



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 849 OF 2010

KENTRO SYSTEMS LIMITED.....PLAINTIFF

VERSUS

SUPERIOR PRINTERS LIMITED.....DEFENDANT

J U D G M E N T

1. The Plaintiff, Kentro Systems Limited, engages in carrying out business of manufacturing and marketing of water purifier known as reverse osmosis/ultra violet/table top water purification system. The Plaintiff developed that new technology in the year 2006. The technology enables essential minerals to be released in RO purified water through total dissolved solids (TDS) control valve. The water purifier was patented by the Plaintiff in India on 23rd August 2007 under Patent No. 199716... the TDS Control valve was also patented in India under Patent No. 199715. The Plaintiff also patented, in India, the unique design of the two water purifiers on 23rd May 2006 and 17th October 2008. The Plaintiff's application for Trademark registration, in India, of "Kent Mineral RO Water Purifiers" is still pending. The Plaintiff did however obtain Trademark registration in India over the mark "KENT MINERAL RO" on 26th April 2017.

2. It is the Plaintiff's case that Superior Printers Limited, the Defendant, entered into an agreement with the Plaintiff whereby the Defendant became the Plaintiff's sole distributor and seller of the water purifiers manufactured by the Plaintiff in Kenya. The Defendant began buying the water purifiers from the Plaintiff in 2006.

3. The Plaintiff pleaded that in the year 2009 the Defendant discontinued buying the purifiers from the Plaintiff. The Plaintiff, by letter dated 8th February 2010 appointed another distributor Agro Irrigation and Pump Services Limited of KENT RO SYSTEM for one year.

4. The Plaintiff pleaded that the Defendant, without its consent or authority, commenced manufacture and sale of similar purifier to the one manufactured by the Plaintiff. Further that the Defendant registered, in Kenya, the trademark Kent Mineral RO Water Purifier. Further that the Defendant began to use the Plaintiff's brand "Ambassador" on boxes, which is identical to the Plaintiff's original product. That the Defendant copied all aspects of the Plaintiff's product and was passing them off as items or products emanating from the Plaintiff. The Plaintiff alleged the Defendant had infringed its trademark "Kent Mineral RO Water Purifier."

5. The Plaintiff seeks the following prayers that:

a) The cancellation of registration of the Trademark to the Defendant.

b) The rectification of the register by registration of the trademarks in favour of the Plaintiff to reflect the rightful proprietor of the trademark.

c) A permanent injunction to restrain the Defendant whether acting by its Directors, officers servants and/or agents from infringing the registered trade mark No. KE/72008/062668.

d) A permanent injunction to restrain the Defendants from passing off water purifiers not of the Plaintiff by use of mark "KENT MINERAL RO WATER PURIFIERS"

e) An order for delivery of or destruction upon oath of all patented or written matter or labels on or for the water purifiers the use which would be a breach of the foregoing injunction.

f) An inquiry as to damage or at the Plaintiff's option on account of all sums found due together with interest thereon."

6. The Defendant by its defence admitted being the sole distributor, in Kenya, of the Plaintiff's water purifier from the year 2006. It however pleaded that it was unaware that its association with the Plaintiff had ceased, as pleaded by the Plaintiff, in the year 2009. It pleaded that it failed to seek more orders, of the purifier, from the Plaintiff because it had in its sufficient quantity in possession the Plaintiff's purifiers. The Defendant denied assembling the Plaintiff's product or infringing the Plaintiff's trademark.

ISSUES

7. There are only two issues to determine. They are:

a. Did the Defendant infringe the Plaintiff's trademark of the water purifier by assembling, manufacturing or selling products that resemble the Plaintiff's water purifier.

b. If the answer to issue (a) above is in the affirmative is the Plaintiff entitled to the prayers in the Plaintiff's Prayer.

ANALYSIS AND DETERMINATION

8. There is a general rule in civil cases which is that a person who alleges a particular fact must prove that fact. That is what is termed as the burden of proof. Section 107 (1) and (2) has this to say on burden of proof.

“(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

9. The facts the Plaintiff had to prove in order to get judgment as sought were: did the Defendant assemble, manufacture and sell products that resembled the Plaintiff's water purifier. Also did the Defendant's trademark infringe the Plaintiff's trademark.

10. The Plaintiff relied on the evidence of two witnesses.

11. The first witness was Vineet Kanwar, the Plaintiff's senior manager. He stated that the Defendant was the sole distributor of the Plaintiff's water purifiers in Kenya from 2006 to 2009. In 2009 the Defendant ceased buying purifiers from the Plaintiff. The Defendant however continued selling those purifiers and even registered a trademark of Kent Mineral RO Water Purifier, in Kenya in November 2007.

12. On being cross examined this witness confirmed that he Defendant was the first distributor, in Kenya, of the purifiers. There was however no written agreement or Memorandum of Understanding between the parties related to that distributionship. On further cross-examination the witness stated:

“They (the Defendant) might have manufactured imported or assembled the products. We have no evidence Defendant produced similar products.”

13. The witness also confirmed that the Defendant's trademark stated the Defendant was the importer and distributor. The witness confirmed that at the time the Defendant registered the trademark there was no other person in Kenya distributing the purifier. He confirmed that the Defendant obtained from the Plaintiff a total of 1,000 purifiers. He also confirmed that there was no specific period within which the Defendant was expected to sell the purifiers. That they could sell the purifiers to anyone within Kenya. He however said that the Plaintiff could not sell its purifier in Kenya because of the subsisting trademark of the Defendant.

14. The witness further stated that the Defendant, through a demand letter, forbade Agro Irrigation, the Plaintiff's distributor, from dealing with the purifier.

15. Finally, the witness stated that there were other companies, in the world who produced similar products to the Plaintiff's purifier.

16. The second witness for the Plaintiff was Mahesh Halai a Senior Manager of Agro Irrigation and Pump Services Limited. That company was appointed, by the Plaintiff, as distributor, in Kenya, of the purifiers in the year 2010. This witness said:

“That I personally saw the Defendant distributing good resembling Kent RO Water Purifiers Systems using the same name and logo as the Plaintiff's products at Westgate Shopping Mall in Nairobi.”

17. The witness further stated that his company placed an advertisement in the newspaper stating that it was the sole distributor in Kenya of the purifier. The Defendant thereafter sent the company a demand to desist from distributing the purifiers because it was infringement of the Defendant's trade mark.

18. The Defendant through the evidence of its director stated that it registered a trademark of importation and distribution, in Kenya, of the purifiers.

19. The Defendant denied assembling or manufacturing the Plaintiff's purifiers. The defendant stated that it ceased ordering more purifiers because it had sufficient quantity in stock and also because it found the Plaintiff's spare parts pricey.

20. There was no evidence presented before Court which showed that the Defendant assembled or manufactured purifiers similar to those of the Plaintiff. The Plaintiff in this regard failed to meet the required standard of proof. In the case **P.L. COLLEGE OF PHYSICIAN AND SURGEONS OF THE PROVINCE OF ALBERTA 1999, ABCA 126**, a Canadian case had this to say on standard of proof.

“Halsbury's Laws of England, vol. 17, 4th ed. (London: Butterworths, 1976) explains (at p. 16, para. 19) that a standard of proof is the second of two elements in a party's legal burden of proof:

“To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a judge or jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof. The standard differs in criminal and civil cases.”

21. The Plaintiff failed to satisfy me that the Defendant assembled, manufactured or sold purifiers that were infringing the Plaintiff's trademark. There simply was no evidence to that fact. Having so failed the Plaintiff's claim for damages and loss also fail.

22. Although the Plaintiff proved that the Defendant had registered a trademark of the Plaintiff's purifier, without their consent, it is important to note that the Defendant was the sole distributor of the purifiers from 2006. Although the Defendant did not order any more purifiers after 2009 there was no evidence that his sole distributorship was terminated. It follows until such termination it continued to subsist and probably continues to date.

23. The Defendant's trademark was registered as sole importer and distributor of the Plaintiff's purifier. It was registered on 1st November 2007 and expired on 1st November 2017. The Defendant was the sole distributor of the purifiers form 2006. There was no evidence of termination of that distributorship. It follows that the trademark to import and distribute the purifier did not infringe the Plaintiff's trademark. After all the trademark was for the purpose for which the Plaintiff appointed the Defendant.

24. Since the Plaintiff failed in the first issue, identified above, the second issue also fails.

25. In the end there being no merit in this case the same is dismissed and the costs of the suit shall follow the event, and are awarded to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 17TH day of OCTOBER, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

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

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

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