class 39.

l) That the actions/ conduct of the 1<sup>st</sup> and 2<sup>nd</sup> defendants has satisfied the threshold of 'passing off' in that:

(i) There is a misrepresentation

(ii) The misrepresentation has been made by the 2<sup>nd</sup> Defendant/ Respondent in the course of trade

(iii) The misrepresentation has been made to prospective customers of his and subsequently to ultimate consumers of transport services supplied by him

(iv) The conduct/ actions of the 2<sup>nd</sup> Defendant/ respondent is calculated to injure the business and good will of the 1<sup>st</sup> plaintiff; and

(v) The conduct/ actions of the 2<sup>nd</sup> Defendant/respondent has caused actual damage to the 1<sup>st</sup> plaintiff.

**m) That the plaintiffs have sufficiently satisfied the threshold set out by the locus classicus desion of Giella -vs- Cassman Brown where the court had to consider the following questions before granting injunctive relief;**

- (a) Is there a prima facie case.....
- (b) Does the applicant stand to suffer irreparable harm..
- (c) On which side does the balance of convenience lie?

**n) Unless swift remedial action in form of injunctive orders are issued by this Honourable Court restraining the unlawful actions by the Defendants (jointly), the 1<sup>st</sup> plaintiff will be run down and reduced into a shell of an entity unable to deliver on its mandate of supplying quality transport services to the resident of Kirinyaga County and its bordering Counties.**

**o) In the circumstances, it is in the interest of justice that the orders sought be granted as prayed.**

3. The application is supported by affidavit of David Muriithi Kababi sworn on 17<sup>th</sup> February, 2020, he has reiterated the above grounds, he depones that the 1<sup>st</sup> plaintiff has a fleet of 450 public service vehicles which are owned by over 500 Citizens' majority of whom are Kirinyaga Citizens.

4. He depones that over 23 years the residents of Kirinyaga county have enjoyed the services rendered by the 1<sup>st</sup> plaintiff and admired the way it has been run professionally despite what has now become perennial control, manipulation or tag and pull with the County Government of Kirinyaga. Rural shuttles limited as well as the illegal body in the trading name of Kukena shuttle limited.

5. He deposes that the chronology of events crystalizing in the violation and fraudulent misdeed that have compelled the plaintiffs to instill this suit as well as file this application under urgency are as follows:

**(a) On the 19<sup>th</sup> February, 1997 (23 years ago), the 1<sup>st</sup> plaintiff after having sufficiently satisfied itself competent as a SACCO was duly registered and issued with a Certificate of Registration by the Ministry of Co-operative Development and it henceforth commenced its operations of rendering quality transport services to the residents of Kirinyaga County. (annexed hereto and marked DMK 1 a is a copy of the Certificate of Registration and marked DMK 1 b is a copy of the Pin certificate).**

**(b) Since its inception, and prior to the devolved units, the 1<sup>st</sup> plaintiff conducted its operations at what is popularly known as Kerugoya Bus Park and it grew its operations to extend various destinations which included Nairobi, Thika, Embu, Mwea, Kagio, Nakuru, Kutus, Sagana, Makutano, Nyahururu, Nyeri and Karatina. As at 31<sup>st</sup> December, 2019. (Annexed hereto and marked DMK 2 is a letter indicating the approved routes).**

**(c) The 1<sup>st</sup> Plaintiff has a fleet of around 450 public service vehicles which are owned by over 500 citizens, the majority of whom are Kirinyaga Citizens.**

**(d) On or about 25<sup>th</sup> November, 2013 the 3<sup>rd</sup>-6<sup>th</sup> Defendants/ Respondents registered a Company by the name **RURAL SHUTTLES LIMITED** with the utmost intention of acting and operating contrary to the interests of the 1<sup>st</sup> Plaintiff/ Applicant. (Annexed hereto and marked DMK 3 is a copy of the CR 12).**

**(e) That on 3<sup>rd</sup> March, 2015 the 1<sup>st</sup> Defendant/ Applicant in complete disregard to the interests and welfare of the Plaintiff/ Applicants (jointly), overstepped its mandate and fraudulently registered KUKENA SACCO as a Trademark under its name. ( Annexed hereto and marked DMK 4 is a copy of the disclosed details through the Register of Trademark offices at KIPI ).**

**(f) That on 11<sup>th</sup> October, 2019 the 6<sup>th</sup> - 8<sup>th</sup> Defendants/ Respondents under the guise of the 1<sup>st</sup> Defendant further entrenched their illegalities by registering **KUKENA TRAVELLERS SHUTTLE LIMITED** in a selfish bid to completely take over the trade and operations of the 1<sup>st</sup> Plaintiff/ Applicant. (annexed hereto and marked DMK 5 is a copy of the CR 12).**

**(g) That it is absurdly an unnecessarily coincidence that the 3<sup>rd</sup> -6<sup>th</sup> Defendants/ Respondents had since April 2013 -22<sup>nd</sup> August, 2018 been involved in the management of the 1<sup>st</sup> Plaintiff and they were hence intensely involved in its trade secrets and management. ( Annexed hereto and marked DMK 6 is a copy of an inquiry report detailing the management of KUKENA SACCO).**

**(h) On the 31<sup>st</sup> day of December, 2019, 2<sup>nd</sup> Defendant/ Respondent without an iota of any legal right, and in utter violation of the Plaintiffs' rights mishandled and molested the 1<sup>st</sup> Plaintiff, its agents and servants and completely paralyzed its operations in the feigned right that they have been dismissed from operating in the Kerugoya Bay.**

**(i) That prior to the invasion on 31<sup>st</sup> December, 2019 the only knowledge the 1<sup>st</sup> plaintiff had of the 2<sup>nd</sup> Respondent's existence was the letter from the National Transport and Safety Authority where the 1<sup>st</sup> Respondent had made an**

application dated 11<sup>th</sup> November, 2019 seeking to have itself licensed as a transport operator. (**Annexed hereto and marked DMK 7 is a copy of the letter dated 28<sup>th</sup> November, 2019**)

(j) That upon catching a whiff of request by the 2<sup>nd</sup> Respondent, I acted promptly by writing a letter to the NTSA wholly and fully objecting to the issuance of a license to a rival illegally registered body whose main aim was solely to cripple the operations of the 1<sup>st</sup> Petitioner. **Annexed hereto and marked DMK 8 is a copy of the letter dated 2<sup>nd</sup> December, 2019.**

(k) The capricious acts of the 2<sup>nd</sup> Respondents bore the indelible fingerprints of the 1<sup>st</sup>, 3<sup>rd</sup> -8<sup>th</sup> Respondents who had acted in complete knowledge of the 1<sup>st</sup> Plaintiffs' Trade secrets.

(l) The 1<sup>st</sup> Plaintiff was perturbed by the high handed, capricious and decadent manner in which the 2<sup>nd</sup> Respondent took over the operations of the Kerugoya Bay while bearing the full knowledge that the 1<sup>st</sup> Plaintiff had managed and conducted its operations in the very same Bay since 1997 (23 years of excellence).

(m) Over 500 families whose livelihoods depend on the 1<sup>st</sup> plaintiff's operations are offended by the adverse, unlawful and irregular orders issued by the 4<sup>th</sup> Respondent as they have adversely affected and incurably paralyzed the 1<sup>st</sup> Petitioner's operations since 31<sup>st</sup> December, 2019

(n) The entire management of the 1<sup>st</sup> Plaintiff and myself, were perplexed when we learnt that the 2<sup>nd</sup> Respondent had been authorized by the County Government of Kirinyaga to operate in the same picking and dropping bay which had been legally and regularly used by the 1<sup>st</sup> plaintiff for over a period of 23 years. (**Annexed hereto and marked DMK 9 is a directive in the form of a letter dated 25<sup>th</sup> October, 2019.**)

(o) In the course of the unnecessary scuffle that ensued on the fateful day, the agents/ servants of the 2<sup>nd</sup> Respondents mishandled and molested the 3<sup>rd</sup> - 34<sup>th</sup> Plaintiffs ( who has sworn a separate affidavit herein) and the commotion has opened the floodgates of litigation in the Kirinyaga Law Courts with complaints of Assault, Battery, Tort, Infringement of rights, Malicious damage to property being the main subject matter in issue.

(p) It has currently, emerged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/ Respondents is largely if not wholly comprised of members who deserted the 1<sup>st</sup> Plaintiff after crippling its business socially and economically/financially. In particular, the 2<sup>nd</sup> Respondent's Chairman is known as Wilson Gathumbi Mbogo and he ranks highly among members who have defaulted in payment of the 1<sup>st</sup> Petitioner's funds ( annexed hereto and marked DMK 10 a is a copy of a letter to surcharge dated 19<sup>th</sup> November, 2019 and marked 10 b are Surcharge Orders issued by the Commissioner for Co-operative Development).

(q) The 2<sup>nd</sup> Respondent has also in the process of oppressing the 1<sup>st</sup> plaintiff and under the power and might of the 1<sup>st</sup> Respondent, registered a name so similar to the 1<sup>st</sup> Plaintiff that members of the public have been led to believe that the two parallel transport companies are operating under the same management while this is just a fraudulent misdeed created by the 1<sup>st</sup> -8<sup>th</sup> Defendants/ respondents. (**Annexed hereto and marked DMK 11 is a copy of the 1<sup>st</sup> Respondent's Certificate of Registration.**)

(r) To further entrench this illegalities, the County Government of Kirinyaga have proceeded to continue harassing the 1<sup>st</sup> plaintiff to continue paying revenue and taxes yet they have chocked and completely extinguished the 1<sup>st</sup> Plaintiff's only source of income. **Annexed hereto and marked DMK 12 a, 12 b and 12 c are copies** of Co-operative Bank receipts evidencing the payment of County Revenue.

(s) It is Public knowledge that the 1<sup>st</sup> Plaintiff's service to the residents of Kirinyaga County and its cross -bordering Counties has been stellar and its operations have since inception been professionally run rendering stellar services to its customers and attracting substantial consultation from neighboring transport entities as well as heavy funding from Gigantic Financial Institutions. **Annexed hereto and marked DMK 13a, and 13b are certificates of recognition and cognition).**

6. He further deposes that unless swift remedial action is taken in form of injunctive orders are issued by this court restraining the unlawful action by the respondents, the 1<sup>st</sup> petitioner will be run down and reduced into a shell of a company unable to deliver on Its mandate to supplying transport to Kirinyaga county and bordering counties.

7. That he has been advised by his advocate on record, that the 3<sup>rd</sup> to 8<sup>th</sup> defendants/ respondents have acted illegally, fraudulently and incomplete disregard of the law by colluding and causing the registration of the 1<sup>st</sup> defendant, and further causing the registration of the trade mark Kukena Sacco under trade mark number 84534 class 39. The actions of the 1<sup>st</sup>, 3<sup>rd</sup> to 8<sup>th</sup> respondents have subsequently formed the genesis and registration of Kukena shuttle limited which said company has paralyzed the operations of the 1<sup>st</sup> plaintiff and occasioned irreparable harm to the applicants' as well as 400 existing members of the 1<sup>st</sup> plaintiff and their conduct has satisfied the threshold of passing off.

8. It is a high time that the court intervenes and upholds the rule of law in the transport sector and granting the orders sought herein.

9. The respondents filed a replying affidavit sworn by Cyrus Kabue Muchira sworn on 2<sup>nd</sup> March, 2020. He depones that he has sworn the affidavit on his own behalf and on behalf of the 1<sup>st</sup> to 8<sup>th</sup> defendants. That the notice of motion dated 20<sup>th</sup> February, 2020 is full of falsehood and is bad in law.

10. He contends that; the 1<sup>st</sup> defendant is a private limited company, however he is no longer involved in transport business. That the 2<sup>nd</sup> defendant, is a limited company incorporated under the companies Act. the 2<sup>nd</sup> defendant is an approved transport operator whose route of operation is Kerugoya - Sagana - Nairobi and back.

11. He further contends that they were allocated a picking bay by the County Government of Kirinyaga on 25<sup>th</sup> October, 2019.

12. It is clear that they were allocated an area between Kukena Sacco booking office and Mount Kenya Sacco, and that the 2<sup>nd</sup> defendant and the plaintiffs' operate separate and distinct picking bays in Kerugoya Town other main stages within Kirinyaga and Nairobi counties.

13. That the plaintiffs' failed to disclose the existence of the Chief Magistrate's court Civil suit No. 183 of 2019 where the court had issued a temporary injunction restraining the defendants' ( the present applicants) from destroying or any way interfering with the applicants peaceful operations of their officers pending interpartes hearing of this application.

14. That the aforesaid orders were extended pending the hearing and determination of the notice of motion dated 31<sup>st</sup> of December, 2019. That this court could not have issued injunctive orders on 17<sup>th</sup> February, 2020 if the Plaintiff's had made full disclosure of the existence of the Chief Magistrate's court civil case number 183 of 2019.

15. It is further contended that the name KUKENA is not distinctive as the same refers to Kutus; Kerugoya; Nairobi which are the major routes and the 2<sup>nd</sup> defendant was licenced to operate within Kenya.

16. That the registration of the 2<sup>nd</sup> defendant has not paralyzed the operations of the 1<sup>st</sup> plaintiff as they have been allocated separate and distinct picking bays in kutus, Kerugoya and Nairobi among other routes.

17. That the registration of KUKENA TRAVELERS SHUTTLE limited was done with compliance with the law and it is not tantamount to passing off.

He prays that the Notice of Motion dated 17<sup>th</sup> February, 2020 be dismissed.

18. The application proceeded by way of oral submissions for the applicant it was submitted that the crux of the application relates to theft of trademark and fraud and the threshold has been expanded in the Notice of Motion.

19. On misrepresentation it is submitted that there is a misrepresentation which refers to KUKENA. That when one says there is Kukena Sacco limited and there is Kukena Shuttle limited to any mind this is one and the said company.

20. He submits that; the County Government in a replying affidavit dated 3<sup>rd</sup> of March, 2020 in Constitutional petition number 1 of 2020 under paragraph 4 the County Government says that it was read to belief that KUKENA Sacco and Kukena Shuttle were one and the same company and the misrepresentation was made by the mushrooming company made to the prospective customers of KUKENA SACCO LIMITED. It was calculated to injure the business and goodwill of the company Kukena Sacco. It has caused actual damage to the applicant.

21. On fraudulent acts of 1<sup>st</sup> and 2<sup>nd</sup> defendant it is submitted that 3<sup>rd</sup> to 6<sup>th</sup> defendant were high ranking committee members of Kukena Sacco Limited, between April 2013 to August, 2018 during their years of reign they propagated a number of mischief key among them the registration of Rural Shuttle Limited. Court was referred to paragraph 4 of the affidavit of Cyrus Kabue Muchira, and the respondents have admitted that Rural shuttle is no longer involved in transport business and their intention was fraud.

22. The 1<sup>st</sup> defendant on 3<sup>rd</sup> May, 2015 registered Kukena Sacco as a Trademark and the action was unknown to Kukena Sacco Limited and the 3<sup>rd</sup> to 8<sup>th</sup> defendant liaised to register Kukena Transport Shuttle limited. That it is not a coincidence that they were committee members and this issues have not been addressed and they are therefore admitted.

23. She further submits that a Superior court of record cannot be bound by a lower court, and their reliance on the proceedings are misplaced and misinformed. They can only be held to have a hidden agenda and the averments in paragraph 5 are an insult to the proceedings before this court and should be disregarded. KUKENA Shuttle is registered irregularly, illegally and fraudulently, the same is a sham.

She prays that the prayers be granted to restrain the defendant from using the name KUKENA.

**For the respondents' it is submitted that**

The 1<sup>st</sup> defendant is a limited liability private company but it is no longer involved, it was wrongly sued. The 2<sup>nd</sup> defendant is a private limited liability company incorporated under the Companies Act. on the other hand the 1<sup>st</sup> plaintiff is a Society

registered under a Co-operative Society Act.

24. The two entities 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant are two separate entities under separate law, and the 2<sup>nd</sup> defendant is approved as operator on Kerugoya - Sagana – Nairobi and back as per a letter dated 11<sup>th</sup> December, 2019 issued by NTSA which has the power and mandate to issue such.

25. The County Government allocated picking and packing bays to the 1<sup>st</sup> defendant within Kirinyaga county between Kukuena Sacco booking office and Mount Kenya Sacco. There is no interference the two operate separate and distinct parking bays and other main stages. No party will be prejudiced.

26. The application is dealing with Injunction and one of the pillars is disclosure, approaching the court with clean hands. The applicants failed to disclose the existence of the suit before the Chief Magistrate's court in which an injunctive order was issued in December, 2019. The applicants failed to disclose.

27. It is also submitted that I have certified the conditions for the grant of an injunction which are laid down in the case of; **Giella - versus- Cassman Brown.**

28. That the applicants' case has no chances of success. That the issue of passing off cannot be dealt with at this point in time. It is further submitted that the name **KUKENA** is not distinctive in any way it can be used by any entity.

29. That it is the role of the County Government to deal with the role of parking in public road transport and the plaintiff cannot take over that mandate.

### **ANALYSIS AND DETERMINATION**

a) The basis of an application of the equitable remedy of injunction has been **Section 63 of The Civil procedure Act and Order 40 of Civil Procedure Rules. Article 23 of the Constitution** identifies an order for injunction as one of the reliefs that a court can grant if it satisfied that a persons right on fundamental freedoms under the bill of rights has been denied, violated or infringed or is threatened.

b) Injunction is a remedy which is intended to preserve a property in dispute until the legal rights and conflicting claims are established so as to prevent the ends of justice from being defeated.

c) Under **Order 40 of the Civil Procedure Rules** injunctions may be issued where the property in issue is in danger of being wasted...

d) An injunction can also be applied for to restrain a party from a breach of contract or other injury.

e) An injunction cannot be claimed as a matter of right and it will normally not be denied arbitrary by the court.

f) The courts have developed guidelines to be considered in an application for a temporary injunction in the celebrated case of : **Giella -vs- Cassman Brown E.A 358.** There are three tests which must be established in order for the court to issue the remedy of injunction.

- Firstly the party seeking a temporary injunction must establish a prima facie case, whether the party will suffer irreparable damage if injunction is denied and in case of doubt the issue in contention ought to be decided on the scale of balance of convenience.

- Secondly **Order 40 Rule 4 Civil Procedure Rules** requires that where it is shown that the object of granting the injunction will be defeated by delay if the court may hear the application ex-parte to preserve the property pending the hearing of the application inter-partes. The intention is that where an injunction is granted ex-parte it must be heard expeditiously and can only be granted once, or not more than fourteen days.

- The applications must be heard expeditiously and in any event within sixty days from the date of filing, unless for good reason the court extends that time or concedes to consider whether the applicant has established a ground to warrant the grant of an injunction.

- Whether the applicant has established a prima facie case.

g) The applicants' case is that they have been in existence since 19<sup>th</sup> February, 1997 (23years ago) when the 1<sup>st</sup> plaintiff was issued with a certificate of registration by the Ministry of co-operative development and it enhancement commenced its operation of rendering quality transport services to the residents of Kirinyaga.

h) They have operated this business at what is popularly known as Kerugoya Bus park and it grew to extend its destination which included Nairobi, Thika, Embu, Mwea, Kagio, Kutus, Sagana and others and during this period they were operating as **KUKENA SACCO SOCIETY.**

i) The 1<sup>st</sup> respondents' registered KUKENA SACCO as a trademark under its name on 11<sup>th</sup> of October, 2019 and also registered KUKENA Travellers Shuttle Limited.

j) They are contesting that the actions of the defendants' and the applicants further contest that the respondents without an iota of any legal right and in violation of the plaintiffs right mishandled and molested the 1<sup>st</sup> plaintiff, its agent, its servants and completely paralyzed its operation and I find that they have been dismissed from operating in the Kerugoya bay.

k) There is no dispute that the respondents registered KUKENA Travellers shuttle Limited and registered Kukena Sacco as a Trade Mark. The respondents had a deliberate intention of crippling the business of the applicants, though the applicants had existed for 23 years and operating business as KUKENA SACCO.

l) The respondents misrepresented when they registered a trademark and used Kukena Sacco a name which had been in use by the applicants for over 23 years. There was a deliberate misrepresentation by the respondents which refers to name: KUKENA. The names are Kukena Sacco and Kukena Travellers Shuttle Limited. The names are so similar as to misled as would expect they are one and the same company.

m) Indeed, the County Government was misled to believe that Kukena Sacco and Kukena Travelers shuttle were one and the same company.

n) This misrepresentation was deliberate as the applicants allege that the 3<sup>rd</sup> to 6<sup>th</sup> respondents registered a company by Rural Shuttles limited which overstepped its mandate and fraudulently registered Kukena Sacco as a Trade Mark, and the 6<sup>th</sup> to 8<sup>th</sup> defendant/ respondent under the guise of the 1<sup>st</sup> defendant registered or entrenched their legalities by registering Kukena Travelers Shuttle Limited.

o) The 3<sup>rd</sup> to 6<sup>th</sup> defendant had been involved in the management of the 1<sup>st</sup> plaintiff and were hence intensely involved in its secrets and managements, the respondents hatched a move to cripple the applicant by registering a name which is so similar to that of the applicant which was calculated to misled.

30. So what is in dispute here is the use of the name Kukena Sacco. The applicants are registered as a Sacco Society under Co-operative Societies Act. Kukena Travelers Shuttle are not the owners of the Trademark Kukena Sacco, Rural Shuttle are the registered owners.

31. Kukena co-operative was registered as Kukena Co-operative Savings and Credit limited. The 2<sup>nd</sup> defendant is registered as Kukena Travellers Shuttle limited and the names they are using the applicant is using Kukena Sacco and the 1<sup>st</sup> defendant Kukena Traveller Shuttle, the names are so similar.

32. The two are in the same business of transport and there is no dispute that the applicants have been in business for the last 23 years. The 2<sup>nd</sup> respondent was incorporated on 11<sup>th</sup> October, 2019, there can be no doubt that the intention of the respondents' was to make a misrepresentation and paralyze the representation of the 1<sup>st</sup> plaintiff. The actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendant have satisfied the threshold of passing off in that: there is a misrepresentation. In the case of **A.G. Spadling Brothers -versus- A. W. Gamge limited & Another (1914 -1915) All ER 147** which laid down the essential of passing off action as follows;

**i. A misrepresentation.**

**ii. Made by a trader in the cause of trade**

**iii. To prospective customers of his or ultimate consumers of goods or services applied to him, which is calculated to injure the business or goodwill of another trader. (In the sense that this is a reasonable foreseeable consequence) and**

**iv. Which causes actual damage to a business or goodwill of a trader by whom the action is brought or ( in a quire timed action) will probably do.**

33. The applicants' have also alleged fraud in the activities of the 1<sup>st</sup> and 2<sup>nd</sup> respondent a matter of fact which is not denied. Instead the respondents have raised the issue that they obtained injunctive orders in the lower court which they have alleged was not disclosed. However, the grounds in support of the application ground 8 and 7 have clearly disclosed that the respondents had filed Kerugoya Chief Magistrates court No. 183 of 2019.

34. The misrepresentation has been made by the 2<sup>nd</sup> defendant in the cause of trade and the misrepresentation has been made to prospective customers and ultimately to consumers of transport services supplied by him and the conduct of the 2<sup>nd</sup> defendant respondent is calculated to injure the goodwill of the 1<sup>st</sup> plaintiff and the conduct actions of the 2<sup>nd</sup> respondent has caused actual damage to the 1<sup>st</sup> plaintiff.

35. Although the respondent has argued that the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant are two separate entities and a separate law, the truth of the matter is that the 2<sup>nd</sup> defendant has entered the transport business for the sole intention of operating a transport business to the exclusion of the plaintiff.

36. They have been issued a letter by NTSA and have been allocated a picking and parking bay and this is not a coincidence that they say that KUKENA Shuttle or the first defendant has been allocated a parking bay between Kukuena Sacco and Mount Kenya Shuttle.

37. There is interference in the Transport business in the 1<sup>st</sup> plaintiff and the use of name Kukuena cannot have been done in good faith.

38. In the case of; **Parke Davis & Company limited –versus - Opa Pharmacy limited ( 1961) EA556** which was an action for passing off, and the Court of appeal held that;

Since the two syllable Capsolin and Capsopa were identical and there were resemblance's in the containers there was a real probability of confusion and the appellants company was entitled to an injunction.

The court held further that;-

***“there is no need to prove intent to deceive for the injury is the same whatever the intent may be”*** similarly they referred to ***A. G -versus- Emirchem Products limited H.C. CC No. 559 of 2002 ( UR), the trademark Niverlin was found to be strictly similar to the trademark Nivea and would probably cause confusion to consumers.”***

39. So in determining whether the defendants business name is distinguishable from that of the plaintiff one has to look at the similarities and in this case the similarities are the name of business and the business being carried out.

40. The principle of similarity was laid down in the case of; **Sabela Bv- versus –Puma A.G and ruled off Dasser Sport Case See; 251/ 1995**

***“where the court held that in making a comparison between the marks one should consider the respective marks, visual, aural and the conceptual similarities with reference to the overall impressions created by them, bearing in mind their distinctive and dominated components”***

41. The Court stated at Paragraph 22 and 23 that;

***“the likelihood of confusion must therefore be appreciated globally. Taking into account all factors relevant to the circumstances of the case. That global appreciation of the visual, aural or conceptual similarities of the marks in questions must be based on the overall impression given by the marks. bearing in mind in particular their distinctive and dominant components.”***

42. The wording of **Article 4 (1) (b) of the Directive :-**

***“ there exists a likelihood of confusion on the part of the public”*** shows that ***the perception of marks in the mind of average consumer of the type of goods and services, in question place a decisive role in the global appreciation of likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyze it various details.***

43. This case was quoted with approval in the case of; **Strategic Industries Limited -versus- Solpia Kenya Limited ( 2019) eKLR** and in the case the court stated that it is clear from the above stated authorities the court is not hesitant of the tort of passing off in cases where similar trade names are used in products of the same nature and which are intended for the same market.

44. In this case the applicant and the 2<sup>nd</sup> respondent are using the same name. That similarity would misled as a person reading the name **KUKENA** would or would automatically assume that it is the same transport company. In most cases customers' could not be interested to investigate or to enquire whether the name refers to one and the same transport company.

45. The question is whether the name would be used to deceive customers of the Company which has used the name for years. In the case of; **Amritdhara Pharmacy vs Satya Dio Copta ( 1963) SC 449.** The court held;

***“whether the trade name is likely to deceive or cause confusion by its resemblance to another already registered, is a matter of 1<sup>st</sup> impression, and one for decision in each case, and has to be decided by taking an overall view of all the circumstances. The standard of comparison to be adopted in judgment resemblance, is on the point of view of a man of average intelligence and imperfect recollection.”***

46. Having analyzed the evidence and the submissions I am satisfied that the applicant has demonstrated that the 2<sup>nd</sup> respondent is depicting the name **KUKENA** as its name which are in no way distinguishable from the applicant's name.

47. The 2<sup>nd</sup> respondent has used the same name for the same business and has caused confusion in the Transport business in the areas that the applicant operates.

48. There can be doubt that the applicant has built an a name in the Transport business and a goodwill and I have already observed that the 1<sup>st</sup> applicant has shown that the conduct of the defendant has passed the threshold of passing off as held in the case of; **Reckit & Colman Products -versus- Borden Inc & Others (1990) 1WLR 491 and in the case of; Brookboard Kenya Limited -versus- Chai Limited (1971) EA 10.** The Court of appeal dealing with a matter of passing off held interalia that;

**“the general impression of the general customer is the best test of passing off and on this the appeal must succeed.**  
” this issue of passing off was also considered in the case of; **Newton Oirere Nyambarika versus K.CB & Another (2017) eKLR Paragraph 19** which defines passing of claim as

**“ a right of a trader to bring a legal action for protection of good will , it is actionable under the law of unfair competition and sometimes as a trademark infringement”**

49. The applicants have demonstrated that they have been in business using the name KUKENA for the last 23 years. They have built the name and a good will.

50. The entry of the 2<sup>nd</sup> defendant has created confusion which is likely to ensue from the resemblance of the name. when the names are so identical the possibility of deceit, confusion and bad trade practices are likely to arise. In situations like that there is no doubt that the applicant will suffer loss and damage.

51. In view of this I find that the applicants have made out a prima facie case with chances of success.

52. The applicants have stated that they have been in business and they state that they have over 500 families whose livelihood depends on the 1<sup>st</sup> applicants operations and the actions of the 2<sup>nd</sup> respondents would affect them adversely.

53. Transport business involves carrying members of the public and their goods and they would be affected where the two entities are using different names in situations where Civil claims would arise by the use of this transport vehicles.

54. From the foregoing the applicants' have met the threshold for the grant of injunction, they have established a prima facie case with chances of success. They are therefore entitled to an injunction at this stage.

I find that the application has merit.

**I order as follows**

- An injunction do issue restraining the respondents from trading in the name KUKENA or any other name closely related to KUKENA in the transport sector industry or any other name or designation bearing a close resemblance thereto pending the hearing and determination of this suit.

- An injunction do issue restraining the respondents and their agents, representatives from holding out as Shareholders and directors of KUKENA Sacco under a registration certificate No. **CS/8051** or at all, pending the hearing and determination of this suit.

- The respondents be restrained from taking over or interfering in any manner with the 1<sup>st</sup> plaintiff transport company, including but not limited to the use of Kerugoya Bus Park under the name KUKENA.

- Costs to the applicants.

**Dated, Signed at Kerugoya this 29<sup>th</sup> day of May 2020.**

**L.W. GITARI**

**JUDGE**