



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 304 of 2007

BULAIM MWANGA KIBIRIGE (NAIROBI) LTD.PLAINTIFF

VERSUS

**BULAIM MWANGA KIBIRIGE (KENYA) LTD. ... 1ST DEFENDANT
FRANCIS NDICHU THAIYA 2ND DEFENDANT
JAMES NG'ANG'A NJUGUNA 3RD DEFENDANT
THE ATTORNEY GENERAL 4TH DEFENDANT**

JUDGMENT

By a plaint dated and filed in Court on 18th June, 2007, the Plaintiff prays for judgment against the Defendants, jointly and severally, for –

- (a) An order compelling the 1st and 2nd Defendants to file a Notice of Change of Name of Company within 14 days and in default thereof, the Registrar of Companies do de-register the 1st Defendant and expunge the name from the Register of Companies.**
- (b) A permanent injunction restraining the 2nd and 3rd Defendants from carrying out business in the 1st Defendant's name or holding itself out as being part of the BMK Group of Companies.**
- (c) A permanent injunction restraining the Registrar of Companies from de-registering the Plaintiff Company and/or in any way interfering with the registration and operations of the Plaintiff Company.**

The Plaintiff's case is that the 2nd and 3rd Defendants, who are Directors of the 1st Defendant Company, entered into an agreement with the Directors of the Plaintiff Company, which is a sister Company of the 1st Defendant, whereby the Directors of the Plaintiff Company, who are relatives (hereinafter referred to as "the Kibiriges"), sold their shares in the 1st Defendant to the 2nd and 3rd Defendants. It was a term of the said agreement that from the date thereof, the Kibiriges' ceased to be Directors or shareholders of the 1st Defendant and the Registrar of Companies was to be notified accordingly. The 1st Defendant was henceforth to continue to operate under the name of BULAIM MWANGA KIBIRIGE (KENYA) LTD. for a period not exceeding one year after which its Directors would file a Notice of Change of Names. The Plaintiff contends that in breach of that agreement, the 1st, 2nd and 3rd Defendants have failed to file a Notice of Change of Names which has led to the 4th Defendant threatening to cancel the Plaintiff's name on account of the similarity of its name with that of the 1st Defendant. This is what led to the prayers sought by the Plaintiffs as outlined in the plaint.

When this case came for hearing, neither the Defendants nor their Advocates attended Court. Being satisfied by affidavits of service on record that all of them were duly served in sufficient time to facilitate their attendance in Court, the Court elected to continue with

the hearing *ex parte*. The Plaintiff Company's only witness was Ali Kibirige, a Director of the Company, hereinafter referred to as PW1. His testimony was that the 1st Defendant, BULAIM MWANGA KIBIRIGE (KENYA) LTD. (hereinafter referred to as "BMK" (Kenya) Limited, was incorporated on 20th November, 1992. He became a Director of said Company together with the 2nd and 3rd Defendants. The other Directors were Bulaim Mwangi Kibirige and Janet Kibirige.

According to the evidence of PW1, in 1998 he instructed his Advocates at the time to conduct a search on the name "BMK (N) Ltd." (hereinafter referred to as "the Plaintiff Company") and a reservation of that name was done. He produced copies of a letter addressed to the Registrar of Companies and dated 19th May, 1998 and a receipt of the same date in acknowledgement of the search fees of Kshs.50/= which were marked as exhibits 1 and 2, respectively. The name was subsequently approved and the Plaintiff Company duly incorporated. A certificate of incorporation dated 24th June, 1998, was issued and a copy thereof was produced in Court as exhibit 3.

It was his further evidence that on 18th July, 2002, Bulaim Mwangi Kibirige, Janet Kibirige and PW1 entered into an agreement with the 2nd and 3rd Defendants for the sale to the 2nd and 3rd Defendants of the Kibiriges' shares in the 1st Defendant Company for a total consideration of US \$39,000. The terms of that agreement, a copy of which was produced as exhibit 4, were –

1. ***THAT Thaiya do and has hereby purchased a total of twenty five (25) shares from the Kibiriges at a total cost of twenty thousand dollars (US\$ 20,000) receipt of which the Kibiriges hereby acknowledge.***
2. ***THAT Njuguna do and has hereby purchased a total of twenty four (24) shares from the Kibiriges at a total cost of nineteen thousand two hundred dollars (US\$ 19,200) which the Kibiriges hereby acknowledge.***
3. ***THAT the parties in this agreement will sign the necessary papers for filing with the Registrar of Companies.***
4. ***THAT from the date of this Agreement the Kibiriges cease to be Directors or shareholders of the company and the Registrar of Companies will be notified accordingly.***
5. ***THAT from the date of this Agreement the Kibiriges cease to assume any responsibility or liability of the Company which might have been incurred in the past, presently or in future.***
6. ***THAT Njuguna and Thaiya own the Company's equity on equal terms from the date of this agreement and they shall pay the charges relating to registration of all the relevant documents.***
7. ***THAT the company will continue to operate under its present name for a period not exceeding one year after which the Directors will file a Notice of Change of Names.***
8. ***THAT in this agreement any reference to "dollars" refers to US Dollars and "Shilling" refers to Kenya Shillings unless otherwise stated.***

The agreement was duly signed by all the parties, registered and duly stamped in compliance with **Section 19 of the Stamp Duty Act**. A copy thereof was produced as exhibit No.4. On or about 16th December, 2004, the Plaintiff Company issued a public notice in the Daily Nation Newspaper advising the general public that the 1st Defendant was not part of the BMK group of companies, which consisted of BMK (Uganda) Ltd.; BMK (Nairobi) Ltd., who are the Plaintiffs herein; BMK (Tanzania) Ltd.; BMK (DRC) Ltd.; BMK (Rwanda) Ltd.; and BMK (Zambia) Ltd. The witness produced a copy the notice as exhibit 5.

From the date of the agreement, the 2nd and 3rd Defendants continued to trade in the name of 1st Defendant but did not effect the Change of Name within one year pursuant to Clause 7 of the Agreement between the parties. This change was necessary since a similarity in the names of the Plaintiff and the 1st Defendant Companies was such that if both continued to carry on business, there was every likelihood of members of the public, and other 3rd parties, being deceived into thinking that the two companies were still sister companies. As an instance of such confusion, PW1 told the Court that on several occasions, the Plaintiff had received demands for payment from 3rd parties which demands should have been channeled to the 1st Defendant. To make it even worse, the Registrar of Companies issued to the Plaintiff Company a notice dated 19th June, 2006, requesting it to change its name within six weeks from that date, failing which the Registrar would have reason to believe that the Plaintiff was no longer in operation, and would proceed to invoke the provisions of **Section 339 of the Companies Act**, which would be prejudicial to the Plaintiff Company. The witness produced a copy of the said letter as exhibit 6.

The witness further told the Court that he went to the Registrar of Companies to see if the issue could be sorted out. When he received no response, the Plaintiff Company's Advocates wrote to the 2nd and 3rd Defendants informing them of the Plaintiff's predicament, and the witness produced a copy of the demand letter dated 3rd July, 2006, as exhibit 7. They also issued the mandatory notice to the Attorney General pursuant to **Section 13 A of the Government Proceedings Act (Cap.40 Laws of Kenya)** dated 5th July, 2006, a copy of which the witness produced as exhibit 8. Finally, the witness also produced as exhibit 9 a copy of a letter dated 11th July, 2006 addressed by

the Attorney General to the Registrar of Companies seeking further details of the case and said that he was not aware whether any action was taken on that notice.

As the Plaintiff was at the risk of having its name struck out from the Companies Register, PW1 also went to the Kenya Industrial Property Institute and patented the initials “BMK”. Thereafter, he filed an application seeking temporary orders restraining the 1st, 2nd and 3rd Defendants from using the initials “BMK” and the orders were duly granted by the Court. The 4th Defendant was also restrained by those orders from de-registering the Plaintiff Company or interfering in any way with the operations of the Plaintiff. Both orders were issued on 18th December, 2007, and were to remain in force pending the hearing and determination of this case. The witness finally told the Court that in spite of being served with the said order, the 1st, 2nd and 3rd Defendants did not cease using the initials “BMK”. Although the Plaintiffs’ name still remains on the Companies Register, the Plaintiffs are nevertheless, still under apprehension that the Registrar of Companies might possibly invoke the provisions of **Section 339 of the Companies Act** to de-register the Plaintiff Company. In the event of such an eventuality, the Plaintiff Company, which is part the “BMK” group of companies, would suffer heavy loses as it has taken quiet a while to build a goodwill which is now enjoyed by the “BMK” group of companies in Eastern and parts of Central Africa.

As the other parties did not participate in the hearing of this case, the above evidence of the only witness for the Plaintiff was not subjected to cross-examination. It was therefore uncontroverted. From this evidence, it appears to me that that genesis of the “BMK” network is the Kibirige family. They participated in the establishment of the 1st Defendant in which the Directors/shareholders were the 2nd and 3rd Defendants, Bulaim and Janet Kibirige, and Ali Kibirige (PW1) joined them later. It is visible to the naked eye that only the 2nd and 3rd Defendants were strangers” as the others were members of the Kibirige family. When the Plaintiff was subsequently incorporated in 1998 as a sister company to the 1st Defendant, its sole Directors were Bulaim Kibirige, Ali Kibirige and Janet Kibirige. After these three sold all their shares in the 1st Defendant to the 2nd and 3rd Defendants to devote their attention to the Plaintiff Company, it is clear, yet again, that they were bent on establishing a business which was exclusively a member of the “BMK” family of companies. It was for this reason that Clause 7 of the Agreement between the parties provided for the 2nd and 3rd Defendants to change the 1st Defendant’s name within a period not exceeding one year in order to avoid unnecessary confusion between the Plaintiff and the 1st Defendant, as the latter was not a member of the “BMK” group of companies. Any such confusion would obviously be detrimental to the Plaintiff whose Directors had already discarded their shares in the 1st Defendant in order to devote their time and energies exclusively to a family undertaking. By this agreement, it was incumbent upon the 2nd and 3rd Defendants to implement Clause 7 in order to protect the Plaintiff. By failing to do so, not only are they in breach of contract, but they have also poised themselves as competitors with the Plaintiff on account of the similarity in the names of the companies which was to me, the reason for Clause 7.

The only semblance of a defence offered by the 2nd and 3rd Defendants is that the 1st Defendant was not a party to the agreement to change the name. This is a very naïve defence. “Companies”, those artificial entities, do not and cannot give themselves names. This is done initially by the promoters and subsequently by the shareholders. After incorporation, a company operates through the medium of its directors, and whatever agreements the latter enter into are binding on the company.

This is a Court of Equity, and a Court of Equity will not sit back and watch a person who has freely and voluntarily entered into a legally binding contract turn around, deliberately breach that contract, and get rewarded for doing so. To deny the Plaintiff the orders sought in this case would amount to giving an *impri matur* to the breach of that contract. As the eye of equity frowns upon those that would want to steal a march on others, I find it fair and proper that the competition posed by the Defendants by continuing to use the name of “BMK (K) Ltd.” is in breach of the contract and should not be sanctioned.

Furthermore, if the Registrar goes on to strike out the Plaintiff’s name from the Register, that would amount to rewarding the wrongdoers against their victims, which reward the eye of equity will not countenance. The general perception of the average consumer will easily lead one into thinking that the 1st Defendant is a member of the “BMK” group of companies, which it is not, and the 1st Defendant will easily continue to capitalize unfairly on the goodwill built by “BMK” in the region over the years. Their influence spreads not only in Kenya, but also throughout the other East African countries and part of Central Africa.

For the above reasons, I am satisfied that the Plaintiff has proved its case a balance of probabilities and that it is entitled to the orders sought. I accordingly make the following orders –

- (a) The 2nd and 3rd Defendants be and are hereby ordered to file a Notice of Change of Name of the 1st Defendant within 14 days. In default, the Registrar of Companies to de-register the 1st Defendant and expunge its name from the Register of Companies.**
- (b) A permanent injunction be and is hereby granted restraining the 2nd and 3rd Defendants forthwith from**

carrying on business in the 1st Defendant's name or holding itself out as being part of "BMK" group of companies.

- (c) A permanent injunction be and is hereby granted restraining the Registrar of Companies from de-registering the Plaintiff Company or in any way interfering with the registration of the Plaintiff Company.*
- (d) The 1st, 2nd and 3rd Defendants to pay the costs of this suit.*

It is so ordered.

Dated and delivered at Nairobi this 13th day of May, 2010.

L. NJAGI
JUDGE