



Jibuco Kenya Limited v Mercy Njoki Nganga t/a Jiburudishe Purified Water & another (Civil Suit E650 of 2021) [2024] KEHC 3620 (KLR) (Commercial and Tax) (15 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E650 OF 2021
JWW MONG'ARE, J
APRIL 15, 2024**

BETWEEN

JIBUCO KENYA LIMITED PLAINTIFF

AND

**MERCY NJOKI NGANGA T/A JIBURUDISHE PURIFIED
WATER 1ST DEFENDANT**

BRAIN MWANGI HENIA T/A BRIHEN INVESTMENTS 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 22/6/2021 the Plaintiff instituted the present suit against the Defendants seeking the following orders:-
 1. A permanent injunction to restrain the 1st and 2nd Defendants whether by themselves, their employees, servants or agents or any of them or otherwise howsoever from infringing the Plaintiff's Trademark JIBU.
 2. A permanent injunction to restrain the 1st and 2nd Defendants whether by themselves, their employees, servants or agents or any of them or otherwise howsoever from using the Trademark JIBU in any context with respect to any water bottle labels, water bottles of any size, purified water or water products generally.
 3. A permanent injunction restraining the 1st and 2nd Defendants whether by themselves, their employees, servants or agents or any of them or otherwise howsoever from using any documents, labels or marketing fliers and brochures which offend the Plaintiff Copyright JIBU in any of its documents, labels or marketing flier and brochures and forms.



4. Destruction upon oath of all documents, labels, water bottles, publicity material, fliers and brochures and any other thing containing or marked with the words JIBU or any colourable imitation thereof.
 5. An enquiry as to damages or at the Plaintiff's option an account of profits and payment of all sums found due upon taking such enquiry or account upon the 1st and 2nd Defendant.
 6. General Damages for Trademark infringement.
 7. Any other relief that the court may deem fit to grant.
 8. Costs of this suit together with interest from the date of filing.
2. It was the Plaintiff's case that it entered into a franchise agreement with the 2nd Defendant whereby the Plaintiff franchised a water purification and bottling machine at Lower Kabete.
 3. The Plaintiff claimed that sometime in 2021, it discovered that the 2nd Defendant's former employee operated another store in Mwimuto whereby they were bottling water using the Plaintiff's JIBU trademark labels and that the Plaintiff's staff who visited the said store found several JIBU Trademark labels in the trash bin within the premises.
 4. It was contended that due to the violations to the franchise agreement, the Plaintiff terminated the agreement vide a letter which was served on the 2nd Defendant on 25/5/2021. That the police from Kingeero Station together with representatives of the Plaintiff visited the Defendant's store in Mwimuto where they found the 2nd Defendant's staff in the process of production and packaging of bottled drinking water in water bottles of various sizes with labels bearing the Plaintiff's registered trademark 'JIBU'.
 5. The Plaintiff contended further that unused water labels and marketing flyers were recovered from the 2nd Defendant's shop in Mwimuto all bearing the Plaintiff's trademark 'JIBU' and that a single business permit bearing the names Jiburudishe Purified Water was erected on the wall of the premises. An official search found that Jiburudishe Purified Water was registered under the 1st Defendant herein who is the 2nd Defendant's wife.
 6. Upon realization that the Defendants had breached his trademark, the Plaintiff filed the current suit.
 7. During the trial the Plaintiff relied on 3 witnesses. PW1 was Maureen Rariewa Karanja, who was the Country Director of the Plaintiff at the material time was the first to testify. She produced her prepared and sworn witness statement dated 22/6/2021 as her evidence in chief.
 8. She testified that on 20/4/2021, she visited the new store in Mwimuto accompanied by her colleagues where she found a man named Allan, a former employee of the 2nd Defendant, and two other workers producing 500ml bottles of water and putting the JIBU trademark labels on them.
 9. PW2 was Esborn Waithuki Kariuki who was the Plaintiff's Production and Quality lead manager. He produced his witness statement dated 22/6/2021 and sought to rely on it as his evidence in chief.
 10. He testified that on Tuesday 15/6/2021, he visited the 2nd Defendant's store in Mwimuto in the presence of three police officers where he found the filling of water into JIBU branded bottles and marketing flyers belonging to JIBU at the said store.
 11. PW2 testified that there was a close resemblance with the interior of the 'Jiburudishe Purified Water' store to that of the 2nd Defendant's franchised Lower Kabete-JIBU store and that the police officers impounded the JIBU branded water bottles that had been filled, the JIBU branded marketing



flyers and a Tuktuk. He testified that the matter was later booked in the Occurrence Book as OB No.51/15/6/2021 at the Kingeero Police Station.

12. PW3 was Boniface Odhiambo of DCI Sub-County Investigation Office Kabete-Kingeero Police Station. He testified that on the evening of 15/6/2021 at around 7 PM, the police station received a complaint from Esborn Kariuki of serious suspicious activities relating to bottling of drinking water in the Plaintiff's branded JIBU bottles at a store in Mwimuto.
13. That he and two other police officers accompanied PW2 to the said store where they found a blue Tuktuk of registration number KTWC445E parked at the entrance of the store that was being loaded with bottled drinking water bearing the brand name JIBU. That upon entry into the store he noticed that there were people filling water into JIBU branded bottles and upon inspection he found marketing flyers bearing the names JIBU.
14. PW3 testified that the police impounded a single business permit no. 2021/5766394 bearing the names Jiburudishe Purified Water found on the wall of the 1st Defendant's business premises.
15. The Plaintiff's witnesses were not cross-examined during trial as the Defendants and/or their counsel were not present.
16. Despite not having been present during the oral hearing of the suit, the 1st Defendant having prepared and filed a statement of defence dated 14/7/2021 and therefore this court is called upon to consider the same. In the said statement of defence, the 1st Defendant denied most of the contents in the plaint and contended that her business in Mwimuto was not in any way connected to the 2nd Defendant who is a stranger to the business entity. Further that she has no interest in the manner in which the Plaintiff operated his business.
17. Similarly, the 2nd Defendant also filed a statement of defence which despite him not attending court to cross examine the plaintiff or its witness, this court is called upon to consider. In the statement of defence, the 2nd Defendant opposed the Plaintiff's claim through his statement of defence dated 15/7/2021.
18. He denied being in any way related and/or connected to the 1st Defendant's business located in Mwimuto and argued that there was another suit pending in court between himself and the Plaintiff being MCCC/E8695/2021 in the Milimani Commercial Courts Nairobi related to the same cause of action. Both Defendants did not call any witnesses to the testify nor produce any documents in support of their respective defence statements.

Analysis and Determination

19. In addition to the oral testimony, the Plaintiff filed written submissions dated 28/11/2023 which I have considered together with all the pleadings filed by the Plaintiff and the Defendants. Upon careful consideration of the same, I note that there are several issues that arise for the court to consider. The first issue that this court needs to consider, to wit; "whether the Plaintiff owned the trademark 'JIBU.'"
20. From the evidence made available by the Plaintiff I note that Plaintiff's exhibit No. 2 is the certificate of registration of the 'JIBU' trademark issued by the Registry of Trade Marks. On the said certificate the proprietor of the trademark is indicated as the Plaintiff and the effective date of registration was 9/10/2015 which registration would valid up to 9/10/2025. It is therefore not in dispute that the Plaintiff is the registered owner of the 'JIBU' trademark. There was no evidence called or made available by the Defendants to disprove or controvert this position.



21. The second issue for determination is whether the 1st and 2nd Defendants infringed upon the Plaintiff's 'JIBU' trademark.
22. From the evidence tendered by the Plaintiff's witnesses it is evident that the Plaintiff being the registered owner of the JIBU trademark entered into several franchise agreements and one such franchise was created by a Franchise Agreement dated 4/5/2020 with the 2nd Defendant. This was evidenced by the Plaintiff's exhibit no. 3 produced by the Plaintiff in its bundle and list of documents. A perusal of the agreement reveals that the Plaintiff as franchisor granted the 2nd Defendant as franchisee permission to own and operate a JIBU Franchise Business in the Lower Kabete area of Nairobi. The 2nd Defendant was required to strictly sell only JIBU approved products in its premises under the terms of the agreement and only at that location.
23. In the said Franchise agreement at Paragraph 8.1 of the Franchise Agreement states the 2nd Defendant acknowledges that the Plaintiff owns the trademarks and that the trademark may only be used as directed by the Plaintiff. Further the 2nd Defendant agreed not to use the trademarks to sell unauthorised products or services as part of their company name or in any other manner not authorised in writing by the Plaintiff.
24. Evidence made available by the Plaintiff's witnesses confirmed that the Defendants colluded and opened a store in the Mwimuto area whereby bottled water of varying sizes labelled with the JIBU trademark was produced. The witnesses testified that JIBU marketing flyers were also found in the Mwimuto store and a tuk tuk ferrying the branded bottles of water was also seen near the store.
25. To prove this, PW2 produced photographs of the water bottles, labels and flyers found in the Mwimuto store. Annexed in the Plaintiff's list and bundle of documents. PW3, a police officer who visited the store, corroborated this by testifying that he impounded the 'JIBU' branded water bottles that had been filled, the 'JIBU' branded labels, marketing flyers and the tuk-tuk in question.
26. Further there is evidence that the Mwimuto store was registered under the single business permit bearing the names Jiburudishe Purified Water which was erected on the wall of the premises. An official search found that Jiburudishe Purified Water was registered under the name 1st Defendant herein. This is evidenced in the business permit and marked as exhibit no. 32 of the Plaintiff's bundle of documents.
27. Section 7 of the Trademarks Act states:-

“Subject to the provisions of this section, and of sections 10 and 11, the registration (whether before or after 1st January, 1957) of a person in Part A of the register as the proprietor of a trade mark if valid gives to that person the exclusive right to the use of the trade mark in relation to those goods or in connection with the provision of any services and without prejudice to the generality of the foregoing that right is infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of permitted use, uses a mark identical with or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade or in connection with the provision of any services in respect of which it is registered, and in such manner as to render the use of the mark likely to—

- (a) be taken either as being used as a trade mark;
- (b) be taken in a case in which the use is upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor



or as licensee to use the trade mark or goods with which such a person is connected in the course of trade;

- (c) be taken in a case where the use is use at or near the place where the services are available for acceptance or performed or in an advertising circular or other advertisement issued to the public or any part thereof, as importing a reference to some person having the right either as proprietor or as licensee to use the trade mark or to services with the provision of which such a person as aforesaid is connected in the course of business;
- (d) cause injury or prejudice to the proprietor or licensee of the trade mark.”

28. Under Section 7(1) of the Trademark Act, registration of a trademark gives exclusive rights to use the said trademark to the proprietor. If a person who is not the proprietor of the trade mark or a registered user thereof uses a mark which is identical to or so similar as to be likely to deceive or cause confusion in the minds of the consumers, that person is said to have infringed the trademark.
29. In the case of Pharmaceutical Company Vs Novelty Manufacturing LTD HCCC NO.746 OF 1998 which was cited with approval in the case of Premier Food Industries Limited v Triclover Industries (K) Limited [2021] eKLR Hon Justice Aaron Ringera (as he then was) held as follows:-
 3. Registration of a trademark confers the right of exclusive use of the mark. Infringement of the trademark is a tort of strict liability. Intention and motive are irrelevant considerations.
 4. Since the right to a trademark is a statutory one, acquiescence cannot constitute an estoppel or any other defence which the statute itself does not recognize.”
30. From the evidence in this case, which is uncontroverted by the Defendants who did produce any evidence to contradict it, it is clear that the Plaintiff’s trademark was utilised to label bottles of water in another business entity that was not authorised by the Plaintiff. This effectively infringed upon the Plaintiff’s trademark who has the exclusive right to use the mark. This was also in violation of the terms of the franchise agreement entered between the Plaintiff and 2nd Defendant.
31. The last question that the court will determine is whether there was collusion between the 1st and 2nd Defendant to infringe upon the Plaintiff’s registered trademark ‘JIBU’.
32. PW2 and PW3 testified that when they visited the 1st Defendant’s store in Mwimuto, the 2nd Defendant’s former employee by the name Allan was in the store. The said Allan previously operated the 2nd Defendant’s Lower Kabete-JIBU Store. This explains why the labels and flyers with the Plaintiff’s logo were found in the 1st Defendant’s Mwimuto store. Further, it was testified that the blue Tuk Tuk which was purchased by the 2nd Defendant through the Plaintiff was parked in front of the 1st Defendant’s store.
33. Further the Plaintiff’s list of documents contains photographs of the 1st and 2nd Defendant which indicate that the two were a couple in a close romantic relationship. Based on the foregoing, I am satisfied that there is sufficient proof of a collusion between the two Defendants in an effort to illegally use the Plaintiff’s trademark in the 1st Defendant’s business entity.
34. The upshot of the foregoing is that I am satisfied that the Plaintiff has, on a balance of probabilities, proved his case. The Court therefore will allow the prayers sought as follows:-



1. That there be a permanent injunction issued to restrain the 1st and 2nd Defendants whether by themselves, their employees, servants or agents or any of them or otherwise howsoever from infringing the Plaintiff's Trademark JIBU.
 2. That there be issued a permanent injunction to restrain the 1st and 2nd Defendants whether by themselves, their employees, servants or agents or any of them or otherwise howsoever from using the Trademark JIBU in any context with respect to any water bottle labels, water bottles of any size, purified water or water products generally.
 3. That there be issued a permanent injunction restraining the 1st and 2nd Defendants whether by themselves, their employees, servants or agents or any of them or otherwise howsoever from using any documents, labels or marketing fliers and brochures which offend the plaintiff Copyright JIBU in any of its documents, labels or marketing flier and brochures and forms.
 4. It is ordered that there be destruction of all documents, labels, water bottles, publicity material, fliers and brochures and any other thing containing or marked with the words JIBU or any colourable imitation thereof.
35. The Plaintiff has also sought damages for infringement of the JIBU trademark. While the evidence called establishes that there was indeed an attempt to use and pass off products from a different location as JIBU branded products, the Plaintiff did not specifically establish the extent to which the activities of the Defendants occasioned it loss and damage. Be that as it may, this court is called upon to exercise its authority and enforce the rights of parties before it bearing in mind the law and *the constitution*. I am satisfied by the evidence produced that the Defendants did indeed use the Plaintiff's trademark of JIBU without its direct authorization at Mwimuto. I award general damages to the Plaintiff for the said infringement for Kshs. 1,000,000/= . I also award the costs of this suit to the Plaintiff against the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF APRIL, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Mutanda for the Plaintiff.

No appearance for the 1st and 2nd Defendants.

Amos - Court Assistant

