



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

Civil Case 336 of 2008

RUTH WAITHIRA NGECHU

**JACKSON NGECHU KIMOTHO *t/a* ASILI HERBAL
CURES.....APPLICANTS**

VERSUS

JOHN MUCHIRI GITONGA

MERCY WANJIKU MUCHIRI *t/a* ASALI HERBAL CURES....1ST DEFENDANTS

ASILIA INTERNATIONAL HERBAL CURES CLINIC.....2ND DEFENDANTS

R U L I N G

Application dated 20/6/08 brought under **Section 3A, 63 (e) Cap. 21** Laws of Kenya and **Order 39 Rule 2 and 2A (1) Civil Procedure Code** seeking orders restraining (1) John Muchiri Gitonga, (2) Mercy Wanjiku Muchiri trading as “*Asali Herbal Cures*” and Peter Kamau trading as “*Asilia International Herbal Cures Clinic*”. John Muchiri Gitonga and Peter Kamau were employees of the plaintiff before leaving their employment and setting up on their own in the said business names.

The application is supported by the affidavit of Jackson Ngechu Kimotho. Certificate of the registration of the business name “*Asili Herbal Cures*” is exhibited as “JKN 1”. The applicants complain that the defendants have established similar business under the names “*Asali Herbal Cures*” and “*Asilia International Herbal Cures*” which business names are similar phonetically and visually to the established and registered name of the applicants as to greatly and potentially cause confusion and deceive the members of the public making them believe that the respective trades and business are either subsidiaries or licensees of the applicants and therefore mistake the business of respondents for that of the applicants.

The passing of by respondents has caused immense damage to the applicants. The applicants are ready to provide necessary undertaking. Indeed the applicants have filed an undertaking to pay damages if ordered. The 2nd defendant has filed grounds of opposition and replying affidavit. He states that the word “*Asilia*” is derived from Kiswahili word meaning the beginning and that the other names used are generic names. He denies the intentional misrepresentation or deceit and has not gone to injure the good will of the plaintiff.

He will suffer irreparable loss if injunction is issued as he has invested much money in advertising the business. The first defendant has filed a replying affidavit whereby he swears that he has never been employed by the plaintiff but that the plaintiffs are his relatives. He denies having passed off his trade or

business as those of plaintiffs. The first defendant would suffer irreparable damage and loss if injunction was granted. It is to be observed that there is no evidence that any of the parties has registered a trade mark to protect their trade marks. Their names are registered under **Business Names Act**.

In their plaint, the plaintiff prays for permanent injunction to restrain the defendants from using their respective business names or advertising, publishing, promoting herbal medical services and other consequential orders. All parties supply herbal medicines and offer services as practitioners of traditional. The plaintiffs bases claims on the tort of passing off. The essentials of a passing off action were laid down Lord Diplock in the case of **Spalding & Bros vs. W. Ganage Ltd. 18 (1915) 84 LJ Ch. 449** this:-

- *Made by a trader in the course of trade*
- *To prospective customers of his or ultimate customers of goods or services supplied by him*
- *Which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence)*
- *Which causes actual damage to a business or goodwill of the trader by whom the action is brought.*

In this case, the applicant states that his patients in Nairobi and other places in Kenya the public recognizes name "**Asili Herbal Cures**" with the goods and services supplied by the applicants. The applicant has built immense goodwill from the general public. The two defendants may have been employees of the plaintiffs but it was held in **Giella vs. Cassman Brown & Co. Ltd.** that an employer is not entitled to protection against competition and it must be established that any agreement in restraint of trade is valid cures as exclusively theirs. The applicant applies that the defendants be restrained from using their business names.

If orders were made the case would come an end without evidence being taken although the defendants have filed defence. Furthermore, the names have been approved for use by the Registrar of business names.

In view of the services rendered by all defendants of providing herbal medicine to the sick, it appears to me that it would be against public policy to grant an injunction to the plaintiff at this interlocutory stage. For the above reasons, I dismiss this application with costs in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 21st day of October 2009.

JOYCE N. KHAMINWA

JUDGE