



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 560 OF 2015
PATRICK KIMANI KAMAU

T/A MKOPA INVESTMENTS.....PLAINTIFF

VERSUS

SAFARICOM LIMITED.....1ST DEFENDANT

M-KOPA KENYA LIMITED.....2ND DEFENDANT

MOBILE VENTURES KENYA LIMITED.....3RD DEFENDANT

RULING

1. The application before me seeks to have the defendants restrained from carrying on business or dealing in any way whatsoever under the name “Mkopa?; “M-kopa?; of “M-kopa Solar? or any other name that is strikingly similar to “Mkopa Investments?.
2. The plaintiff says that the application is based on the fact that the defendants were using the name “Mkopa” and “M-kopa” which they had adjusted to “M-kopa Solar” as a trade name of one of their products.
- 3.As the plaintiff deems those alleged derivatives to be strikingly similar to his registered name, “MKOPA INVESTMENTS”, he asserted that the only way that the defendants could have lawfully used them, would have been after getting the consent and authority of the plaintiff.
4. The plaintiff asserted that the use by the defendants, of the names complained about, constituted an infringement of the name “Mkopa”.
5. He added that the continual infringement of his registered trade name, and the defendants’ blatant disregard of the plaintiff’s right to the exclusive use of the name, was causing untold suffering, losses and damages to the plaintiff.
6. The plaintiff also said that his business faced a real “*threat of imminent collapse*”, due to the loss of business, goodwill and unfair competition from the defendants.
7. The plaintiff exhibited his Certificate of Registration dated 10th December 1997. The said certificate is proof that the plaintiff, **PATRICK KIMANI KAMAU** was carrying on business under the business

name of **MKOPA INVESTMENTS**.

8. The plaintiff also provided the court with copies of fliers issued by the defendants, to promote their products, “*M-kopa solar panels*” and associated products.

9. It is common ground that the defendants commenced their business in the year 2011.

10. The plaintiff sees the entry of the defendants into the market as a real threat to the very existence of his business.

11. Therefore, on 16th January 2015, the plaintiff sent a demand letter to **SAFARICOM LIMITED** to stop using the names “*M-kopa*” and “*M-kopa Solar*”.

12. Thereafter, on 22nd May 2015, the plaintiff sent demand letters to **MOBILE VENTURES KENYA LIMITED and M-KOPA KENYA LIMITED**.

13. Safaricom Limited responded to the demand letter on 27th January 2015, rejecting the plaintiff’s contentions about the infringement of his registered trade name.

14. Meanwhile, the 3rd defendant, **MOBILE VENTURES KENYA LIMITED**, had written to the plaintiff on 2nd August 2012, asking him to immediately cease carrying on business, marketing, promoting, sourcing for business or dealing in any way under the name **M-KOPA INVESTMENTS** or any other name which was identical or confusingly similar to its Trade Mark “*M-kopa*”.

15. In effect, although the plaintiff had registered his business name in 1997, it was the 3rd defendant who first issued a demand notice arising from the use of the name “*Mkopa*”.

16. As the plaintiff was put on notice from 2nd August 2012, concerning the 3rd defendant’s ownership of the Trade Mark “**M-KOPA**”, it would have been expected that the plaintiff could have moved to court soon after August 2012.

17. However, it was not until 3 years later when the plaintiff filed suit. That meant that by the time this case was instituted, the 3rd defendant had carried on business, using the registered Trade Mark for about 4 years.

18. The plaintiff has not provided evidence about the nature or scope of his business. Therefore, it is not known, at this stage, whether or not the business of the plaintiff was in direct or even indirect competition with the defendants businesses.

19. But, at least, the court can attest to the fact that although the plaintiff had expressed the fear that his business faced imminent collapse, the alleged fear had not materialized.

20. The plaintiff has also not made available to the court particulars of his trading records, which could have enabled the court establish, even on a prima facie basis, what the impact, if any, was upon the said business, after the defendants started using the disputed marks.

21. By failing to make available his records, the plaintiff may have, inadvertently weakened his position.

22. According to the plaintiff, he was entitled to the exclusive use of the registered name Mkopa-Investments, as well as to any names which were either similar to that name or which could be confused with the registered business name. The right to be the exclusive user of a registered business name is said to be provided for by the Registration of Business Names Act (*Cap 499*). A perusal of that statute reveals that there is no express provision that the registration of a business name gives to the registered proprietor the exclusive right to use the said name.

23. That position can be contrasted to that which obtains in the Trade Marks Act (*Cap 506*).

24. In **AGILITY LOGISTICS LIMITED & OTHERS Vs AGILITY LOGISTICS KENYA LTD Hccc No. 840 of 2010**, Kimondo J compared a scenario in which a name of a company was registered under the Companies Act and the situation which prevails under the Trade Marks Act. The learned Judge said;

“The Companies Act only protects such names to the extent that no other company can be registered by a similar name but does not protect the intellectual property in the name itself as to confer exclusive use as does a trademark”.

25. I venture to say that the registration of a business name does not confer upon the proprietor, the right to the exclusive use of that name, as would the registration of a trade mark.

26. This comparison is significant because, by virtue of the registration of “*M-kopa*” and “*M-kopa Solar*” as trademarks, the 3rd defendant acquired the right to exclusively use those trademarks.

27. Therefore, if this court were to restrain the 3rd defendant from utilizing the said registered trademarks, the court would actually be depriving the defendant the very right which had been conferred on it, by law.

28. Having analysed the evidence presented and the applicable law, I find that the plaintiff has not made out a prima facie case with a probability of success.

29. The plaintiff has also not demonstrated that he stands to suffer irreparable loss which he could not be compensated for by way of damages unless the injunction is granted.

30. At present, when nothing is known about the nature or scope of the plaintiff’s business or how the defendants actions can negatively impact that business, it cannot be said that the plaintiff cannot be compensated by an award of damages.

31. If I were to so find, in the light of the spartan information provided by the plaintiff, I would be deemed to be engaging in speculation. I refuse to speculate.

32. Finally, as the plaintiff and the defendants have continued carrying with their respective business over the last 5 years, the justice of the case demands that they be allowed to carry on in the same manner, pending the hearing and determination of the case.

33. Accordingly, there is no merit in the plaintiff’s application. It is therefore dismissed, with costs to the defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 21ST day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Gichohi for the Plaintiff

Ondati for Havi for 1st the Defendant

Ondati for Havi for the 2nd Defendant

No appearance for the 3rd Defendant

Collins Odhiambo – Court clerk.