



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 2760 OF 1997**

**RICHARD KAMUTU KARIUKI.....PLAINTIFF**

**VERSUS**

**METRO CASH & CARRY K (LTD).....DEFENDANT**

**JUDGMENT**

By his Complaint dated the 3rd November 1997, the Plaintiff prays for a permanent injunction restraining the Defendant whether by its Directors, Officers, Servants or otherwise howsoever from using or continuing to use the name Metro Cash and Carry (Kenya) Limited and damages for infringement of the Plaintiff's name and other losses occasioned and costs of this suit. The Defendant's position is that they are the lawful owners of the company known as Metro Cash and Carry (Kenya) Limited and are fully entitled to carry on business under that name and they owe no liability whatsoever to the Plaintiff. The gravamen of the Plaintiff's case is contained in paragraph 5 of its complaint where he avers that by using and applying the name Metro Cash and Carry (Kenya) limited, which is identical to the Plaintiff's business name, in all respects, the Defendant has infringed upon the Plaintiff's name and constitutes a source of confusion to his customers and loss of business to him. Particulars of this allegation are therein contained in the Complaint. I will deal in due course with whether or not this constitutes a cause of action known to the law or not later in the Judgment.

I will now turn to the facts which appear from the exhibits contained in the agreed bundle. The Plaintiff claims that he reserved the name 'Metro Cash & Carry' by a letter in his own hand addressed to the Registrar of companies on which a date 21st of February 1996 appears there is a tick against the name Metro Cash & Carry which the Plaintiff alleges was the Registrar's approval of that name. Thereafter the Plaintiff made application by way of a statement of particulars for the registration of the business name Metro Cash and Carry under the provisions of the Registration of Business Name Act from which it appears that the sum of Kshs.120 was paid for a registration fee on the 21st March 1996. Exhibit 2 in the bundle is the Certificate of Registration of the business name in favour of the Plaintiff dated the 20th March, 1996. It seems therefore that the Statement of Particulars was paid for after the Certificate of Registration was issued.

On the 22nd February 1996 the Defendant applied for the registration of various names amongst which was Metro Cash & Carry (Kenya) Ltd. (Exhibit 4 in the bundle) from which it appears that the name was reserved on the 29th February 1996 and the appropriate fee was paid as appears from the copy of the receipt attached.

Subsequently Messrs. Kaplan & Stratton who were instructed by the Defendants to form a company in the name of Metro Cash & Carry (Kenya ) Ltd. wrote on the 7th March, 1996 to know if the name was

available for registration and asking for it to be reserved.

Again on the 18th April, Kaplan & Stratton wrote asking if the name Metro Cash & Carry (Kenya) Ltd. was available for registration and if so asking the Registrar to reserve it. Mr. Zulfikar Hassanali Alibhai who was an Advocate working with Messrs. Kaplan & Stratton gave evidence and stated that he had been informed by the Registrar when the application of the 7th March 1996 was made that the name Metro Cash & Carry (Kenya) Ltd. was not available. He was not surprised as he knew his clients had already reserved the name and that such reservation would be effective for a period of 30 days from the 29th February, 1996. Subsequently when he wrote the letter of the 18th April, 1996, he was informed that the name was not available as there was a business name Metro Cash & Carry which had been registered on the 20th March, 1996. This surprised him, as the reservation by his client of the Defendant's name was effective upto and until the 29th March 1996 some nine days after the certificate in the name of Metro Cash & Carry had been issued. As a result he wrote to the Registrar of Companies on the 7th May expressing surprise that the name Metro Cash & Carry had been taken by the Plaintiff and stating that the issue of the Certificate appeared to be irregular. He asked the Registrar to look into the matter as a result of which the Registrar wrote to Messrs. Kaplan & Stratton on the 14th of May stating that the registration of the business name was irregular and that the proprietor would be asked to change his name to another business name which was registered by mistake.

As a result, Messrs. Kaplan & Stratton on behalf of the Defendants lodged for registration a company in the name of Metro Cash & Carry (Kenya) Limited which was duly registered and a Certificate of Registration issued on the 27th May 1996 which is No. 43 in the bundle. Thereafter the Plaintiff's Advocate wrote to the Registrar of Business Names on the 22nd August 1997 claiming that the name given to the Defendant was done so erroneously and asking that the necessary action be taken to deregister the name.

On the 12th September 1997, the Plaintiff's Advocates again wrote to Metro Cash & Carry (Kenya) Limited stating their client was the registered owner of Metro Cash & Carry threatening proceedings without saying on what grounds but stating that the use of misleading names will not only prejudice their clients interests but also the Defendant's prospective customers and the general public.

In his evidence the Plaintiff stated that the registration of the Defendant's name by the Registrar was done as he was corrupt and is the highest corrupt person. he also claimed that the Registrar in his actions was discriminatory, unfair and fraudulent. Apart from this allegation which was not substantiated in any way, the Plaintiff thereafter set up a supermarket at Umoja Estate. He did not use the name Metro Cash & Carry and as he said he got a letter from the lawyers and ended up closing the supermarket down. He also alleged that he had suffered substantial embarrassment as his customers informed him that there was another supermarket run by the Defendant with the name Metro Cash & Carry (Kenya) Limited. The Defendant produced no evidence of any loss suffered by him as a result of his opening and closing of the supermarket at Umoja Estate. During cross-examination, the Defendant admitted that he had been to South Africa and had seen a chain of stores in South Africa which had the name Metro Cash & Carry which is part of the chain of stores to which the Defendant is affiliated.

In my view the Plaintiff's complaint if any must lie against the Registrar of Companies for issuing two certificates one under the Business Names Registration Act and one under the Companies Act with similar names. If the Plaintiff felt that the Registrar was wrong, as he undoubtedly does, then he should have brought an action against the Registrar to cancel the name Metro Cash & Carry (Kenya) Limited which is owned by the Defendant.

I can find no annexures between the fact that the Plaintiff opened and closed his supermarket to the fact that the Defendants were carrying on business under the name Metro Cash & Carry (Kenya) Limited whilst he had the name Metro Cash & Carry. It is not for this Court to speculate as why two certificates were issued in similar names but it is not uncommon for individuals who have come across the name of a famous business name to seek to register it with a view to getting some profit from it when the owner of the name in some other country comes to carry on business in Kenya.

I have no doubt that the Plaintiff in this case thought up the name Metro Cash & Carry after seeing the chain of stores in South Africa which bears that name.

It is also strange that the Plaintiff although he had a certificate in the name Metro Cash & Carry when opening the Supermarket in Umoja called it 'Mohimwa' as appears from Exhibits 68,69 and 70 in the bundle. I am of the view that the Plaintiff has brought this action to attempt to obtain moneys from the Defendant by claiming he has the right to the name Metro Cash & Carry.

As far as the law is concerned, the Court will restrain someone from using a trade name which is deceptively like that used by another person with a view to obtaining the goodwill of the rightful owner of the trade name.

In this case firstly, the Defendant has a perfect right to use the name it has, as it was registered in a lawful manner. The Registrar says the name Metro Cash & Carry which is held by the Plaintiff was issued by mistake. Until such time as the Plaintiff challenged that registration in favour of the Defendant in the courts by an action against the Registrar of Companies, I cannot see that the Plaintiff has any other remedy. He has wholly failed to prove that he has any goodwill attached to the name Metro Cash & Carry and that the same has been infringed by the setting up by the Defendant of its supermarket under its registered name.

In my view the Plaintiff does not disclose a cause of action as the only allegation is that the Defendant by using its name constituted a source of confusion to the customers and loss of business to the Plaintiff. There are no particulars of the confusion or loss save for the averment in paragraph 6 of the Plaintiff which states that the Plaintiff was caused loss of business and profits as its customers sought the services from the Defendant taking it to be that of the Plaintiff.

There is no evidence of the substantial loss and damage which he claims nor were any customers called to say that they had diverted their custom from the Plaintiff's business to the Defendant and in fact no evidence was produced by the Plaintiff to show that he had a business called Metro Cash & Carry which was affected by the Defendant's business.

In the circumstances, I find that the Plaintiff has not proved his claim and shown that he has a right to a permanent injunction as asked for. I dismiss the Plaintiff's suit with costs.

Dated and delivered at Nairobi this 21st day of March, 2001.

**PHILIP J. RANSLEY**

**COMMISSIONER OF ASSIZE.**