



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

**Civil Case 304 of 2007**

**BULAM MWANGA KIBIRIGE (NAIROBI) LTD.....PLAINTIFF**

**VERSUS**

**BULAIM MWANGI KIBIRIGE (KENYA) LTD.....1<sup>ST</sup>**  
**DEFENDANT**

**FRANCIS NDICHU THAIYA.....2<sup>ND</sup>**  
**DEFENDANT**

**JAMES NG'ANG'A NJUGUNA.....3<sup>RD</sup>**  
**DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup>**  
**DEFENDANT**

**RULING**

The application is a chamber summons dated 18<sup>th</sup> June, 2007 brought by the Plaintiff in this suit against the four Defendants. The application is expressed to be brought under Order XXXIX rule 1,2,3 and 9 of Civil Procedure Rules and Section 3 and Section 3A of Civil Procedure Act. Prayer 1 and 2 is moot. In prayers 3 and 4 as follows:

**3. THAT this honourable court be pleased to grant the Plaintiff/Applicant herein a temporary injunction restraining the 4<sup>th</sup> Defendant, his servants and/or agents from de-registering the Plaintiff/Applicant company and/or interfering in any manner with the operations of the Plaintiff/Applicant company pending the determination of this suit.**

**4. THAT this honourable court be pleased to grant the Plaintiff/Applicant herein a temporary injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents from using the initials "BMK" and/or interfering in any manner whatsoever with the operations of the Plaintiff/Applicant company pending the hearing and determination of this suit.**

The application is based on the following grounds:

**1) THAT the Plaintiff/Applicant company has been in operation since 1998 and operates as the BMK group of Companies in several countries in East and Central Africa.**

- 2) **THAT pursuant to an agreement between the Directors of the Plaintiff/Applicant Company and 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents and consideration having been paid, it was agreed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents would cease operating as the 1<sup>st</sup> Defendant's name on or about 18<sup>th</sup> July, 2002 but that they have to date declined to comply with the said terms of the agreement.**
- 3) **THAT 1<sup>st</sup> Defendant/Respondent issued the Plaintiff/Applicant Company with a notice to change it's name despite the approval having been given by the 1<sup>st</sup> Defendant/Respondent and has now threatened to de-register the Plaintiff/Applicant Company to the detriment of the Plaintiff/Applicant Company and all the subsidiary Companies operating in East and Central Africa under the BMK group of Companies.**
- 4) **That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents have been holding themselves out as being part of the said group which is dishonest and untruthful and riding on the goodwill of the BMK group of Companies.**
- 5) **THAT the de-registration of the Plaintiff/Applicant Company will cause the Plaintiff/Applicant Company and all its subsidiaries irreparable and substantial loss and that cannot be compensated by way of damages.**
- 6) **THAT the Plaintiff/Applicant Company is apprehensive that unless restrained by this honourable court, the 4<sup>th</sup> Defendant/Respondent intends to deregister the Plaintiff/Applicant Company thus halting their operations in Kenya and in the other countries.**

The application is further supported by the affidavit sworn by **ALI KIBIRIGE**, the Managing Director of the Plaintiff Company. The affidavit annexes the agreement entered into between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant on one hand and Bulaim Mwangi Kibirige, Ali Kibirige and Janet Kibirige on the other hand. It was the agreement of the parties under clause 7 of the agreement that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant would use the name of the 1<sup>st</sup> Defendant for a period not exceeding one year from date of agreement, which was 18<sup>th</sup> July, 2002, after which they were to file a notice of change of names. The Managing Director of the Plaintiff Company depones that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's have willfully failed, ignored and or refused to comply with clause 7 of their agreement. It is deponed further that the 4<sup>th</sup> Defendant served the Plaintiff a notice invoking Section 20 of the Companies Act cap 486 (Laws of Kenya that the Plaintiff Company changes its names.

The application is opposed. The Respondent/1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed grounds of opposition. The issues raised in the grounds of opposition are not grounds but statements of fact in which an attempt to reply to the supporting affidavit is made. An attempt is also made to interpret the agreement between the parties referred to in the supporting affidavit. It is trite that a party seeking to respond to matters of fact should either file a replying affidavit, or give *viva voce* evidence. Since no affidavit was filed in reply to the Plaintiff's application, and since no evidence was given, the averments in the supporting affidavit are uncontroverted and carry the day.

I have considered the submissions by both Counsels and the application before me together with the supporting affidavit and annexures thereto. I do find that the Plaintiff's/Applicants contention that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have failed to comply with clause 7 of their agreement dated 18<sup>th</sup> July, 2002 to change the 1<sup>st</sup> Defendant's name, and that as a consequence the 4<sup>th</sup> Defendant, has invoked Section 20 of Companies Act and has directed the Plaintiff/Applicant to change its name, is uncontroverted.

The Applicant has demonstrated that it has regional representation in various African countries in its name and that it will suffer irreparably if it is forced to change its name. I am satisfied that the Applicant has demonstrated that its business in the region will be affected if it is forced to change its name as threatened in the annexed letter from Registrar of Companies. More importantly, the Applicant's and the

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's had entered into a clear unambiguous contract in which it was agreed the latter would change its name. The Respondents are in breach of the Agreement and further the 4<sup>th</sup> Respondents letter cannot lie in the circumstances. The Applicant has demonstrated that it has a *prima facie* case with probability of success. Even on the principle of irreparable loss, I would still find in favour of the Applicants. The Applicant Company has regional representation and the change of name will affect it and may cause it to close down its business or to incur great losses.

The Plaintiff's application is deserved and is consequently allowed as prayed. Temporary injunction is granted in terms of prayers 3 and 4 of the application dated 18<sup>th</sup> June 2007.

The Applicant will get the costs of the application.

**Dated at Nairobi this 2<sup>nd</sup> day of November, 2007**

**LESIIT, J.**

JUDGE

Read, signed and delivered in the presence of:

Ms. Kimani h/brief M/s Kamau for Applicant

Nasir h/brief Mr. Mbugua for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

**LESIIT, J.**

JUDGE