

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 583 of 2006

MONTANA (K) LIMITEDPLAINTIFF

VERSUS

ANTHONY MAINA KARA1ST DEFENDANT

STEPHEN MBURU KARIUKI2ND DEFENDANT

MOTANA (K) LIMITED3RD DEFENDANT

RULING

The Plaintiff filed the present action seeking amongst other prayers an injunction to restrain the Defendants from infringing the Plaintiff's trade mark No.58820 and/or passing off Motana not of the Plaintiff and as for Montana of the Plaintiff by the use of the mark Motana. The Plaintiff came before court under certificate of urgency exparte by Chamber Summons dated 23rd October, 2006. This ruling relates to that exparte hearing of this matter. The Plaintiff seeks the following prayers:

2. That the plaintiff/applicant be permitted to enter the defendants/respondents premises situated in Industrial Area Masai Road in Nairobi and Maragua at Rurago petrol station and in Muranga and elsewhere within the Republic that the defendants is storing products infringing in the plaintiff's trademark and passing off products as belonging to the plaintiff for purposes of entering and seizing all the labels, logos, bottles and contents which have been designed using the plaintiff's/applicants bottles and labels that are deceptive all purchases and sales records for the past two months and such documents, copies any items of whatever nature which constitute or could constitute evidence necessary to substantiate it cause of action and preserve the same.

3. THAT the defendants/respondents whether acting by themselves, their servants and/or agents or any of them or otherwise howsoever be restrained from infringing the plaintiff/applicants trademark number 58820, name and use of its containers by offering for sale, selling, storing, preparing and/or distributing liquor under its name or labels similar to that of the plaintiff and or passing off their products as belonging to the plaintiff pending the hearing and determination of this application or further orders of this court.

4. THAT the defendants/respondents whether acting by themselves and/or agents or any of them or otherwise howsoever, be restrained infringing the plaintiffs/applicants trademark or using its containers or making liquor under the name of Motana (K) Limited and or passing off their products as belonging to plaintiff.

In support of the application the Plaintiff director in his affidavit stated that the Plaintiff Company was incorporated on 10th May, 2005. The Plaintiff is engaged in the preparation, packaging, selling and distribution of liquor. The plaintiff's director annexed a copy of the liquor licence issued to the Plaintiff and dated 31st January, 2006. Its validity runs up to 31st December, 2006. The Plaintiff sells liquor under registered name Montana which was registered under the Trade Marks Act Registration certificate No.58820. The Plaintiff has the name Montana emblazoned on the bottle. It came to the attention of the Plaintiff that the Defendants jointly have been selling in the market a liquor known as Motana which is

similar to the Plaintiff's trade name. The Plaintiff is of the view that that similarity is deliberate and intended to cause confusion and unfairly take the Plaintiff's market. The Plaintiff annexed to the application an original of the label of Motana to the application. The Plaintiff also annexed its own label to the application. It was further deponed that the 1st and 2nd defendants are selling their aforesaid liquor under the name of Motana (K) Limited which company the Plaintiff has found does not exist under the Registrar of Companies. The Plaintiff deponed that the defendants in selling liquor under duplicated label which resembles the Plaintiff's label, were passing off the said product as belonging to the Plaintiff without the plaintiff's consent and or authority. The Plaintiff's director stated that the defendant do not have a trade licence to prepare the liquor which business they embarked on in the last two months and since licences are usually issued once a year in January. That not having a trade licence and not having the product tested by the Bureau of Standards there was a great risk to the consumer. The Plaintiff director confirmed that he had found out that the Defendants are brewing the said liquor at a godown at Masai road off Mombasa road where they also have a store and further that they have a distribution point in Maragua at Rurago Petrol station and also in Murang'a among other parts of the country. The Plaintiff's director in a further affidavit sworn on 30th of October, 2006 said that he had instructed his salesman by name of Mr. Kimani to purchase a carton of Motana liquor at the defendant's outlet located at Rurago Petrol station in Maragua District. The said purchase took place and the plaintiff annexed a copy of cash sale receipt issued and dated 29th October, 2006 for a quantity of two cartons of Motana liquor at the cost of Kshs.2,400/=. The Plaintiff also annexed to the said affidavit photographs taken where the liquor Motana was being sold and the photograph shows the liquor of the Plaintiff placed next to liquor being sold by the defendant. The Plaintiff concluded by saying that unless the orders are granted exparte in the first instance the Plaintiff will continue to suffer damage and more importantly there was a danger of the Defendant destroying the evidence of passing off. The Plaintiff counsel therefore stated that what the Plaintiff was seeking from this court at this exparte state is an ANTON PILLER Order.

As seen from evidence summarized hereinbefore the Plaintiff has on a prima facie basis shown that the Defendants is involved in the distribution of liquor which has labels resembling the labels of the plaintiff and indeed as seen in the photographs the bottle used by the Defendant is identical to the bottle used by the Plaintiff. The order which the Plaintiff seeks at this exparte stage is based on an inherent jurisdiction which order gives permission to the plaintiff to enter the premises under the control of the Defendants for the purpose of inspecting documents or articles and taking custody of documents or other articles pending the hearing of the matter. For such an order to be granted there are three pre conditions. Firstly it is imperative that the applicant shows an extremely strong prima facie case. Secondly, the damages or the potential damages likely to be suffered by the plaintiff must be very serious. Thirdly there must be clear evidence the Defendants have in their possession incriminating documents and that there must be a possibility that they may destroy that material before the application is heard interpartes.

I find that the Plaintiff has met the standards necessary for the granting of the orders sought.

The purpose for which an ANTON PILLER order is issued is to ensure that material evidence necessary to prove the Plaintiff's case is preserved. The reason why that order is made exparte is to ensure the Defendant does not destroy the material evidence on being aware of the suit for the order to achieve the purpose for the plaintiff would be targeted to the labels, bottles and other materials including invoices and sale receipts which the Plaintiff will find in the Defendant's premises. This indeed will be material that will assist the Plaintiff to prove to this court that there has been an infringement of its trade mark and passing off. The court does find that the Plaintiff has shown a strong prima facie case for the granting of the order and the court is of the view that the damage that the Plaintiff potentially might suffer is serious and recovery of such damage may be remote because as stated in the Plaintiff's affidavit, the 3rd Defendant Company is not registered under the Companies Act. There is every likelihood that the 3rd Defendant Company does not exist. The court therefore grants the following orders:-

1. That the plaintiff/applicant be permitted to enter the defendants/respondents premises situated in Industrial Area Masai road in Nairobi and Maragua at Rurago petrol station and in Murang'a and elsewhere within the Republic that the defendants is storing products infringing in the plaintiff's trademark and passing off products as belonging to the plaintiff for purposes of entering

and seizing all the labels, logos, bottles and contents which have been designed using the plaintiff's/applicants bottles and labels that are deceptive all purchases and sales records for the past two months and such documents, copies any items of whatever nature which constitute or could constitute evidence necessary to substantiate its cause of action and preserve the same. The police stations close by to the premises where the Plaintiff will effect this order are to render to the Plaintiff all the necessary assistance to ensure that in effecting this order there will be no breach of the peace.

2. The Plaintiff immediately on seizing the items in Order No.1 hereinabove shall file an affidavit within 7 days after such seizing wherein the Plaintiff will give details of all the Defendant's items it has taken into custody and in that affidavit the Plaintiff's director Stephen Ndirangu Waweru shall give an undertaking not to use the items seized other than in the proper conduct of this action.

3. The Director Stephen Ndirangu Waweru shall personally within 3 days from this date hereof give an undertaking as to costs and damages in this matter.

4. The Hearing of the Chamber Summons dated 23rd October, 2006 interpartes shall be fixed at the reading of this ruling.

MARY KASANGO

JUDGE

Dated and delivered this 1st day of November, 2006.

MARY KASANGO

JUDGE