REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 53 OF 2013

WEETABIX LIMITED:::::::::::::::::::::::::::::::::::PLAINTIFF/APPLICANT

VERSUS

MANJI FOOD INDUSTRIES LTD:::::::DEFENDANT/RESPONDENT

R U L I N G

INTRODUCTION

1. The **Notice of Motion** application before the court is dated **12th February 2013** and filed in court on 14th February 2013 pursuant to Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 40 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and all relevant provisions of the law.

2. The application seeks to secure the following orders:-

> ***1) . . . .***
>
> ***2) . . . .***
>
> ***3) That this Honourable Court be pleased to order that a temporary injunction do issue restraining the Defendant/Respondent whether by itself, its directors, officers, employees, servants or agents, licensees, franchisees or otherwise howsoever from importing , packing, distributing, selling or offering and displaying for sale the product "MULTIBIX" or any cereal or other products similar to the products of the Plaintiff and bearing names containing the suffix "BIX" and with similar get up of "WEETABIX" and/or "OATBIX" or any other name or designation bearing a close resemblance thereto pending hearing and determination of this suit.***
>
> ***4) That pending the hearing and determination of this this application or the suit, this Honourable Court be pleased to issue an order for:-***
>
> ***i. The delivery of the Plaintiff/Applicant of, or destruction on oath, of all infringing "MULTIBIX" whole grain cereal biscuits within the Defendant's possession, custody or power, which would otherwise offend against the provisions of the foregoing injunction;***
>
> ***ii. The delivery of all documents relating to the importation, purchase, distribution, selling or offering for sale of "MULTIBLIX"***

iii. Restraining the Defendant/Respondent from importing, packing, distributing, selling or offering and displaying for sale any cereal or other wheat products similar thereto bearing any Trade mark containing the suffix "BIX" and/or with get up similar to that of the Plaintiff/Applicant's products.

5) That the Defendant/Respondent herein be ordered to disclose the names and addresses of all those by whom it has supplied goods failing within the provisions of the orders sought above together with sales and details of quantities so supplied and the price thereof.

6) 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 Defendant/Respondent as a result of the aforesaid passing off by the Defendant/ Respondent and an order for payment of any sums found due together with interest thereon at court rates.

7) That the Honourable Court be pleased to make such further order or orders as it deems just and fit in the interest of justice.

8) That th e costs of this application be borne by the Defendant/Respondent.

3. 3. The application is premised on the grounds set out therein and is supported by the affidavit of **Richard Martin** dated **14th November 2012** and filed in court on 14th February 2013

<u>THE PLAINTIFF'S/APPLICANT'S CASE AND EVIDENCE</u>

4. Simultaneously with this application, the Plaintiff/Applicant filed a Plaint in court praying for above injunction orders and other prayers. However, for now the application is limited to prayer 3, 4 and 5 of the application.

5. The Plaintiff's case as captured in the Plaint, and in the supporting affidavit of Richard Martin is that since the year 1932 or thereabouts, the Plaintiff/Applicant has been carrying on business as a manufacturer, packer and distributor of cereal foods and wheatmeal based biscuits and has been selling its products in many parts of the world extending to over one hundred countries including the Republic of Kenya. The Plaintiff/Applicant commenced selling its products in Kenya in the year 1978.

6. The deponent avers that the Plaintiff/Applicant has at all times been the registered proprietor of the Trade Marks "**WEETABIX**", "**OATIBIX**", "**VIBIXA**" and the prefix and/or suffix "**BIX**" in Kenya. The Plaintiff made applications to register the said Trade Marks and the same were duly registered. The Plaintiff is also the registered proprietor of the Trade Marks:- "**BANANABIX**", "**MINIBIX**", "**FRUITIBIX**", "**CHOCOBIX**", "**WEETABIX**", "**CRUNCHES**", "**OATIBIX**", "**WEETABIX**", "**MINIS**" under the Madrid System of registration of Trade Marks. The Plaintiff made applications to register the said Trade Marks and the same were registered.

7. The deponent further avers that the registration of the Trade Marks above in respect of cereal foods and wheatmeal biscuits in Kenya and in other countries worldwide including the United Kingdom has at all material times been valid and subsisting since the dates of registration set out in the tables appearing under Paragraphs 5 and 7 of the Supporting Affidavit. According to the deponent, the said cereal foods and wheatmeal biscuits have always comprised as a prominent feature the printed words "**WEETABIX**", "**OATIBIX**", "**BANANABIX**", "**MINIBIX**" and "**FRUITIBIX**" being printed in several font types and having the ear of wheat representation. He avers that the Plaintiff/Applicant has both in Kenya and other countries, advertised and sold very large quantities of wheat biscuits bearing the said printed words, **WEETABIX**, **OATIBIX**, **BANANABIX**, **MINIBIX** and **FRUITIBIX** bearing the distinctive suffix 'BIX' also registered as a Trade Mark.

8. It is also avered by the deponent that the suffix **BIX** has been and continues to be element and a common component of various Trade Marks belonging to the Plaintiff. He states that the Plaintiff/Applicant has expended colossal amounts of money, time and effort in the publication,

promotion and marketing of the breakfast cereals products sold under the Trade Marks particularized in Paragraph 5 and 9 of the Affidavit.

9. It is the Plaintiff's case that suffix **BIX** as used jointly with other words has therefore become very well-known and is distinctive of the cereal foods and wheatmeal biscuits manufactured and/ or packed and distributed exclusively by the Plaintiff/Applicant and its licensees all over the world. However, it is the Plaintiff's case that the Defendant/Respondent has since put up in the market and sold whole grain cereal biscuits, not of the Plaintiff's Applicant's manufacture, packing or distributing in packages bearing the name **MULTIBIX** which name is a deceptive imitation of the said well-known products of the Plaintiff/Applicant namely "**WEETABIX**", "**OATIBIX**", "**BANANABIX**", "**MINIBIX**" and "**FRUITIBIX**".

10. It is the Plaintiff's contention the use by the Defendant of the name "**MULTIBIX**" in connection with the distribution and sale of whole grain cereal biscuits, not of the Plaintiff or Plaintiff's Licensee's manufacture and/or packing and distribution, has led to deception and confusion. It has further led to the belief that the Defendant's whole grain cereal biscuits are the products of the Plaintiff. The same has also led to deception and/or confusion to members of the public acquiring the packets of whole grain cereal biscuits of the Defendant in the belief that they are acquiring the cereal foods and wheatmeal biscuits manufactured by the Plaintiff.

11. The deponent avers that the Plaintiff has in proceedings before the Registrar of Trade Marks successfully opposed the registration of the Defendant's Trade Mark MULTIBIX based on some of the grounds stated herein-above. Copies of the Ruling of the Registrar of Trade Marks is annexed at pages 19 to 37 of the Plaintiff's bundle. On that basis it is his position that the Defendant's Trade Mark **MULTIBIX** is incapable of registration as found by a lawful Tribunal of competent jurisdiction renders the continued use of the Word and Get Up **MULTIBIX** an illegality. It is the Plaintiff's' case that they have suffered and continue to suffer damage on account of the Defendant's continued use of the Word **MULTIBIX** on its products aforementioned.

THE DEFENDANT'S/RESPONDENT'S CASE AND EVIDENCE

12. Both the suit and this application are opposed by the Defendant/Respondent vide an undated defence filed in court on 17th June 2013, in which the Defendant denies in toto the Plaintiff's allegations contained in the Plaint. The Defendant also in opposing the application filed a Notice of Preliminary Objection on 10th December 2013 in which it states that this court lacks jurisdiction to hear and determine the Plaintiff's suit, and therefore the suit is defective and an abuse of the process of this court. The Defendant/Respondent also filed a replying affidavit to the application on 21st August 2014 sworn by **Christopher Nzyoka** on **20th August 2014**.

13. In brief, the Defendant's case is that the product namely, **MULTIBIX** is not a deceptive imitation of the Applicant's products namely **WEETABIX, OATBIX, BANANA BIX, MINIBIX** and **FRUITBIX**. It is further the Defendant's case that there is no breach of any Trade Mark by the Defendant, and that there is no deception and or confusion. Defendant avers that the manufacture, distribution and Sale of Defendant's product MULTIBIX is not confusing to the members of the public. It is also his assertion that the Defendant is not passing off its product as that of the Plaintiff, as alleged or at all.

14. With regard to the proceedings before the Registrar of Trade Marks, it is the Defendant case that they have lodged an intended appeal against the decision of The Assistant Registrar of Trade Marks. The deponent avers that a Notice of Motion was filed on 26th February, 2013, for inter alia leave of this Honourable Court to extend time for filing appeal and record of appeal. (*Copy of Notice of Motion in Misc. App No.167 of 2013 is annexed and marked as* ***"C.N.2")***. It is therefore his position that the opinion expressed therein is subject to the outcome of the intended appeal. It is the Defendant's position that there is no breach of Trademarks or any passing off.

15. With the leave of the court parties filed written submission to the application which were highlighted in court on 21st January 2015.

PARTIES SUBMISSIONS

16. The Plaintiff's counsel M/s Muchiri submitted that the Respondent herein filed trademark application number KE/T/2009/066428 "MULTIBIX" in class 30 in respect of 'biscuits' on 23rd September 2009. The Plaintiff herein successfully opposed the registration of the said trademark application and the Ruling of the Honourable Registrar of Trade Marks is annexed from pages 21 to 52 of the supporting affidavit.

17. Having considered the evidence presented before her and the Submissions made by the respective Counsels for the Parties before her, the Honourable Registrar concluded that the two trademarks 'Weetabix' and 'Multibix' are *similar* and that entry of both trademarks in the register of the Trade Marks would be a *contravention of the provisions of sections 14 and 15 (1) of the Trade Marks Act*. The Registrar also concluded that 'Weetabix' is quite well known in Kenya and deserves protection under the provisions of section 15 A of the Trade Marks Act.

18. Counsel for the Plaintiff submitted that despite the Registrar's decision that 'Multibix' cannot co-exist with trademark 'Weetabix' as the same are confusingly similar, the Respondent has continued offering for sale, selling and advertising the said goods bearing the said trademark. The current application is therefore seeking the orders of this court to assist the Plaintiff enjoy the benefits of the Registrar's ruling.

19. With regard to the intended appeal against the decision of the honourable registrar, counsel for the Plaintiff admits that there is a Motion Application dated and filed on 25th February, 2013 in High Court Misc Application No 167 of 2013 about 6 months after the Registrar delivered her Ruling seeking to extend time within which to file an Appeal. It is counsel's submission that there is no Appeal and as at the date of drawing up these Submissions, the Motion Application stands adjourned generally and has no hearing date.

20. It is therefore the Plaintiff's case that the ruling of the Honourable registrar is a valid decision of a competent tribunal and there exists no stay or a decision overruling that decision. According to the Plaintiff's counsel, an intended Appeal is not an appeal and also an appeal is not in any way a stay of the decision of the registrar. Therefore the decision is unchallenged.

21. It is further the Plaintiff's case that there exists an issue of *estoppel* between the Plaintiff and the Defendant on the question of whether or not the Defendant's product MULTIBIX is an infringement of the Plaintiff's product WEETABIX. This is because the Registrar's findings being the findings of a competent tribunal remain unchallenged. There is no evidence produced to the contrary or to controvert the findings and opinion.

22. Counsel for the Plaintiff further submits that, in addition to the decision of the Registrar, the Plaintiff has presented incontrovertible evidence that the Plaintiffs are the registered proprietor of the trademark '**–bix**' in Kenya. The Plaintiff is also the registered proprietor of various trademarks incorporating the component **'–bix'** in Kenya and in other jurisdictions. It is submitted by counsel that the registration certificates of the said trademarks have not been challenged.

23. It is submitted by counsel that all these registrations give the Plaintiff exclusive rights as encapsulated in section 7 of the Trade Marks' Act. In particular the section gives a registered proprietor the **right to the exclusive use of the registered trademark and** prohibits the use by any other person who not being a proprietor or authorised by the proprietor from using a similar, identical or a trademark that so resembles the registered trademark as to likely deceive or cause confusion. Such use by such a person amounts to infringement.

24. It is therefore the Plaintiff's case that the continued use of the trademark "**multibix**" is an infringement of the exclusive trademarks rights conferred by law under the registration of all the above trademarks and in particular trademark numbers 6339 and 1011488 'Weetabix'.

25. In seeking for a temporary injunction, the Plaintiff relies on the principles of granting temporary injunctions as laid down by Court of Appeal in the classic case of ***Giella v Cassman Brown & Co***

Ltd [1973] EA 358. They are:-, first the applicant must establish a prima facie case with a probability of success; Secondly the applicant must stand to suffer irreparable harm not compensatable in damages; and Thirdly, if in doubt, the court will assess the balance of convenience.

26. It is the Plaintiff' case that they have proved that the Defendant is not only passing off its products as those of the Plaintiff but also that the Defendant has and continues to infringe on the Plaintiff's exclusive rights granted under the Trade Marks Act.

27. It is further the Plaintiff's case that no amount of money can repair wilful disobedience to the express orders of a competent Tribunal. It is submitted for the Plaintiff that public policy requires all the directives of the Court or lawful Tribunal to be obeyed. It is also submitted for the Plaintiff that the Respondent to continue trading its product is to render the decision of the Registrar of Trade Marks and the provisions of the Act free to be disobeyed without consequences. Accordingly, to the Plaintiff this will invite impunity and that will cause irreparable harm and loss to the Plaintiff and the fraternity of persons who are supposed to enjoy the protection under the Act. In addition there is no amount of monies that can make up for a damaged or tainted goodwill. It is the Plaintiff's case that goodwill is intangible yet most profound. Decisions on what to purchase are made based on the goodwill a product enjoys. According to the Plaintiff every day and every moment that the Defendant's infringing products continue being on the market in Kenya continues to erode that goodwill. This loss can neither be quantified in monetary terms nor can it be adequately compensated through an award of damages.

28. On balance of convenience, counsel for Plaintiff submits that the actions of the Defendant are in clear contempt of a decision of a competent tribunal and secondly that the Defendant continue to unlawfully benefit from rights granted exclusively to the Plaintiff. There is no defence put forth by the respondent to show that their actions are not what they are, unlawful. For these reasons and also for the reasons advanced above, the counsel submits that the balance of convenience tilts in the Plaintiff's favour.

29. The Plaintiff has also sought for orders of destruction of the infringing materials and of account of profit. It is the Plaintiff's case that the Defendant has continued to unlawfully sell or offer for sale the infringing products in the Kenyan market deriving profits from such sale. It is the Plaintiff's contention that these are proceeds of their work and an order of account of profit and destruction of infringing products will serve not as an equivalent of the loss suffered by them but as a reprieve and as a step towards the recovery of the said loss. It is further the Plaintiff's contention that even after being informed and advised by the Plaintiff to pull out its products from the market through a cease and desist letter dated 10th September, 2012, the Defendant has blatantly continued to infringe on their trademark's rights.

30. In response, the Defendant/Respondent through its counsel Mr. Billing submitted that the Defendant filed its Notice of Appeal together with its Misc. Application number 167 of 2013, seeking *inter-a-lia* leave to file the intended appeal out of time. However, the Notice of Motion was adjourned because at one stage both parties were desirous to see if an amicable settlement was possible. This did not materialize.

31. With regard to the decision of the Registrar of Trademarks, it is counsel's submission that unless the Defendant's application for leave to file appeal out of time is heard and determined, it will be premature to comment at this stage.

32. Further, as regards the Ruling of the registration and on matters touching on the trademark "**bix**", it was submitted by counsel that the same are subject and issue in the intended appeal, as envisaged by the Memorandum of Appeal filed in Misc. App. No. 167 of 2013. It is therefore counsel's position that it will not be proper to comment in this application. Furthermore, the Defendant has denied any breach of the Plaintiff's Trade Mark or that it is passing off its goods as those of the Plaintiff, intentionally or unintentionally.

33. It is the Defendant's case that there is no evidence before this Court that there is likelihood of confusion as to the source of the product nor is there any evidence that the Plaintiff has suffered any loss

or damage. It is further the Defendant's case that the issues of alleged loss and damages as raised by the Plaintiff is a question of fact and law to be determined at the trial and not at this stage of the hearing.

34. On the issue of whether or not the Plaintiff is entitled to orders of temporary injunction, Mr. Billing submitted that the Plaintiff has not satisfied the principles set out in **Giella V. Cassman Brown & Co. Limited [1973] E.A. 358 (Plaintiff's Authority No. 4).** The Counsel reiterated that the application for leave to appeal out of time against the Assistant Registrar decision is still pending for determination before this Court. He further reiterates that the Defendant has denied any breach of Trade Mark or Passing off. It is further submitted by counsel that the Defendant has not disobeyed any Court Order.

35. It is the Defendant's case that the Plaintiff has failed to establish a *prima facie* case, and that it would not be fair and just to grant the orders sought.

ANALYSIS

36. I have carefully considered the application and the opposing submission of the parties. I have also carefully considered the Bundle of Exhibits marked '**RM**" by the Plaintiff which contains the legal documentations protecting the Plaintiff's rights to the various trademarks referred to in this application. I have noted, also, very carefully, that no part of this bundle has been meaningfully challenged by the Defendant in this application. Further, I have carefully considered the Ruling delivered by the Assistant Registrar of Trademarks in the **MATTER OF TRADE MARK NO. KE/T/2009/666428 "MULTIBIX" (WORD) IN CLASS 30 IN THE NAME OF MANJI FOOD INDUSTRIES LIMITED AND OPPOSITION PROCEEDINGS THERETO BY WHEETABIX LIMITED**.

37. Having made the above considerations, I still believe that the issues raised by the Honourable Assistant Registrar of Trade Mark are still the issues to be determined by this Court. The other issue is the one raised by the Defendant that these proceedings are pre-mature and that they should wait for the Defendant's intended appeal against the Tribunal's decision. In summary, the following are the issues for determination in this court.

> ***i. Is the Respondent's mark "Multibix" so similar to the Applicant's mark "Weetabix" as to cause a likelihood of confusion in contravention of the provisions of Section 14 of Trade mark Act.***
>
> ***ii. Is the mark "Weetabix" a well known mark in Kenya deserving a protection under Section 15 A of the Trade Mark Act?***
>
> ***iii. Are these proceedings premature and should they wait for the intended appeal by the Respondent?***

38. Firstly, it is the duty of this court to observe that there is in this matter a lawful, carefully considered decision of the Assistant Registrar of Trade Marks on the issue at hand. That Ruling was delivered to both parties via the Assistant Registrar's letter of 31st August 2012, in which the Registrar upheld the objection by the current Applicant to the registration of the mark "Multibix" by the Respondent. That decision in my view was well considered and has not been challenged by the Defendant/Respondent save that the Defendant intends to appeal against the same. In the meantime, it has become necessary for the Plaintiff/Applicant to bring this application because the Plaintiff believes that it is continuing to suffer loss by the alleged illegal acts of the Defendant. The ideal position would have been for the Respondent to cease all actions of trading in the mark "Multibix" immediately the said Ruling was delivered. However, despite being asked to do so by the Applicant, the Defendant, in defiance of the said Registrar's Ruling continued to engage in business as usual, causing the Plaintiff to allege the continued suffering caused by the said passing off. This court cannot close its eyes to the existing decision by the Registrar of Trade Mark, which decision has not been reviewed or appealed. The Defendant has the right to prosecute his intended appeal to the most logical conclusion. However, failure to do that in time or at all will not in any way stop the Applicant from seeking justice in this Court. In any event, there is no stay of proceedings in the matter pending the intended appeal. This application is therefore properly before this

court and the allegations by the Defendant that the court lacks the jurisdiction to hear it, or that it is premature are not well founded and I herewith reject that argument in answer to issue number three herein above.

39. In answer to issue number one above there exists an *issue estoppel* between the Plaintiff and the Defendant on the question of whether or not the Defendant's product "**MULTIBIX**" is an infringement of the Plaintiff's product "**WEETABIX**". The Registrar's findings are the findings of a competent tribunal which remains unchallenged. Since the Registrar of Trademarks is an expert in trademarks issues, in this case the finding and the opinion contained in the decision rendered is that of an expert. There is no evidence produced to the contrary or to controvert the findings or the opinion.

40. In addition to the decision of the Registrar, the Applicant has presented incontrovertible evidence that the Applicant is the registered proprietor of trademark '–bix' in Kenya. Certificate of registration of this trademark is on page 4 of the Applicant's supporting affidavit. The Applicant is also the registered proprietor of various trademarks incorporating the component '–bix' in Kenya and in other jurisdictions. These trademarks include Weetabix (in various variations), Bananabix, Minibix, Fruitibix, Chocobix, Oatibix, Vibixa, Goldenbix, Barlabix, Withoutabix and Withabix amongst others. The registration certificates are annexed as from page 1 to 19A of the Applicant's Supporting Affidavit as proof of registration to these trademarks. These certificates are not challenged.

41. All these registrations give the applicant exclusive rights as encapsulated in section 7 of the Trade Marks' Act. In particular the section gives a registered proprietor the right to the exclusive use of the registered trademark and prohibits the use by any other person who not being a proprietor or authorised by the proprietor from using a similar, identical or a trademark that so resembles the registered trademark as to likely deceive or cause confusion.

42. From the registrations it is also clear that the Applicant has established an apparent series of trademarks with a recognizable and common characteristic of '–bix' specifically when the same is applied as a suffix. This can be seen through-out the trademarks analysed above. This series of trademarks is what the Applicant refers to as '**The Bix Family'**. The Bix Family is strictly used by the Applicant for cereals, cereals preparations for human consumption, wheat-meal biscuits and all other goods in class 30 of the 10th edition of the Nice Classification of Goods. This is the same for registration except for trademark 6339 'Weetabix' which is registered under class 42 which is the old classification. Reference is made to Rule 6 of the Trade Marks Rules.

43. In answer to issue number two, and in determining whether or not the Applicant's series of trademarks referred to as 'The Bix Family' should be protected and recognized as a Family of Marks, the court will apply the test laid down in the INTA Guidelines for Trademarks Examination which lays down the test as follows. In order to constitute a Family of Marks, a group of marks must:- have a recognizable common characteristic; and the common characteristic of the family of marks must be associated with the trademark owner.

44. In the current instance, the pattern of usage of the '**–bix**' suffix, is an indicator of the source of the goods not only through the trademarks registered but also through the name of the proprietor of the trademark who is the Applicant herein. The Applicant, whose identity has the suffix '**-bix'** has been in existence since the year 1932. It has been manufacturing cereal foods and wheat-meal based biscuits and selling them using the name 'Weetabix' in Kenya since the year 1978.

45. It is the Applicant's submission that the respondent's trademark Multi**bix'**s *main component* and market place brand is the suffix **'-bix'** and it is currently used against goods in class 30 and in particular 'biscuits'. Such use by the respondent is contrary to section 7, 14 and 15 of the Trade Marks Act and is likely to deceive or cause confusion and lead to the wrong conclusion that 'Multi**bix**' is yet another product from the 'Bix family'.

46. It is the Plaintiff's case that the Defendant is, intentionally or unintentionally passing off the product Multibix as one of the Plaintiff's products. In determining whether or not an action for passing off exists,

court in the case of **Reckitt & Coleman v Borden ('Jif Lemon') [1990] RPC 341, 499** held that three basic requirements must be established in a claim of passing off:-

> ***1) That is, there is goodwill in the get-up of goods or services;***
>
> ***2) There is misrepresentation leading the public to believe the goods supplied by the Defendant are those of the claimant; and***
>
> ***3) That there was damage caused by reason of the erroneous belief.***

47. The Plaintiff has and continues to suffer damage with the continued use of the trademark 'Multi**bix**' by the Defendant in Kenya. The incorrect relation between these two trademarks is one that cannot be erased from the minds of the consumers as they purchase the goods in question;

48. Further and in the finding that trademark Weetabix is a well-known trademark, the Registrar of Trade Marks considered all the relevant facts and law presented before her and in conclusion she expressly on page 32 of the Ruling states:-

> ***"Weetabix is quite well known in Kenya and deserves protection under section 15 of the Trade Marks Act"***

Section 15A of the Trade Mark Act provides that well known trademarks shall be protected in Kenya whether or not they are registered in Kenya. In particular section 15A (4) prohibits the registration of any trademark if that trademark or an essential part thereof is likely to impair, interfere with or take an unfair advantage of the distinctive character of the well known trade mark.

49. Therefore, the trademark '**Weetabix'** should be protected as a well known trademark and any use of the said mark or of any part thereof is contrary to section 15 A(4) of the Trade Mark Act. The protection afforded by the Trade Mark Act was never intended to be academic and only exist in the Register of Trade Marks. It was intended to be effected in the market place where the trading of the products of the owners of the mark take place. The Applicant must enjoy the protection in the market place and that protection ought to be enforced by this Court.

50. The last issue which I did not raise above, but which is an issue in every application for injunctive orders, is whether the application satisfied the grant of injunctive orders. The principles upon which an injunction may be granted are well settled, and parties counsels' submitted on the same. I have carefully considered those submissions and I am satisfied that the Plaintiff/Applicant deserves injunctive orders, firstly because a tribunal dealing with the technical issue as is herein, has ascertained the probability of the Plaintiff suffering severe loss, and secondly, in my view, such loss can be of such a magnitude which, if not arrested in time by an order of injunction may end up unquantifiable. This is so, without making any reference to the Applicant's goodwill which needs to be protected. As it were with the existence of Tribunal orders in favour of the Applicant, the Applicant clearly has a *prima facie* case with possibility of succeeding. I am not in doubt, but if I were, the balance of convenience in my Ruling would favour the Applicant. I am satisfied that the Applicant has satisfied the principles laid out in the case of **Giella – Vs - Cassman Brown Limited** and is deserving of injuctive orders.

DISPOSITION 51.

51. In the upshot I allow the application and make orders as follows:-

> ***1) A temporary injunction do issue restraining the Defendant/Respondent whether by itself, its directors, officers, employees, servants or agents, licensees, franchisees or otherwise howsoever from importing , packing, distributing, selling or offering and displaying for sale the product "MULTIBIX" or any cereal or other products similar to the products of the Plaintiff and bearing names containing the suffix "BIX" and with similar get up of "WEETABIX" and/or "OATBIX" or any other name or designation bearing a close resemblance thereto pending***

hearing and determination of this suit.

2) That pending the hearing and determination of the suit, the following further orders do issue:-

i) The Respondent shall deliver to the Plaintiff/Applicant, or destroy on oath, all infringing "MULTIBIX" whole grain cereal biscuits within the Defendant's possession, custody or power, which would otherwise offend against the provisions of the foregoing injunction;

ii) The Respondent shall deliver to the Applicant all documents relating to the importation, purchase, distribution, selling or offering for sale of "MULTIBLIX";

iii) The Respondent is hereby restrained from importing, packing, distributing, selling or offering and displaying for sale any cereal or other wheat products similar thereto bearing any Trade mark containing the suffix "BIX" and/or with get up similar to that of the Plaintiff/Applicant's products.

3) The Defendant/Respondent herein is hereby ordered to disclose the names and addresses of all those whom the Respondent has supplied goods failing within the provisions of the orders sought above together with sales and details of quantities so supplied and the price thereof with effect from the 31st August 2012 when the said Tribunal Ruling was notified upon the parties.

4) Any party is at liberty to apply for further clarification of these orders.

5) Costs shall be for the Plaintiff/Applicant.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Maruti for the Plaintiffs/Applicant

M/s Ochieng for the Defendant/Respondent

Teresia – Court Clerk