REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 706 of 1998

L.G. HARRIS & COMPANY LIMITED……PLAINTIFF

VERSUS

L.G. HARRIS & CO. (EAST AFRICA) LIMITED……..DEFENDANT

JUDGMENT

1. The Plaintiff commenced suit against the Defendant by filing in court a plaint on the 12/11/1998. The plaint is dated 11/11/1998. The Plaintiff asked for judgment against the Defendant for:-

   A. An injunction to restrain the defendant whether by itself, its directors, officers, servants or agents or any of them or otherwise howsoever from doing the following acts or any of them, that is to say, manufacturing, selling, supplying or distributing any product which bears the HARRIS tradename or which is confusingly similar to the products manufactured, sold and on (sic) distributed by the plaintiffs under the Trademark "HARRIS"

   B. Destruction upon oath of:-

   (i) all paint brushes, decorators tools and or household brushes

   C. An enquiry as to damages or at the Plaintiff's option an account of profits and payment of all sums found due upon taking such enquiry or account.

   D. An order that the defendant do within a period to be fixed change its name so as to remove the name L.G. Harris therefrom on the grounds of its being undesirable and incompatible with public interest as it is the plaintiff's name and is in effect an infringement of the plaintiff's trademark.

   E. Costs and interest.

2. The Plaintiff's claim arises out of an alleged Trademark Licence Agreement dated 1/03/1998 under which the Plaintiff agreed to grant to the Defendant exclusive use of its (Plaintiff's) trademark "Harris" within the East African region in consideration of royalty payments. The Plaintiff avers that the Defendants failed to remit the royalties as agreed and was thus in breach of the agreement. The Plaintiff also avers that as a result of the breach the Plaintiff terminated the Licence Agreement by a letter dated 13/04/1994, subsequent to which the registration of the licence with the Registrar of Trademarks was cancelled on 20/12/1996.

3. The Plaintiff averred that despite the termination of the Licence Agreement and the cancellation of the registration of the trademark, the Defendant continued to manufacture, sell and use the trademark in a manner the Plaintiff says was calculated to pass off the products as those of the Plaintiff, and in particular:-

   (a) The products are sold with a sticker in the following terms "Manufactured by L.G. Harris & Co."

(b) Some paint brushes are sold with the name "HARRIS" printed on the handle.

(c) The metal collars enclosing the paint brushes bristles bear the HARRIS tradename on the front and on the rear

(d) The wall at the Defendant's godown bears the "HARRIS" trademark.

(e) The name "L.G. Harris & Co" relates essentially to the manufacture of the HARRIS painters and decorators' tools and brushes.

4. By its defence filed in court on 8/01/1999, the Defendant denied the Plaintiff's claim and averred that it was using its own name, viz; L.G. Harris & Co. (EAST AFRICA) Limited for and in the furtherance of its business and denied that it was using the name "HARRIS" on its products as stated in the plaint. The Defendant thus denied any acts of passing off and infringement as claimed in the plaint or at all. The Defendant specifically denied all the particulars of infringement set out in paragraph 8 of the plaint. The Defendant asked the court to dismiss the Plaintiff's suit with costs.

5. The issues that were agreed for determination and filed in court on 18/02/2002 are (a) whether the Defendant has infringed the Plaintiff's trademark and (b) costs of the suit. The Plaintiff contended that the Defendant had indeed infringed the Plaintiff's trademark and asked the court to make such a finding and to condemn the Defendant with the costs of the suit.

6. The Plaintiff adduced evidence by which it sought to prove the following namely that

(i) *the Plaintiff was at all times the registered owner of the trademark "Harris"*

(ii) the Plaintiff agreed to grant the Defendant the exclusive use of its registered trademark

(iii) the Plaintiff subsequently cancelled the licence and caused the registration to be cancelled

(iv) the Defendant continued the use of the Plaintiffs' trademark despite the cancellation.

7. The Plaintiff called two witnesses. PW1 was ANIL KANTARIA; a part-time employee with the Plaintiff. PW1 produced a certified copy of the trademark "Harris" and a renewal certificate as PExhibits 1 and 2. The witness told the court that he was familiar with the handwriting of one Andrew Harris, the Plaintiff's Managing Director, and he went ahead to identify the Trademark Licence Agreement dated 1/03/1988 between the Plaintiff and the Defendant, which agreement was signed by Andrew Harris on behalf of the Plaintiff.

8. PW1 also produced 3 paint brushes, two of which were manufactured by the Defendant and containing the label, "*L.G. Harris & Co. [East Africa] Limited*". The witness said he had purchased the two brushes on 27/09/2001 and 15/02/2002 respectively. The third paint brush was a product of the Plaintiff bearing the trademark "Harris". The 3 paint brushes were produced as PExhibits 7 to 9 respectively. PW1 explained to the court that the quality of a brush is determined by the elements at the top, that is to say the part which is dipped in the paint before it is applied. He also said that the quality of a brush is also determined by the number of bristles that reach the top; and went on to say that whereas 85% the bristles of the Plaintiff's brushes reached the top, only 60% of the Defendant's brushes reached the top.

9. The Plaintiff's PW2 was MARY MUTHONI GITUMBI, an advocate of this honourable court and working with the firm of Hamilton Harrison & Mathews Advocates as an intellectual property lawyer. PW2 testified that she caused a search to be conducted at the Kenya Industrial Property Institute in relation to the dispute between the parties. According to her testimony, the findings of the search were:-

(i) Trademark "Harris" was advertised in the Kenya Gazette on 17/04/1970 – see PExhibit 10.

(ii) The trademark's validity period was severally extended, the last extension being on 30/10/1988 for a further 14 years.

(iii) There had been registered a registered user agreement between the proprietor of the mark namely, the Plaintiff, and the Defendant

(iv) The cancellation of the registered user agreement was published in the Kenya Gazette dated 20/12/1998.

10. According to the further testimony of PW2, both the registered user agreement and the subsequent cancellation thereof were registered at the Kenya Industrial Property Institute. She said that the cancellation of the user agreement meant that the Defendant ceased to be entitled to exploit the marks. PW2 also testified that the cancellation was done at the behest of the Plaintiff and that the advertisement in the Kenya Gazette of 20/12/1998 was a notification to members of the public that the registered user agreement between the Plaintiff and the Defendant was now null and void and of no effect.

11. The Defendant also called evidence in an attempt to rebut the evidence given by the Plaintiff. DW1 was KANSHIK SHAH, a director of the Defendant company. His evidence was that the Defendant company was incorporated by the Plaintiff in 1996 and that the current shareholders bought the Defendant company under an agreement which was produced as DExhibit 2. He said that all the shares of the Defendant company were bought from Bharet Doshi and Trade Setters Tyres Limited; that at the time of purchase the Defendant company was manufacturing paint brushes and brooms. The brushes which were being manufactured by the Defendant Company according to DW1 were Harris Paint brushes. DW1 also stated that at the time of purchase of the Defendant Company, there was no restriction to them to use the name LG Harris & Co. (E.A) Limited. DW1 stated that the Defendant still manufactured the brushes that were being manufactured when they bought the company and that the manufacture is done in accordance with certain conditions required by Kenya Bureau of Standards (KEBS), both in respect of the brushes and the bristles. DW1 also stated that the Defendant company had not put any trademark in the brushes and that all that the Defendant company has done is to manufacture its products according to the law. DW1 also testified that the Defendant company had not used the trademark "Harris" anywhere on their brushes, nor had the Defendant company used the labeling that was shown on PExhibit 9. DW1 also told the court that the Defendnat company had not sold out any of their products bearing the trademark of the Plaintiff and that if any brushes were still in the market bearing the Plaintiff's trade mark, then such brushes may have been in the market as part of old stock containing the Plaintiff's brushes at the time of purchase.

12. When cross-examined, DW1 stated that he was not aware of any agreement between the Plaintiff and the Defendant, though he conceded that he was aware of the agreement marked as PExhibit 2. This is the agreement of acquisition of the Defendant Company by the present owner. DW1 also stated that the Plaintiff and the Defendant were still associated. DW1 also stated that the Plaintiff came into the market after filing the present suit and that since buying the Defendant Company, the Plaintiff stopped using the name HARRIS on their brushes.

13. The parties' advocates, M/s Hamilton Harrison & Mathews and B.M. Quadros for the Plaintiff and the Defendant respectively made extensive submissions. Counsel for the Plaintiffs gave the following summary of what the Plaintiff makes of this case:-

*1. The Defendant's only witness who is the Defendant's Managing Director admitted that at the time they were buying and taking over the Defendant company in September 1993, he knew that the Defendant was using the **Harris** trademark.*

2. The defendants witness became aware of the Licence Agreement for the "Harris" Trademark in October/November 1993. This is well before the said Licence Agreement was cancelled by the Plaintiff in 1996. He admits that they continued to manufacture brushes that were being manufactured by the defendant at the time of the take over.

3. Clause 7 of the Licence Agreement provides that any goods manufactured and distributed by the licencees bearing a trade mark different from "Harris" but sufficiently similar to it to mislead the purchasers of the product into thinking that the goods carry the "Harris" brand name shall be deemed for the purpose of the Agreement to be carrying the "Harris" brand name.

4. The defendants witness is not credible. He claims that he was initially not aware of the Licence Agreement between the parties yet they shared the same legal counsel for the take over.

5. The witness admits that the paint brushes produced in court look alike to the naked eye, are the same size and indicate the name "Harris". He however states that no confusion is likely to be caused. This is highly unlikely.

6. The witness testified that they did not consider that in buying the defendant they were also buying the name Harris yet he stated that they bought and acquired the business and its goodwill, goodwill being the name of the company.

7. The witness admits that they considered a change of name L.G. Harris would cause them problems as it's the name for which the products were known.

14. On the law, counsel for the Plaintiff referred to section 7 of the Trade Marks Act (Cap 506) Laws of Kenya and submitted that under the provisions of the said Act, the "*registration of a proprietor of a trademark if valid gives to that person the exclusive right to use the trademark in relation to the goods or services and that the right is infringed by any person who not being the proprietor of the trademark 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 in a manner that is* likely to:-

(i) be taken either as being used as the trademark;

(ii) Be taken in a case in which the use is upon the goods or in physical relation thereto or in any advertising circular or other advertisement issued to the public, as importing a reference to same person having the right either as a proprietor or as registered user to use the trademark or goods with which such a person is connected in the course of trade".

15. Counsel for the Plaintiff submitted further that the evidence is clear and that it is not disputed that the Plaintiff is the registered owner of the "Harris" trademark and secondly that the actions by the Defendant of continuing to manufacture and to use the said trademark long after the user agreement had been deregistered and a public notice put out in the Kenya Gazette amounted to infringement of the Plaintiffs trademark.

16. Counsel for the Plaintiff also cited **Halisbury's Laws of England Vol. 48 paragraphs 84 and 85** for the meaning of the word "use" for purposes of infringement. Paragraph 85 which is entitled "Application of mark to material for labeling or packaging reads:-

> *"A person who applies a registered trade mark to material intended to be used for labeling or packaging goods, as a business paper or for advertising goods or services, is to be treated as a party to any use of the material which infringes the registered trade mark if, when he applied the mark, he knew or had reason to believe that the application of the mark was not duly authorized by the proprietor or a licensee."*

17. The long and short of the two paragraphs is that a person uses a sign or mark if, in particular he –

(i) Affixes it to goods or the packaging thereof;

(ii) Offers or exposes goods for sale, puts them on the market or stocks them for those purposes under the sign

(iii) Imports or exports goods under the sign

(iv) Uses the sign on business papers or in advertising;

and that it does not matter that the use of the mark is or is not for trade. Counsel for the Plaintiff submitted that the Defendant's use of the word "Harris" on its brushes resembles the Plaintiff's registered trade mark "Harris" and that the resemblance of the two is so close that it is likely to lead to deception or cause confusion in the course of trade. Counsel for the Plaintiff further submitted that since registration of a trade mark confers the exclusive rights to the use of a trade mark and that since such a right is statutory, infringement of the trade mark is a tort of strict liability, the Defendant's knowledge, intention and motive being irrelevant. (see ***Pharmaceutical Manufacturing Co. –vs- Novelty Manufacturing Ltd. [2001] 2 EA 521*** *and* ***British Sugar Plc v James Robinson & Sons Ltd. [1996] R.P.C. 281)***.

18. Further, counsel for the Plaintiff submitted that even upon the evidence on record, DW1 admitted that the brushes produced in court looked alike to the naked eye, are the same size and indicate the name "Harris". This is what DW1 stated in part during his testimony on cross examination:-

> *"Exhibit 8 is not similar to exhibit 9 Shapes are different, decoration different, sizes are different exhibit 8 is 6 inch/150mm exhibit 9 is 6 inch/152 mm. To the naked eye they look the same size. Both of them indicate the name Harris. There is no confusion likely to be caused. I would not know whether the name Harris is connected with paint brushes in this company Exhibit 9 shows trademark Harris. It is labeled that way. We do not deny the Plaintiff has a registered trademark. I do not know that there was an agreement between the Plaintiff and Defendant through its previous owner."*

19. In light of the above evidence, counsel for the Plaintiff submitted that the Defendant's brush would easily pass off as being that of the

Plaintiff. Counsel urged the court to make a finding that the Plaintiff has discharged its burden of proof and proved its claim on a balance of probability that its trade mark has been infringed and goods passed off by the Defendant as being those of the Plaintiff and to enter judgment against the Defendant as prayed in the plaint.

20. The law on the subject of passing off is now well settled and the applicable principles were restated in ***Biersdorf Ag v Emirchiem Products Limited [2002]1 KLR*** 876 to be

(a) *the plaintiff must establish a goodwill or reputation attached to the goods or services with an identifying get-up*

(b) the Plaintiff must demonstrate a misrepresentation by the Defendant to the public leading or likely to lead the public to believe that the goods offered by him are the goods or services of the Plaintiff

(c) he must demonstrate that he suffers, or in a ***quia timet*** *action, that he is likely to suffer damage by reason of the erroneous belief engendered by the Defendant's misrepresentation that the service of the Defendant's goods or services is the same as the source of those offered by the Plaintiff.*

These are the principles that are applicable in this case. I shall return to them later in this judgment.

21. M/S B.M. Quadros, counsel for the Defendant argued vehemently against the Plaintiff's claims against her client. Counsel referred to PExhibit 10, the Kenya Gazette Notice dated 17/04/1970 which reads:-

> *"The under-mentioned applications are proceeding in the name of L.G. Harris and Company Limited a British Company ---. In classes 8 and 16 schedule III.*
>
> *15189 – Painting trowels, scrapers, shave hooks, putty knives and stripping knives, all being hand tools for use by painters and decorators; and steam rollers and scissors, all for use by paper-hangers.*
>
> *`15190 – painting and decorating brushes."*

22. Counsel for the Defendant submitted that PExhibit 10 would only make sense if it is read together with PExhibit 1 which shows that the trademark 'HARRIS' was registered on 23/06/1970 in respect of Painting and Decorating brushes in class 16 (schedule III) under No. 15190. Counsel submitted that according to PExhibit 2, the Certificate of renewal of the same trade mark no. 15190 for a further 14 years from the 3/10/1988, the trade mark would have expired on 3/10/2002. Counsel contended that the Plaintiff did not adduce evidence to show that from the year 2002, the trade mark had been renewed. Counsel also submitted that the Plaintiff did not place any evidence before the court explaining what clauses 8 and 16 comprised of nor was there evidence by the Plaintiff to say what schedule III related to. On the basis of the above counsel for the Defendant submitted that the Plaintiff had failed to prove its claim as to ownership of the trade mark; and further that since the trademark was only in respect of painting and decorating brushes, the Plaintiff's prayer for injunction in general terms cannot be sustained and should be dismissed.

23. Regarding the Plaintiff's second prayer seeking an order for the removal of the name ***L.G. Harris***, counsel for the defendant submitted that the Plaintiff's never owned the name ***L.G. Harris*** but that it owned only the trade mark ***"HARRIS'*** in respect of painting and decorating brushes from 23/06/1970 to 3/10/2002. Counsel urged the court to dismiss this second prayer by the Plaintiff.

24. As regards the alleged infringement of the trademark "**Harris**" counsel for the defendant submitted that PExhibits 7 and 8 which were manufactured by the Defendant had a label which clearly showed that the paint brushes were manufactured by L.G. Harris (East Africa) Limited and that the label does not have the trade mark "Harris" on the handle. The Defendant's contention was that the mere identification of a manufacturer does not amount to exhibiting a trade mark; and that all that the defendant was doing was to comply with the requirement by Kenya Bureau of Standards (KEBS) and that the evidence on the paint brushes agrees with D.W1's evidence in which he stated, "*we have not put any trade mark on the brushes*", and further that this was in compliance with the requirements of Section 9 of the Standards Act Cap 496, Laws of Kenya and Legal Notice No.2756/90 and 112/90. Part of the two Legal Notices states as followed:-

> *"....no person shall manufacture or sell these commodities or use these methods and procedures on or after the date of publication of this order unless the commodities and methods and procedures comply with the requirement of the relevant Kenya Standards,*" which in this case was standard number KS 03-911 (D exhibit 3).

25. According to the Standard above mentioned, counsel for the Defendant submitted that each of the brushes manufactured by the defendant had to be legally and indelibly marked or stamped with the following details:-

(a)The manufacturers name or recognized trade mark, if any

(b)The size of the brush

(c) The grade of the brush

(d)The declaration "made in Kenya" in light of the requirements of the above

26. In light of the requirements of the above Legal Notices, counsel for the Defendant submitted that all that the defendant was doing was complying with the law by labeling the brushes, and that in the circumstances, the Plaintiff cannot purport to have any property in the legally registered name of the Defendant. In any event, counsel for the Defendant argued, the Defendant company was registered by the Plaintiff company and in this regard, counsel asked the court to find that the Plaintiff has not proved its claim against the defendant on a balance of probabilities.

27. Counsel for the Defendant also submitted that the Plaintiff had not placed sufficient evidence before the court to demonstrate that the Defendant was passing off its goods as those of the Plaintiff. Counsel pointed out the admitted fact that the paint brushes manufactured by both parties herein were of the same colour and said that similarity in colouring was a requirement of the law about which the Defendant could do nothing and in particular that the Defendant was only complying with the provisions of paragraphs 2, 3, and 4 of the specifications set out by the Kenya Bureau of Standards (KEBS) which specify the following colours:-

Grade 1 Red and Lacquered

Grade 2 Green and Lacquered

Grade 3 Unmarked and unlacquered

The court notes that from the above specifications, it is clear that both parties herein were manufacturing Grade 2 paint brushes.

28. According to counsel for the Defendant, the Defendant's hands were tied as regards the colour and the type of materials that the paint brushes were to be made of and that the Defendant was allowed no creativity whatsoever in the manufacture of the paint brushes for sale in Kenya. Counsel also submitted that the Plaintiff's claim that the products sold by the Defendant were sold with a sticker in the following words "manufactured by L.G Harris & C" was not proved since P exhibits 7 and 8 *(*paint brushes manufactured by the Defendant) showed that the brushes were labeled with the words" manufactured by L.G. Harris & Co (East Africa) Limited" with the Kenyan address. Counsel for the Defendant also submitted that the Plaintiff failed to adduce evidence to demonstrate or prove that the Defendant sold some brushes with the name "Harris" printed on the handle, or that the metal collars enclosing paint brushes' bristles bears the name "Harris" on the front and the rear. Counsel also submitted that the Plaintiff did not prove its claim that the Defendant's stationary is embossed with the "Harris" trade name that the wall at the Defendant's go-down bears the "Harris" trademark or that the name L.G. Harris & Co. related essentially to the manufacture of the Harris painters and decorator's tools and brushes.

26. Counsel for the Defendant cited a number of authorities to buttress the Defendant's case, namely **Brook Bond Kenya Limited vs Chai Limited [1971] E.A. 10** and **Nation Starch Manufacturing Company vs Munns Patent Maizena and Starch Company [1984] AC 275.** In the latter case the purported trade mark "Maizena" which had been invented by the Plaintiff in 1856, had for a quarter of a century been allowed to be used as a term descriptive of the article, and not of their manufacture thereof. The respondents had applied the word to their own manufacture but did not try to pass the same as that of the applicants but the use of the labels and packets calculated to deceive the public on that paint. The court held that the word had thereby become a public juris, and was no longer a registerable trademark. The court also found that no evidence of any kind had been given showing that that any one was deceived". Counsel further submitted that in the present case, no evidence was led by the Plaintiff such as the evidence of a painter to show that such a painter was deceived into buying a paint brush thinking that it was a paint brush manufactured by the Plaintiff. Counsel for the Defendant submitted further that no such confusion could arise since P.W.1 stated that he was easily able to distinguish the two paint brushes. Counsel urged the court to dismiss the Plaintiff's allegation that the Defendant is guilty of passing off of its products as those of the Plaintiff.

29. As regard the Plaintiff's claim for damages counsel for the Defendant submitted that no particulars were either pleaded or

proved. Paragraph 7 of the plaint reads:-

> *"7. the goodwill and reputation of Harris paint brushes and decorative tools is considerable and the products are recognizable by the trade mark "HARRIS"*

30. Counsel for the Defendant submitted that the Plaintiff had completely failed to prove or otherwise show that the goodwill and reputation of the "HARRIS" trade mark, were at stake, more so when there was evidence on record that the Plaintiff company had sold its Kenyan concern in Kenya and left the manufacture of the brushes in Kenya to the Defendant company. Further, counsel submitted that the Plaintiff had admitted through P.W.1 that the Plaintiff had come into the Kenya market only some 18 months before P.W.1 testified and that it was the Defendant which had manufactured the paint brushes for at least 10 years and that it was the Defendant company that had built the name that was now well known within the Kenyan market. In this regard counsel for the Defendant relied on the BROOKE BOND case (above) in which it was held inter alia :-

(i) *There can be no property in general words descriptive of the goods*

(ii) *.....*

(iii) *The test of comparisons of marks side by side is not sound since a purchaser will seldom have the two works before him and since marks with many differences may yet have an element of similarity which may cause deception* ***(Thomas Bear & Sons (India) Ltd vs. Prayag Norain Jegennath (1941) 58 R.P.C. 25)***

(iv) *.....*

(v) *.....*

(vi) *the general impression of the average customer is the test of passing off ..."*

31. For the reasons above given, counsel for the Defendant urged the court to dismiss the Plaintiff's suit on grounds that –

(1) *The Plaintiff has no property in the name of the Defendant which has been legally acquired*

(2) *The Plaintiff has no property in the name "**Harris**" the trademark having expired in 2002.*

(3) *Notwithstanding (2) above, the Plaintiff has not shown or proved that the Defendant was "passing off" the goods of the Defendant*

(4) *No breach of a licence agreement has been proved, in fact no licence agreement was produced to show that the Defendant breached the same.*

(5) *No evidence of loss and damages has been proved.*

32. The court has now considered the evidence and the law. The questions that are for determination by the court, as agreed upon by the parties are (a) did the defendant infringe the Plaintiff's trademark and (b) who should bear the costs of this suit. The court has observed the brushes produced as PExhibits 7, 8 and 9 and is alive to one of the holdings in the ***Brook Bond Case*** that "*The test of comparison of marks side by side is not sound since a purchaser will seldom have the two marks before him and since marks with many differences may yet have an element of similarity which may cause deception*

33. After considering all the above, the following are the findings. The first principle to be applied in this case is that the Plaintiff must establish a goodwill or reputation that attached to the goods and services with an identifying mark. The evidence on record confirms that the Plaintiff's trade mark "Harris" was registered as long ago as 1970 and that it was to be used by the Defendant herein under the user agreement which was cancelled when the Defendant failed to pay royalties to the Plaintiff. Although the Defendant stated that the Plaintiff sold its concern in Kenya and left the manufacture of the brushes to the Defendant, the Defendant admitted that it continued to manufacture the same brushes that used to be manufactured by the Plaintiff at the time when the Plaintiff sold the Defendant company in 1996. The Plaintiff has adduced evidence to show that after the user agreement was cancelled, the Defendant had no right to continue manufacturing the brushes bearing the Plaintiff's trademark "Harris". The

Plaintiff took the trouble when the relationship between it and the Defendant went sour to publish the cancellation of the registered user agreement in the Kenya Gazette of 20/12/1998.

34. Apart from the above, there was ample evidence from both PW1 and DW1 that the two sets of brushes seemed quite alike. These two witnesses were not ordinary people in the market place, and if they could be so deceived then, the ordinary person in the market place could be even more deceived by the Defendant's brushes which could pass for the brushes of the Plaintiff. There is therefore no doubt that the Plaintiff has suffered and is likely to continue to suffer damage by reason of the erroneous belief engendered by the Defendant's misrepresentation that the paint brushes manufactured by the Defendant have the same source as those brushes that are manufactured by the Plaintiff. In summary, the Plaintiff herein succeeds in both the infringement and passing off action. Accordingly, I enter judgment for the Plaintiff as against the Defendant in the following terms:

(a) an injunction be and is hereby issued to restrain the Defendant whether by itself, its directors, officers, servants or agents or any of them or otherwise howsoever from doing the following acts or any of them that is to say manufacturing, selling, supplying, or distributing any product which bears the HARRIS trade name or which is confusingly similar to the products manufactured, sold or distributed by the Plaintiffs under the trademark "HARRIS".

(b) There shall be destruction upon oath of:

(i) All paint brushes, decorators, tools and or household brushes bearing the "HARRIS" trademark or any other representation the breach of which would be a breach of the injunction granted at (a) above and verification upon oath that the Defendant no longer has in its possession, custody or control articles so marked or the means of making the said articles.

(c) an enquiry as to damages or at the Plaintiff's option an account of profits and payment of all sums found due upon taking such enquiry or account.

(d) the Defendant herein shall change its name within six (6) months from the date of this judgment so as to remove the name L.G. Harris therefrom on the grounds of its being undesirable and incompatible with public interest as it is the Plaintiff's name and is in effect an infringement of the Plaintiff's trademark.

(e) Costs of the suit shall be paid to the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of February, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Miss Mikangi (present) For the Plaintiff

M/s B.M. Quadros (absent but duly notified) for the Defendant

Weche – court clerk