



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 488 OF 2012**

**HAMDİ RESTAURANT LIMITED:.....:PLAINTIFF**

**VERSUS**

**HAMDİ HOTELS AND RESTAURANT LIMITED:.....:1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR OF COMPANIES:.....:2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before the Court is the **Notice of Motion** dated **30<sup>th</sup> July 2012** and filed in Court on even date. It is expressed to be brought under Order 40 Rules 1 and 2, Order 50 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act.
2. The main orders sought for in the application are that a mandatory injunction do issue compelling the 2<sup>nd</sup> Defendant to cancel from the registry of companies the company name Hamdi Hotels and Restaurant Limited or any other similar name to that of the Plaintiff. The Applicant also seeks to permanently restrain the 1<sup>st</sup> Defendant from trading in the name Hamdi Hotels and Restaurant Limited.
3. The application is based on the grounds stated therein and is supported by the affidavit of **Abdirashid J. Ahmed** sworn on **30<sup>th</sup> July 2012** as well as the further affidavit of the same person sworn on 18<sup>th</sup> March 2013.
4. In opposing the said application, the 1<sup>st</sup> Defendant has filed the Replying affidavit of **Ali Ahmed Duale** sworn on **24<sup>th</sup> October 2012** and the supplementary affidavit of **Mohammed Farah** sworn on **25<sup>th</sup> February 2013**.
5. The background to this application is as follows. The Plaintiff is the registered owner of the name Hamdi Restaurant Limited, having been issued with a Certificate of incorporation No. CPR/2009/12822 by the Registrar of Companies. (*Annexed to the application and marked "AA.2" is a copy of the Certificate of incorporation*). In the month of July 2011, the Plaintiff realized that there was a similar Company running similar business. The Plaintiff requested their lawyers to raise the issue with the registrar of companies which they did vide the letter dated 17<sup>th</sup> June 2011.
6. On 8<sup>th</sup> August 2011 the Registrar of Companies replied to the Advocate's lawyers. On the same date, the Registrar wrote to the 1<sup>st</sup> Defendant directing them to desist from using the name Hamdi Hotels and Restaurant Limited. According to the Plaintiff the Defendant failed to comply with the directive of the Registrar of Companies.
7. It is averred by Mr. Ahmed, a director of the Plaintiff that the business has suffered loss and

- damage due to the infringement by the 1<sup>st</sup> Defendant and failure to remedy the situation by the 2<sup>nd</sup> Defendant. The Plaintiff therefore urges this Court to grant the prayers sought in the application.
8. In opposition to the application, the 1<sup>st</sup> defendant filed a Replying affidavit on 24<sup>th</sup> October 2012 sworn by Mr. Ahmed Duale, a manager of the 1<sup>st</sup> Defendant. The manager avers that Hamdi Hotels and Restaurant Limited is a subsidiary of a franchise of hotels registered in Canada and trading in the name Hamdi Restaurant Inc. He further avers that Hamdi Restaurant Limited was incorporated in 2010 and a certificate of incorporation issued in March 2011. (Annexed and marked MO2 is a copy of the certificate of incorporation dated 1<sup>st</sup> March 2011)
  9. It is the deponent's assertion that they were shocked to learn that there was a similar business trading in the name of Hamdi Restaurant Limited. The 1<sup>st</sup> Respondent informed their Advocates to write to the registrar of companies to investigate the double registration. The Registrar confirmed that there was indeed a similar business trading in the same name, that is, the Plaintiff herein. The Registrar advised the 1<sup>st</sup> Defendant to change their name from Hamdi Restaurant Limited to any other name. It is at this point that the 1<sup>st</sup> Defendant changed their name to Hamdi Hotels and Restaurant Limited. The registrar of Companies confirmed availability and accepted the said name. Subsequently, the 1<sup>st</sup> Defendant was issued with a certificate of change of name being CPR 2011/42208.
  10. However, while the 1<sup>st</sup> Defendant thought that this matter had rested, the Registrar of Companies wrote to them requiring that they change the name again. The 1<sup>st</sup> Defendant applied once more for reservation of two names Hamdi Hotels Limited and Hamdi Group of Hotels. As stated by the 1<sup>st</sup> Defendant's managing director, the 2<sup>nd</sup> Defendant either refused to accept the proposed names or failed to respond to their request.
  11. It is the 1<sup>st</sup> Defendant's case that the name Hamdi Hotels and Restaurant Limited is different from the Plaintiff's name. The 1<sup>st</sup> Defendant therefore urges this Court to find that the two names are not similar and dismiss the Plaintiff's application with costs.
  12. The Respondent filed a Supplementary affidavit on 25<sup>th</sup> February 2013 sworn by **Mohamud Farah** on the same day. Mr. Farah avers that the 1<sup>st</sup> Defendant Company with the sanction of the special resolution and with the approval of the Registrar of Companies changed its name from Hamdi Hotels and Restaurant Limited to Hamdi Café a& Cuisine Limited. (*Attached to his affidavit and marked MF1 is a copy of Certificate of Change of Name No. CPR/2011/42208 dated 4<sup>th</sup> January 2013*). It is therefore the 1<sup>st</sup> Defendant's case that their name is now distinct from that of the Plaintiff and that the prayers sought by the Plaintiff cannot be granted in the circumstances.
  13. In response the Plaintiff filed the Further Supporting affidavit sworn by Abdirashid J. Ahmed on 18<sup>th</sup> March 2013. The Plaintiff still takes issue with the name Hamdi Café and Cuisine. It is the Plaintiff's contention that the 1<sup>st</sup> Defendant is being mischievous and wants to retain the name HAMDI which use has caused them serious damage. The plaintiff maintains that the name Hamdi Café and Cuisine Limited is causing confusion and interference with the Plaintiff's business and thereby occasioning loss.
  14. The 2<sup>nd</sup> Defendant did not enter appearance.
  15. The application was prosecuted by way of written submissions.
  16. I have considered the application, the affidavits on record as well as the submissions by Counsel.
  17. The main issue for determination is whether the 1<sup>st</sup> Defendant is using a similar business name to that of the Plaintiff and subsequently occasioning the Plaintiff losses. To begin with, the Plaintiff sued the Defendant for using the name HAMDI HOTELS AND RESTAURANT LIMITED which the Plaintiff alleges is similar to its business name HAMDI RESTAURANT LIMITED. However, the 1<sup>st</sup> Defendant has since changed its name to Hamdi Café & Cuisine Limited vide Certificate of Change of Name No. CPR/2011/42208 dated 4<sup>th</sup> January 2013.
  18. The Plaintiff however maintains that the said name is still similar to its business name hence causing confusion and losses to their business. It is the Plaintiff's contention that this is detrimental to them as they first registered the name HAMDI Restaurant Limited and the name HAMDI is very significant to its business.
  19. With regard to the business name, the 1<sup>st</sup> Defendant has since taken steps to ensure that the name

used by its Company is available with the Registrar of Companies. **Section 17 (1)** of the **Companies Act** provides that a Certificate of incorporation given by the Registrar shall be conclusive evidence that a company is duly registered and has met all the requirements under the act in respect of registration. Therefore, if there is any anomaly with the 1<sup>st</sup> Defendant's current name, the Plaintiff's cause of action lies with the 2<sup>nd</sup> Defendant. Further, under **section 19** of the **Companies Act**, the Registrar of Companies has the discretion to accept, reserve and register a company name.

20. Other than the word Hamdi, the current name used by the 1<sup>st</sup> Defendant is in my view not similar to that of the Plaintiff. The Plaintiff has no legal basis to lay claim over the name or word 'HAMDI' yet they have not registered the same as a trademark. (see section 5 of the Trademarks Act, which provides as follows:-

***“No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark, but nothing in this Act shall be deemed to affect rights of action against any person for passing off or the remedies in respect thereof.”***

21. The Plaintiff has made allegations of loss but has not made any attempt to demonstrate such loss. Therefore the same is not substantiated and cannot stand.

22. In view of the foregoing, the Plaintiff seems to have no cause of action against the 1<sup>st</sup> Defendant. As already stated in this ruling the current name used by the 1<sup>st</sup> Defendant is not similar to that of the 1<sup>st</sup> Plaintiff. There is no proof that the same is causing confusion or occasioning losses to the Plaintiff. Besides, the Plaintiff also failed to prove that the earlier name used by the 1<sup>st</sup> Defendant caused confusion and brought losses to the business. In any case, it was not the fault of the 1<sup>st</sup> Defendant that the name was reserved as available by the Registrar of Companies.

23. In the circumstances, the order that commends itself to this Court is to dismiss the Notice of Motion dated 30<sup>th</sup> July 2012 and filed in Court on even date. The effect of this order is such that the suit filed by the Plaintiff vide the Plaint dated 30<sup>th</sup> July 2012 and filed in Court in even date is also dispensed with. I will however give no order as to costs as it is clear that the genesis of the suit and subsequently the application was due to some oversight in the Companies Registry.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Njoroge holding brief for Kenyeriri for the plaintiff

Atako for the Defendants

Teresia – Court Clerk