REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO 266 OF 2015

LANDOR LLC.....1ST PLAINTIFF

WPP LUXEMBOURG GAMMA SARL.....2ND PLAINTIFF

VERSUS

WAGUDE LUI T/A LANDOR & ASSOCIATES.....1ST DEFENDANT

LANDOR AND ASSOCIATES LIMITED.....2ND DEFENDANT

LUI O. WAGUDE.....3RD DEFENDANT

JUDGMENT

1. Walter Landor is the founder of Landor LLC (the 1st Plaintiff) and the name of the Company "Landor LLC" is derived from the surname of its founder. Through a Certificate of Registration dated 7th September 2010, WPP Luxembourg Gamma Sarl (the 2nd Plaintiff) was registered in the Business Names Registry to do business in the name "Landor Associates".

2. Prior to acquiring the name Landor LLC, the entity was initially named "Walter Landor Associates" and later renamed 'Landor Associates' before the change to its current name.

3. The Plaintiffs pride themselves as leaders in Global Branding, Advertising, Public Relations, Marketing and Communication. Indeed 'Landor' and 'Landor Associates' Trade Marks are registered in over 20 Countries around the World. In Kenya 'Landor' was registered with the Kenya Industrial Property Institute (KIPI) as a Trade Mark of 2nd Plaintiff with effect from 23rd June 2010. It is the Plaintiffs' case that they enjoy a market reputation on the Trade Names "Landor" and "Landor Associates".

4. All seemed well for the Plaintiffs until sometime in September 2015 when they became aware of another business operating in the name and style of Landor and Associates. A search conducted by their Advocate at the Business Names Registry and The Companies Registry revealed the following:-

a) The Business Name 'Landor and Associates' was registered under the Business Name Certificate of Registration Number BN/2009/53796 on 28th November 2009 and

b) The Business 'Landor and Associates' was registered as 'Landor and Associates Limited' under company registration number CPR/2014/129132 on 23rd January 2014.

Both are registered under the names of Lui Wagude t/a Landor and Associates (the 1st Defendant) and Landor and Associates Limited (the 2nd Defendant) respectively.

5. There was further concern. An online search revealed that a domain name *www.landor.co.ke* is registered and owned by Lui O. Wagude (the 3rd Defendant) and the Defendants have created and published a linkedin page under the name 'Landor Associates' which is globally accessible at a world wide web page as *http:/www.linkedin.com/company/landor-and-associates*. Of further disquiet to the Plaintiffs is that the 1st and/or 2nd Defendants are listed on the website at *http;www.landor.co.ke/passervices* as offering branding and communication services.

6. An entity by the name Redsky Advertising is a subsidiary of WPP Scan Group Limited (Scan Group). Scan Group is said to be one of the largest marketing communications services groups in the Country. Just like Redsky, the 1st Plaintiff is a subsidiary of WPP. At some time Lui Wagude (3rd Defendant) worked as the General Manager of Redsky. He resigned on 14th September 2009. The Plaintiffs hold the belief that while in that employment, Wagude came across the Plaintiffs' Trade Marks or name.

7. The Plaintiffs assert that the Defendants have created and will continue to create confusion in the market that would lead members of the public to believe that the 1st Defendant's branding services offered through the name 'Landor and Associates', and the 2nd Defendant's services are those of the Plaintiffs or offered in association or collaboration with Plaintiffs. The Defendants are also assailed as taking unfair commercial advantage of the Goodwill and Reputation of the Plaintiffs Trade Marks.

8. The Claim by the Plaintiffs is encapsulated in an Amended Plaint dated 20th July 2015 and presented to Court on the same day. The Plaintiffs set up a two pronged Claim. The first is for infringement of Registered Trade Mark and related to it of a well-known Trade Mark. The second is the common law claim of Passing-off. The Plaintiffs seek the intercession of Court and request for the following Orders:-

a) A permanent injunction restraining the Defendant whether by himself, servants, agents, employees and/or assigns, from trading, advertising, marketing and/or in any other way using or dealing in the name "Landor & Associates" or any other name closely resembling or incorporating the first Plaintiff's name "LANDOR" or a name including the words "LANDOR" or the prefix 'LANDOR' or resembling the first Plaintiff's well-known trademark 'LANDOR', howsoever arising.

b) A permanent injunction restraining the Defendant whether by himself, servants, agents, employees and/or assigns, from trading, advertising, marketing and/or in any other way using or dealing in the name "Landor & Associates" or any other name closely resembling or incorporating the second Plaintiff's name "LANDOR ASSOCIATES" or a name including the words "LANDOR ASSOCIATES" or the prefix 'LANDOR' and/or resembling the second Plaintiff's well-known trademark 'LANDOR ASSOCIATES', howsoever arising.

c) A permanent injunction restraining the Defendant whether by himself, servants, agents, employees and/or assigns, from trading, advertising, marketing and/or in any other way using or dealing in the name "Landor and Associates" and/or "Landor And Associates Limited' and/or any other name closely resembling or incorporating the second Plaintiff's name "LANDOR ASSOCIATES" or a name including the words "LANDOR ASSOCIATES" or the prefix 'LANDOR' and/or any name resembling the second Plaintiff's trademark 'LANDOR ASSOCIATES', howsoever arising.

d) A permanent injunction restraining the third Defendant whether by himself, servants, agents, employees and/or assigns, or in trading as "Landor And Associates' from passing off any of the first and /or third Defendant's products or branding, advertising and related services as those of, sourced from or associated with the Plaintiff.

e) A declaration that the business name "Landor And Associates' infringes on the Plaintiffs' trademarks and should be changed within the provisions of section 9 and 17 of the Registration of Business Names Act, Chapter 499 of the Laws of Kenya.

g) A declaration that the Company Name "Landor And Associates Limited" infringes on the Plaintiffs' trademarks an should be changed within the provisions of sections 19 and 20 of the Companies Act, Chapter 486 of the Laws of Kenya.

f) General and aggravated Damages.

g) Costs of this suit.

h) Interest.

9. Landor and Associates Limited is a limited liability company registered both in Kenya and Uganda. Prior to incorporation Lui Wagude had registered 'Landor and Associates' as a business name under registration No.BN/2009/537996. This was on 28th November 2009. Wagude tells Court that he formed the business name 'Landor' by combining his daughter's name (Lauren Mandisa Wagude) and "OR" (meaning gold in French). In respect to the word "OR" he explained further,

"*My daughter was my first Jewel hence 'Gold'!*"

10. It was the testimony of Wagude that the company has been operational from the dates they were registered in Uganda on 14th January 2010 and in Kenya on 23rd January 2014. That the core business of the company is construction, security installation, information communication technology, project management and consulting .It is also asserted that its business is in no way similar to that of the Plaintiff. In addition that there is no similarity between the 2nd Defendant's mark 'Landor' and the Plaintiffs' trade mark "Landor". In the end, the Defendants disagree misrepresenting it's business to it's customers on the goods and services it offers. It is finally averred that it has over its lifetime accumulated market presence, reputation and customer loyalty in Kenya and the East and Central African Region.

11. The parties have formulated the following three issues for determination:-

(i) Whether the Defendants have infringed upon WPP Sarl Trade Marks 'Landor' and 'Landor Associates'.

(ii) Whether the Defendants have passed off and/or attempted to pass off their Services as those of, sourced from or associated with the Plaintiffs.

(iii) Whether the Plaintiffs are entitled to the reliefs sought in the Amended Plaint.

This Court proposes to begin its determination by considering whether there is an infringement by the Defendants of "Landor" which is registered in favour of the 2nd Plaintiff.This claim slightly differs from the complaint that there is infringement of "Landor Associates" as a well known mark. The reason for this approach will shortly become apparent.

12. It is common ground that on 23rd June 2010, the 2nd Defendant was registered as proprietor of the Trade Mark 'LANDOR' under the Trade Mark No.68507 in class 35 (Advertising; business management; business administration, office functions(P Exhibit page 81). The exclusive right of a proprietor to use a registered Trade Mark is guaranteed by the provisions of Section 7(1) of The Trade Marks Act in the following way:-

> "1) Subject to the provisions of this section, and of sections 10 and 11, the registration (whether before or after 1st January, 1957) of a person in Part A of the register as the proprietor of a trade mark if valid gives to that person the exclusive right to the use of the trade mark in relation to those goods or in connection with the provision of any services and without prejudice to the generality of the foregoing that right is infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of permitted use, uses a mark identical with or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade or in connection with the provision of any services in respect of which it is registered, and in such manner as to render the use of the mark likely to—
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> (a) be taken either as being used as a trade mark;
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> (b) be taken in a case in which the use is upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as licensee to use the trade mark or goods with which such a person is connected in the course of trade;
>
> (c) be taken in a case where the use is use at or near the place where the services are available for acceptance or performed or in an advertising circular or other advertisement issued to the public or any part thereof, as importing a reference to some person having the right either as proprietor or as licensee to use the trade mark or to services with the provision of which such a person as aforesaid is connected in the course of business;
>
> (d) cause injury or prejudice to the proprietor or licensee of the trade mark".

13. On the reading of this statutory provision the conditions to be met in an action for Trade Mark infringement under Section 7 are:-

a) The Plaintiff is the registered proprietor of the Trade mark.

b) The alleged infringement was a Mark identical which or so nearly resembles that of the registered Mark so as to be likely to deceive or cause confusion in the course of Trade or in connection with the provision of the services in respect of which it is registered.

c) The use of the Mark is without the consent or authority of the Proprietor.

d) The use of Mark is such that it is likely to cause injury or prejudice to the proprietor or licensee of the Trade Mark.

14. Even before examining whether the Plaintiffs have met these conditions it needs to be mentioned that a centerpiece of the Defence is that the 1st Defendant has been carrying out business in the name of "Landor and Associates" since 28th November 2009 when that business name was registered in favour of Wagude under the provisions of the Registration of Business Names Act (chapter 499 of The Laws of Kenya). In doing so the Defence of prior use is set up. That Defence is provided in Section 10 of the Trade Mark Act as follows:-

> "Nothing in this Act shall entitle the proprietor or a licensee of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date anterior—
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> (a) to the use of the first-mentioned trade mark in relation to those goods by the proprietor or a predecessor in title of his; or
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> (b) to the registration of the first-mentioned trade mark in respect of those goods in the name of the proprietor or a predecessor in title of his,whichever is the earlier, or to object (on such use being proved) to that person being put on the register for that identical or nearly resembling mark in respect of those goods under subsection (2) of section 15".

The Court will return to this later in the Decision.

15. That the 2nd Plaintiff is the registered Proprietor of the Trade Mark "Landor" has been easily established and is not controversial. The first condition is therefore met.

16. On the second ingredient, it was submitted by Counsel for the Defendants that an allegation of deception, confusion and resemblance must be proved by a witness. Counsel then asserts that the Plaintiffs failed to list and/or provide any witness Statement from any of their clients who was confused by the operations of the 3rd Defendant. To further that argument, the Decision of Nyamweya J. in Jonathan Mutuku

Kaysoka vs. Muthini Kyaa Musau Kyaa t/a Maazoni Picnic Bar [2017] eKLR, is cited. There, the learned Judge approved the Decision of Ringera J (as he then was) in Supa Brite Limited vs. Pakad Enterprises, Nairobi High Court Case No. 287 of 2001 as follows:-

> "Secondly, the Plaintiff did not call any witnesses to establish the Defendants' use of a similar name as that of the Plaintiff's trade name, and that the same had caused them confusion or enticed them to the Defendants' business as pleaded. The onus was on the Plaintiff to prove the resemblance, deception, infringement and the attendant damage. See in this regard the decisions in Aktiebolaget Jonkoping v East Africa Match Company Limited [1964] E.A. 62, East African Industries v Trufoods Limited [1972] E.A 420, Cut Tobacco Kenya Ltd v British American Tobacco Ltd [2001] KLR 36, Martinair Africa Limited v Global Freight Services [2012] eKLR, Dinah Bhoke Makini t/a Dr Mary Riziki v Willis Wanjala & 4 others [2005] eKLR and Anne Njeri Kihiu v Standard Group Limited,[2011] eKLR.

It was necessary for the Plaintiff to adduce evidence of a member of the public to show the confusion in the passing off his goodwill as was held by Ringera J. (as he then was) in Supa Brite Limited vs Pakad Enterprises Limited, Nairobi High Court Case 287 of 2001 (unreported) as follows:

> "*I am of the opinion that like in the case of personal reputation, evidence of goodwill must, whether at interlocutory stage or final hearing of a suit, be offered by members of the public and not the subject of the reputation himself or the trader and his consultant as the case may be …..*"".

17. These submissions are met by the Plaintiffs argument that proof of actual confusion is not mandatory. The Plaintiff think that they find support in the decisions in :-

(i) Pastificio Lucio Garofalo S.P.A vs. Debenbar and Fear Ltd [2013] eKLR (4).

(ii) Pharmaceutical Manufacturing Company vs. Novelby Manufacturing Company Ltd (2001) KLR 392.

(iii) Sony Corporation vs. Sony Holdings Limited [2018] eKLR.

18. In regard to this second element of a trade mark infringement the Plaintiff must prove two separate but interrelated limbs:-

a) That the offending Mark is identical with or so nearly resembles the Registered Mark and

b) That because of that resemblance the offending Mark is likely to deceive or cause confusion in the course of Trade or in connection with the provision of Services of the Registered Trade Mark.

In paragraph 19A of the Amended Plaint it is averred as follows:-

> "*The offending Names being used by the Defendants are identical to and/or deceptively and confusingly similar to the Plaintiffs well-known Trademarks and the second Plaintiffs' registered Trade Mark*".

19. Although there is a general denial of the contents of that portion of the Plaintiffs' pleadings, this Court did not sense any serious or spirited attempted by the Defendants either in their Pleadings, testimony or submissions, to challenge the contention that the words "LANDOR" being the registered Mark does not resemble 'LANDOR AND ASSOCIATES LIMITED", the name of the 2nd Defendant. And such a challenge would have failed because the common feature in the two is the name "LANDOR'. 'LANDOR' has to be the distinctive and dominant mark in the two names. This is because the word "Associates" in the name of the 2nd Defendant is a noun in English which means, (as is relevant here),

> "a partner or companion in Business or at work" (*Concise Oxford English Dictionary 12th Edition)*

The word "Limited" (as is relevant) means "denoting a limited Company"The word "Associates" and "Limited" do not provide any distinctiveness. The conclusion to be drawn is that the Mark "LANDOR" and the name "LANDOR AND ASSOCIATES LIMITED" resemble.

20. The second limb and which is more contested is whether the Plaintiffs have proved that the mark said to be offending is likely to deceive or cause confusion in the connection with the provision of services provided by the Plaintiff. To be resolved first is the nature of what needs to be proved and the manner in which that has to be done.

21. Looking at the language used in Section 7, I would have to agree with Counsel for the Plaintiffs that actual deception or confusion need not be proved. It is enough to show that deception or confusion is likely. Nonetheless, there will be occasion when it will be necessary to prove actual deception or confusion. For instance where the Plaintiff seeks damages for the infringement. Actual deception or confusion can inform the Damages to be awarded.

22. As to the manner of proving that deception or confusion is likely to ensue, it has to be remembered that whilst witnesses will have their positions and views as to whether deception or confusion is likely, the final call belongs to the Judge who must assign reasons why S[he] holds a certain view. Regarding the approach it has to be that,

"*… a value judgment ….based on a global appreciation of the two Marks and overall impression that they leave in the context of the underlying purpose of a trademark which is that it is a badge of origin*".

(Yuppiechef Holdlings (pty) Ltd Vs. Yuppie Gadgets Holdings (pty) Ltd (1088/2015) 2016 ZASCA 118.

Having found that there is obvious and remarkable similarity between the two Marks, then the second task is to see whether in the context of the Trade or Services offered by the protagonist, the apprehension of confusion or deception is credible.

23. There is evidence that the 2nd Plaintiff is engaged in advertising, media investment management, public relations and public affairs, branding and identity. There is evidence of its global reach in these Services and in particular branding and design services (P Exhibit pages 82-158). In the year 2014, for example, Landor Associates was honored a total of five times for it's work in a new hotel brand for Hyundai in South Korea (P Exhibit page 84). Importantly, as well class 35 for which the Trade mark is registered extends to advertising.

24. The reaction by the Defendants to this is that the 2nd Defendant's nature of Business is in no way similar to that of the Plaintiffs. What is the evidence?

25. Wagude's evidence was that he carried out business in construction, ICT, security solutions, architectural designs and investment. He did not mention that the 2nd Defendant also did branding. When confronted with screen shots (P Exhibits page 167 -168) of the website *http;www.landor.co.ke/#/page portfolio*, he conceded that "*those belong to us*". He further admitted that branding was listed on the screenshots. But he maintained that the 2nd Defendant was not involved in "Branding" as ordinarily understood. He offered this explanation on re-examination,

"*The Branding here refers to as placing brands on Construction sites in a creative manner. Branding is a component of Construction*".

26. Is the explanation that the Branding undertaken by the 2nd Defendant as merely a component of construction and not as separate business believable? Let me look at the screenshot on page 167. First, the activity of Construction stands distinct from branding. Put differently, branding is not listed as an activity that falls under or within Construction. In respect to Branding the following words appear,

Branding

"*We believe in the true character of managing brands distinctively. We generate ideas that capture the customers/consumers/society creatively out with relevance. We work from scratch and we give your Brand/Campaign idea, a unique identity. We work as a team @ Landor we have the skills to creatively develop ideas that generate a Buzz in the Market*". (*my emphasis*)

27. It is clear to this Court that the Branding referred to above is not a subset of Construction. It is the type of Branding that is intended to generate "a Buzz in the market" (the 2nd Defendants own words). The intention is to manage Brands so as to create an atmosphere of excitement and activity about it in the market. It is about Marketing!

28. And that Branding is not a peripheral activity of the 2nd Defendant is supported by the screenshot on page 168 which names the activities undertaken by the company as construction, branding, communication, security, strategic planning, ICT consultancy, and project management. But is it not revealing that the slogan appearing on the screenshot is "we speak Brands"! The Court has no hesitation in holding that the 2nd Defendant engages in the business of Branding as a separate activity from Construction.

29. Given the glaring similarity between the registered Trade mark of the 2nd Plaintiff and the name of the 2nd Defendant, and that the 2nd Defendant offers a service affiliated with Advertising over which the Trademark is registered, the use of the name by the 2nd Defendant is likely to confuse the relevant market that branding services offered by the 2nd Defendant originate from or are connected with the 2nd Plaintiff.

30. If that was all to the matter then I would have held that infringement of the Trade mark belonging to the 2nd Plaintiff has been proved. However, this Court must consider the Defence of prior use which is codified in Section 10 of the Trade Marks Act and which I again reproduce,

"Nothing in this Act shall entitle the proprietor or a licensee of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date anterior—

(a) to the use of the first-mentioned trade mark in relation to those goods by the proprietor or a predecessor in title of his; or

(b) to the registration of the first-mentioned trade mark in respect of those goods in the name of the proprietor or a predecessor in title of his, whichever is the earlier, or to object (on such use being proved) to that person being put on the register for that identical or nearly resembling mark in respect of those goods under subsection (2) of section 15".

31. Explaining the object of similar Statutory provisions of Section 36(1) in The South African Trade Marks Act (194 of 1993), The Supreme Court of Appeal of South African said,

"*The underlying purpose of this section is to prevent a proprietor of a trade mark from exercising rights merely on the basis of priority of registration and it preserves whatever common-law rights there may be antecedent to the rights of the registered proprietor. A party relying on this defence must establish bona fide and continuous use of the mark, either by itself or by its predecessor in title, at a time prior to the use or registration of the registered mark by the proprietor thereof, whichever is earlier. In this case registration was the earlier date*".

Extraction (pty) ltd vs. Tyrecor (pty) Ltd (20185/2014) 2015 ZASCA 78

32. Whilst Section 36 of The South African Statute explicitly provides that the prior use must be both 'continuous and bonafide' use of the Trade mark from an anterior date, the Kenyan statute does not include the word 'bonafide'. Nevertheless, the Court takes the view that only **continuous and bonafide** prior use deserves protection. It would be preposterous to give protection of an antecedent mark which, though continuous, has been deployed for ulterior and *malafides* purpose/s. For example, used so as to frustrate or defeat a subsequent registration of a mark by the true proprietor thereof. The Court holds that notwithstanding that the word "bonafide" is excluded from our statute, the prior use must be bonafide or honest (and of course continuous) so as to be deserving of protection. I am not alone in this view (see Hon. Ogola J. in Clips Limited vs. Brands Imports (Africa) Limited formerly named Brand Imports Limited [2015] eKLR.

33. It has been suggested by the Plaintiff that the 2nd and 3rd Defendants dishonestly, maliciously and intentionally sought to ride on the goodwill and reputation of the already existing Trade Mark 'Landor' at the time of their registration. Any merit in this proposition?

34. The answer could be found in the history of part of the working life of Wagude.In 2001, Wagude worked with Ogilvy & Matter Advertising (Ogilvy). He resigned on 3rd September 2001 (P Exhibit page 159). In 2002 he joined MaCann and Erikson for a short stint and rejoined **Ogilvy** in November 2003. He was later to join Redsky (a subsidiary of Scan Group) from where he resigned on 14th September 2009. In both Ogilvy and Redsky, Wagude occupied senior managerial positions. He was a Business Unit Director in Ogilvy and in Redsky, a General Manager.

35. The evidence of Mr. Jon Eggar for the Plaintiffs is that Wagude would be familiar with Landor because he (Wagude) worked with Ogilvy which is a subsidiary of WPP and later with Redsky which is a subsidiary of Scan group. He further added,

"*Ogilvy and Landor and Scan group are part of WPP family. Information across the family is made available to anyone working in any party of the family*".

From that evidence Scan Group, Landor and Ogilvy are in the WPP family. And as Redsky is a subsidiary of Scan Group it also belongs to that family.

36. On their part, the Defendants maintain that it was not until 2013 (long after the registration of the 1st Defendant), that WPP bought into Scan Group (D Exhibit page 47). A plea that he would not be aware of Landor at the time of registration of his Business name in 2009.

37. Yet the evidence of Wagude ignores some information revealed in his own Document which suggests that the relationship between WPP and The Scan Group began way before 2013 when there was actual acquisition of Scan group as a subsidiary of WPP PLC. The article gives the following chronology:-

(i) Scanad was formed in 1982.

(ii) It morphed to Scan Group in the year 2005.

(iii) A year later in 2006 it was listed on the Nairobi Securities Exchange.

(iv) 'Within months' of becoming a public company Scan Group attracted the interest of WPP. This would be sometime in 2007 but certainly by 2008.

(v) The two (WPP and Scan Group) began working together. This relationship grew strong and coalesced into the acquisition in 2013.

38. From this evidence, a deduction can be drawn that by 2008 when Wagude was still with Redsky (a subsidiary of Scan Group), Scan Group already had a working relationship with W.P.P. In addition there is the following evidence by Eggar,

"*W.P.P has had a presence in Kenya for many years through Ogilvy initially and now through W.P.P Scan Group. In all these years we have used Landor*".

This unchallenged evidence would suggest that W.P.P was using the mark "Landor" by 2008 and 2009 when it had a relationship with Scan Group who were the owners of Redsky and where Wagude held the high office of a General Manager.

39. It does not seem conceivable that such a high ranking Officer of a subsidiary of Scan Group would be unaware of the relationship between Scan Group and W.P.P (no doubt highly valued by Scan Group because of the acknowledged global strength of W.P.P as a marketing communication group). If Wagude was aware of this relationship then he would very likely be aware that W.P.P was using the name 'Landor'. This Court indeed finds that he was well aware of this when, 3 months after his resignation from Redsky, he registered the name 'Landor and Associates' as a Business. It would be a blissful coincidence that, without ever hearing of the name "Landor", he would

conjure up such a name by combining some letters from his daughters name and a French word. This explanation does not find favour with the Court. The Court very much doubts its candour!

40. Being of the above persuasion it is not necessary to consider the other two limbs of the Plaintiffs' grievances. One is that the Defendants have infringed on the Plaintiffs well known mark "LANDOR ASSOCIATES". The other is for Passing off. This is because once the 2nd Plaintiff succeeds in its claim for infringement of the registered Trade mark, the efficacy of the Orders the Court will grant against the Defendants will by implication benefit "Landor Associates" the mark which though unregistered in Kenya is said to be well known. As to the claim for passing off, it is not necessary to consider it at all because although the Plaintiffs claim General and aggravated Damages and submit that it should be presumed, there is no proposal made as to quantum. It would seem to have been abandoned.

41. In closing the finding of the Court is that the Company name "Landor and Associates Limited" infringes on the registered Trade mark of the 2nd Plaintiff. The Company name cannot be allowed to stand and the 2nd Defendant will have to change its name. The Amended Plaint was filed on 20th July 2005, a date before the commencement of the current Companies Act (Act No. 176 of 2015). In the pleadings, the Plaintiffs call into aid the provisions of Section 19 and 20 of The Companies Act (chapter 486) which was then applicable.

42. Sections 19 and 20 of the retired Companies Act provide :-

> "19. (1) (a) The registrar may, on written application, reserve a name pending registration of a company or a change of name by a company.
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> (b) Any such reservation shall remain in force for a period of thirty days or such longer period, not exceeding sixty days, as the registrar may, for special reasons, allow, and during such period no other company shall be entitled to be registered with that name.
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> (2) No name shall be reserved, and no company shall be registered by a name which consists of abbreviations, initials or by a name, which, in the opinion of the registrar, is undesirable.
>
> 20. (1) A company may, by special resolution and with the approval of the registrar signified in writing, change its name.
>
> (2) (*a*) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name is registered by a name which, in the opinion of the registrar, is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the registrar and, if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the registrar may think fit to allow.
>
> (*b*) If a company makes default in complying with a direction under this subsection, the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred shillings for every day during which the default continues.
>
> (3) Where a company changes its name under this section, it shall within fourteen days give to the registrar notice thereof and the registrar shall enter the new name on the register in place of the former name, and shall issue to the company a certificate of change of name, and shall notify such change of name in the Gazette.
>
> (4) A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name".

43. The current Companies Act has similar provisions in Section 58(1) as follows:-

> "1) The Registrar may direct a company to change its name if it has been registered by a name that is the same as or, in the opinion of the Registrar, too similar to—
>
> (a) a name appearing at the time of the registration in the Registrar's index of company names; or
>
> (b) a name that should have appeared in that index at that time".

So both statutes have sufficient statutory framework to effect a change of name of a Company.

44. The upshot is that this Court allows the Plaintiffs' claim in terms of paragraph (a), (b), (c), (d), (dd), (e) and (ee) of The Amended Plaint of 20th July 2015. In respect to Prayer (ee), the 2nd Defendant is granted 90 days from the date of this decision to have its name changed.

45. Costs of the suit to the Plaintiffs as against the Defendants.

Dated, delivered and signed in an open Court this 25th day of January 2019.

F. TUIYOTT

JUDGE

In the presence of;

Omondi h/b Mwongo for the Plaintiffs

Ahomofor Wamalwa for the Defendants

Nixon - Court Assistant