



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL CIVIL SUIT 6 OF 2012

PESTLAB
LIMITED.....PLAINTIFF/RESPONDENT
VERSUS
HANNINGTON MBAI MBITI T/A

PESTLAB CLEANING SERVICES.....1ST
DEFENDANT

PESTLAB CLEANING SERVICES
LIMITED.....2ND
DEFENDANT

RULING

1. This is an application by the Plaintiff seeking injunctive orders against the Defendants to restrain them from howsoever passing-off their name, address products and services as those of the Plaintiff.

2. The Plaintiff is a Limited Liability Company incorporated on 9th February, 2004 with Stephen Mutua Kilonzo and Resley Makena Kileba as directors. It carries on the business of pest control, cleaning, maintenance and fumigation, amongst others. The grounds of the application are, *inter alia*, that:

- The Defendants are in the same business field and have committed and continue to commit acts of passing off the Defendant's name, address, products and services as those of the Plaintiff in that they have used the Plaintiff's profile, Certificate of Registration VAT Certificate and reference letters in tendering for business.
- The Defendants have published the Plaintiff's physical address, postal address, directors and staff members as their own.
- The Defendants have registered an email address and website info@pestlab.co.ke and www.pestlab.co.ke almost similar to the Plaintiff's info@pestlabltd.com and www.pestlabltd.com
- The Defendants have used a name which is causing and has caused confusion and deception

among the Plaintiff's existing and target clients and purchasing public.

3. The Plaintiff alleges that all these actions have damaged and injured the Plaintiff's business reputation and goodwill. The application was supported by the affidavit of Stephen Kilonzo to which was annexed a sixty eight page bundle of documents.

4. Plaintiff alleges that the 1st Defendant Hannington Mbai Mbiti, carries on business in the name of Pestlab Cleaning Services, registered under the Registration of Business Names Act, whilst the 2nd Defendant is a limited liability company. In his affidavit, Mr. Kilonzo depones that Hannington Mbai was during 2007-2009 engaged by the Plaintiff as its agent in Nairobi. That the 1st Defendant, without the Plaintiff's consent registered a business name Pestlab Cleaning Services on 6th May, 2009 under Business Name BN/2009/28945. A of the certificate of Registration is annexed at "SK3".

5. Further, in the affidavit, the deponent alleges that Mr. Hannington Mbai has represented himself as the Managing Director of the 2nd Defendant, and has been passing-off and masquerading to the Plaintiff's clients and general public that the physical and postal address of the Defendants at Mombasa is the same as that of the Plaintiff. In his affidavit, Mr. Kilonzo sets out a long list of various actions and conduct of the Defendants that he alleges constitutes passing-off. This includes that the Defendants filed a tender in which they masqueraded as the Plaintiff. On appeal on the Public Procurement Appeals Board, the Board cancelled the tender award and noted that the Defendants had been improperly qualified using the Plaintiff's documents or information.

6. The 1st Defendant filed a Replying Affidavit on 7th March, 2012 on his own behalf, and as Managing Directors of the 2nd Defendant. He deponed that the sole proprietorship, Pestlab Cleaning Services, ceased operations when he incorporated the 2nd Defendant. He admits that he was the Plaintiff's agent. He depones as follows: that together with Mr. Stephen Kilonzo the Plaintiff's Director, they opened an account in Nairobi for the Plaintiff; that he sold his vehicle and invested the proceeds in the Plaintiff, which moneys Mr. Kilonzo fraudulently withdrew; that he withdrew as signatory from the Plaintiff's account; that he then ceased to act as the plaintiff's agent; that he registered his business with the full knowledge and approval of Mr. Stephen Kilonzo.

He further deponed that he and Mr. Kilonzo retained cordial relations, and when he won large tenders he would sub contract, some of the work to the Plaintiff. The result was that the 2nd Defendant and the Plaintiff complemented each other, particularly with regard to joint business activities. These, the Defendant depones, are material facts concealed by the Plaintiff and which disentitle it to injunctive relief.

7. The Plaintiff/Applicant filed its written submissions on 20th April, 2012 and the Defendant/Respondent on 24th April 2012.

The Applicant argued that it was established in 2004 at its registered address. That its relationship with Hannington Mbai Mbithi was always one of principal and agent, the terms of which includes:

"a) To source for contracts for Pestlab Limited

b) To represent the Plaintiff in Nairobi

c) Mr. Stepphen Kilonzo and myself (Hannington Mbithi) to operate as signatories of the Plaintiff's Bank accounts

d) To invest in joint business in the Plaintiff if its business was progressing."

8. According to the Plaintiff, the Defendant breached this agency arrangement and registered a business the name Pestlab Cleaning Services which are similar to the Plaintiff's name. The Plaintiff relied on the

case of **Paul Kukubo and 30 others vs Reollout Publishing Ltd** Nairobi HCC 323 of 2006 and **Premier Food Industries Ltd vs Al Mahra Ltd** Milimani HCC 661 of 2005 (2006) e KLR. These cases summarise the ingredients of passing-off as follows:

“First, the Plaintiff must establish a goodwill or reputation attached to the goods or services which he supplies, in the mind of the purchasing public by association with identifying “get up”

Secondly, he must demonstrate a misrepresentation by the Defendant to the public (whether or not with intention) leading or likely to lead the public to believe that goods and services are of the Plaintiff.

Thirdly, he must demonstrate that he suffers, damages by reason of the erroneous belief enlarged by the Defendant’s misrepresentation that the source of the Defendant’s goods or services is the same as those offered by the Plaintiff.”

Counsel for the Plaintiff asserts that from their submissions and annexed documents the Plaintiff has established a *prima facie* case of passing off, in satisfaction of the principles under **Giealla vs Cassman Brown & Co. Ltd** [1973] EA 358.

9. In their submissions, Defendants state that there are four issues for determination:

- a) Are the Defendants actually passing-off as claimed by the Plaintiff?
- b) Has the Plaintiff directly or indirectly benefitted from the Defendant’s business?
- c) Has the Defendant acquiesced to the so called **“pass off”**?
- d) Is the Defendant entitled to interlocutory relief sought?

10. The Defendants restate the positions held in the 1st Defendant’s affidavit, pointing out that there was a harmonious, mutual and supportive business relationship between the Plaintiff and Defendants; that the plaintiff used the Defendant’s Nairobi offices, address and telephone numbers, whilst the Defendants used the Plaintiff’s office in Mombasa. As such, neither can be said to have been misrepresenting the other.

11. Further, the Defendants aver that their actions do not amount to passing-off because the Defendant operated with the full awareness of the Plaintiff, and used to benefit from the sub contracts by the 1st Defendant. The Plaintiff went as far as trying to misrepresent itself as the 1st Defendant so as to receive payments for services offered by the 1st Defendant as shown in exhibit **“HMM4”**.

12. Finally, the Defendants argued that there was acquiescence by the Plaintiff to the Defendants’ business in that the two parties operated in mutual support of one another. Thus, that the Plaintiff has not satisfied the requirements for injunctive relief under the **Giella** Principles.

13. I have carefully considered the submissions of counsel for the parties, the application and reply, and all documents supplied by the parties in respect of this application.

In my view, and given the orders sought in the notice of motion by the Plaintiff, the issues for determination are:

- a) Whether the nature of the relationship between the parties raises a *prima facie* presumption of passing off by the Defendants.
- b) Whether, in light of (a) above, the Defendants should be stopped from carrying on trade in the name and style of Pestlab Cleaning Services or Pestlab Cleaning Services Ltd.

I now answer the first question: Whether the nature of the relationship between the parties raises a

***prima facie* presumption of passing off by the Dependants.**

14. The first observation to make is that there is no dispute that between 2007 and 2009 the 1st Defendant was acting as agent of the Plaintiff. The precise terms of the agency are not recorded. However, the agency appears to have broken down when the 1st Defendant wrote a letter (“HMM2”) to the bank, copied to the Plaintiff, withdrawing as signatory. Part of that letter is quoted hereunder due to its importance:

***“...However, I wish to notify you of some financial irregularities which have resulted into a severe disagreement between the signatories, hence my humble request to you, to cancel my name from the said account.*”**

Kindly note that with effect from the recipient (sic) of this letter, I shall not be held accountable for any transaction done through the account.” (emphasis mine)

With allegations such as the above, and the declaration not to be held accountable, it is my view that as at 27th May, 2009, the agency agreement was more or less at an end.

15. On careful perusal of the decision of the Public Procurement Administrative Review Board annexed as “SK4” to the Plaintiff’s affidavit, I note as follows:

- The tenders therein were advertised in the Daily Nation of 15th March, 2011
- In respect of Review case Number 19/2011 both Pestlab Limited and Pestlab Cleaning Services tendered. The former was the Applicant in the Review and the latter was an Interested party. At page 30 of the Plaintiff’s Bundle (page 9 of the Review Decision) it is recorded that Stephen Kilonzo represented Pestlab Cleaning Service as Director. Unless that is an error on the face of the record, it says something about the relationship between the parties.
- In the Review case Number 20/2011 Pestlab Cleaning Services was again an Interested party.
- At page 37 (9 of Review Decision) the Appeals Board disqualified Pestlab Cleaning Services for using documents as follows:

***“...3 The successful bidder being the Interested Party herein [Pestlab Cleaning Services] attached documents in its bid relating to the Applicant [Pestlab Ltd] in Application 19/2011 well knowing that it was a different bidder.*”**

As earlier shown in case 19/2011 Pestlab Cleaning Services is recorded to have been “Represented by Mr. Stephen Kilonzo, Director.”

The foregoing procurements appear to have been done jointly or in collaboration or tacit knowledge and consent as between Plaintiff and Defendants.

16. I have also looked at other documents annexed to the Plaintiff’s affidavit. At page 38-39 (“SK5”) of the bundle is a document (it appears torn out of a bound document, such as a tender) on the letterhead of Pestlab Cleaning Services. It has no date but indicates that the following names for the Nairobi Head Office:

“Contact Person: Hannington Mbithi Direct cell 0724 699606”; and for the Mombasa office, following names:

“Contact Person:- Stephen Kilonzo – Direct cell 0720136 679.”

On page 38 is an ‘office contact’ sheet where, again Hannington Mbithi tel 0722 796 156 appears under

“General”, “Personnel”, and “Financial Enquiries”, whilst Stephen Kilonzo appears under Technical Enquiries” using Telephone number 020 218 2997.

17. If the Defendant was going behind the Plaintiff’s back and misrepresenting his business as that of the Plaintiff’s, it does not make sense that he would include the direct cellphone Number of the Plaintiff’s director; Nor would he include or the Plaintiff’s letterhead and “HMM2” as annexed to the Respondent’s Replying Affidavit, which was in use when the Respondent withdrew as a bank signatory.

18. The last document I refer to is “HMM 3(b)” the photocopy of the Yellow Pages telephone directory advertisement by Pestlab Limited, the Plaintiff. In it, the contact addresses and telephone numbers of the Plaintiff at its incorporation address in Mombasa contained in the notice of motion clearly and, expectedly, feature. However, so do the contact addresses of the 1st Defendant. In (“HHN3 C”) another similar Yellow Pages advertisement appears in the name of Pestlab Limited; and there, the following email address appears:

“Email:nmbiti@gmail.com”

19. Given all the foregoing factual information, the only conclusion I can draw is that the Plaintiff and Respondent(s) operated in consonance. Whether their relationship there was a *quid pro quo* details of which have not been disclosed, and which extended well beyond the undisputed termination of the agency arrangement between them.

Accordingly, I answer the first issue in the negative. There is no *prima facie* evidence of misrepresentation by the Defendant such as to raise a presumption or indication of passing off. If anything, the parties appear to have been working together, particularly on tenders, for mutual benefit.

20. The second issue is whether the Defendants should be stopped by injunction from carrying on trade in the name and style of Pestlab Cleaning Services or Pestlab Cleaning Services Limited. This I also answer in the negative, given that no case of misrepresentation, or interference or threat of damage to the Plaintiff by the Respondents has been established on a *prima facie* basis.

21. The upshot of all the foregoing, is that the Plaintiff’s application is hereby dismissed with costs to the Respondent.

Dated, signed and delivered this 26th Day of June 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....