**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 133 OF 2019**

**GLOBAL GAMING LIMITED .....FIRST PLAINTIFF/APPLICANT**

**WHITE RHINO VENTURES LIMITED.....SECOND PLAINTIFF/APPLICANT**

**-VERSUS-**

**OXYGEN8 EAST AFRICA LIMITED.....FIRST DEFENDANT/RESPONDENT**

**OXYGEN8 LOTTO LIMITED.....SECOND DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated **4th June 2019** the plaintiff seeks the following prayers:

> (a) **THAT** pending the hearing and determination of this suit a temporary order of injunction be issued restraining the second Defendant (whether acting by its servants or agents or any of them or otherwise howsoever) from trading, advertising, marketing and/or in any way using or dealing in the name **"MY LOTTO KENYA"** or any other name closely resembling or incorporating the first plaintiff's trademark "**KENYA LOTTO NETWORK"**, howsoever arising.
>
> (b) **THAT** pending the hearing and determination of this suit a temporary order of injunction be issued restraining the Second Defendant (whether acting by its servants or agents or any of them or otherwise howsoever) from trading, advertising, marketing and/or in any way using or dealing in the name **"TATUA3 NI RAHISI KAMA 1,2,3"** or any other name closely resembling or incorporating the second plaintiff's trademark **"3TATUA NI RAHISI KAMA 1,2,3"** howsoever arising.

2. The 1st plaintiffs is the registered proprietor of the trademark **"KENYA LOTTO NETWORK"** which is registered under the Trademark No. 87924 is class 9,38,41 and 42 in respect to computer software, telecommunication services, entertainment services and computer services. It is on that basis the plaintiffs seek the prayers in above stated application. Although the deponent of the affidavit in support of the application, George Gerald Mealy, does not state how long the plaintiffs have been in business, he does say that the plaintiffs are in the business of running lotteries through the electronic media. It is deponed that the 2nd defendant has commenced a lottery promotion using the name **"MY LOTTO KENYA"** which in name and design is identical to the 1st plaintiff's registered trademark. The plaintiffs argued that that useage is likely to lead members of the public to believe that the services of the 1st defendants are connected to the plaintiff. Further that the 2nd defendant has commenced lottery promotion using the name **"TATUA3 NIRAHISI KAMA 1,2,3".** That both the design and name of the 1st defendant's promotion is identical to the 2nd plaintiff's registered trademark and is calculated to lead the public that those services are connected.

3. The application is opposed by the defendants through the replying affidavit of Joan Mwaura the chief executive officer of the defendant. She deponed that the 1st defendant has been in the Kenyan gaming industry close to a decade. That the 1st defendant began, in 2014, to offer new product by the name of **"LOTTO".**

4. That the plaintiff was managing the defendant's lotteries products until 2017. That the plaintiff only known gaming product is supa 5 which was launched in 2017.

5. The parties relationship began in 2015 when the 1st defendant approached the 1st plaintiff to advance its lottery business. In that regard the parties entered into a joint venture agreement to conduct business in particular lotto lottery. That while carrying out the 1st defendant's management role the 1st plaintiff registered the defendant's trademark on behalf of the defendant. That however unknown to the defendant the plaintiff surreptitiously registered one of the trademark under its name. That throughout the duration of the management agreement the plaintiff failed to disclose the alleged proprietory right over the trademark which is now the subject of this suit.

6. I have considered the parties affidavit evidence. Section 7 of the Trade Mark Act (the Act) provides that a registered proprietor of a trademark, if valid, gives that person the exclusive right to use the trademark. Section 10 of the Act however saves vested rights, where a party has continuously used the trademark. This is what the defendant is alleging. That is has been in continuous use of the trademark, longer than the period the plaintiff registered the trademark.

7. The 1st defendant has deponed that it has invested some Ksh 3 Billion which the injunction as sought would affect.

8. The principles of granting an injunction are set out in **Giella v Cassman Brown & Co. Ltd (1973)358**. The plaintiff is supposed to satisfy the three principles enunciated in that case. They are that the applicant must show a prima facie case with probability of success, an injunction will not be granted unless the applicant might suffer irreparable injury which would not be adequately be compensated by an award of damages. Lastly the court if it is in doubt it will decide the application on balance of convenience.

9. The plaintiffs have not, in view of the evidence before me shown as prima facie case with probability of success. Since matter is still interlocutory I will avoid considering the merits of the application suffice it to say that I do not find that the first principle of granting injunction is satisfied. Further I find that the loss, if any, the plaintiff will suffer the same can be compensated by an award of damages. Since I entertain no doubt on those two principles I shall not proceed to consider where the balance of convenience lies.

10. Accordingly the application fails but I will order the costs to be in the cause.

11. The Notice of Motion dated **4th June 2019** is dismissed and the costs shall be in the cause.

**DATED** and **SIGNED** at **NAIROBI** this **4TH** day of **OCTOBER,** 2019.

**MARY KASANGO**

**JUDGE**

***Ruling Read*** *in* ***Open Court*** *in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**