

UGANDA / JUDGMENT

Jubilee Industries Ltd v Balle Balle (U) Ltd (H.C.Miscellaneous Application No. 855 of 2020) [2021] UGCommC 93 (12 January 2021)

[2021] UGCommC 93

COURT

Commercial Court of Uganda

BEFORE

Gaswaga, J

CASE / FILE NUMBER

H.C.Miscellaneous Application No. 855 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPLA

[COMMERCIAL DIVISION]

M. A. No. 855 of 2020

(ARISING FROM CIVIL SUIT No. 819 of 2020)

JUBILEE INDUSTRIES LTD :::::::::::::::::::::::::::::::::::APPLICANTS

VERSUS

BALLE BALLE (U) LTD :::::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON, JUSTICE DUNCAN GASWAGA

RULING

- [1] This is a ruling on an application brought under Sections 33,38(1) & 39(2) of the Judicature Act Cap13, Sections 22 & 98 CPA, Section 79 of the Trademarks Act and Order 52 rr 1-3 CPR for orders that the respondent does permit the applicant to enter upon his residence and business premises to wit; stalls, ware houses situate at Block 8, Masaka Road, Natete or such parts thereof as shall be occupied or used by the respondent/agents or distributors for purposes of inspecting all assets, documents, materials or articles relating to infringement of the applicant's trademarks; removing into custody of this honourable court all moulds,documents,materials or articles relating to unauthorized manufacture, compilation,

distribution, and or

sale of the applicant's registered trademark. It is further for orders that a temporary injunction pending disposal of the main suit doth issue restraining the respondent / defendant and his agents/servants from; infringing the applicant's trademark, selling, distributing and offer to sale all products arising out of the infringement of the applicant's registered trademark and disposing of or destroying all materials or articles and or products relating to the infringement of the applicant's trademark and that costs of the application be provided for.

[2] The grounds of this application were stated in the affidavit of Mr. Zaheer Nathani, the Executive Director of the applicant and they are that; the applicant is the registered owner of the trade mark 'FROTO', number 53037 in class 32 in respect of the beverages which was registered some time in 2015; that due to the unique qualities, extensive advertisements and promotions, the said 'FROTO' beverages acquired distinctive reputation overtime which has enabled the plaintiff to distribute them in various parts of Uganda, that the respondent commenced production, manufacture and distribution of beverages by the name 'FROOTI' which is visually and phonetically confusingly similar to the applicant's trademark 'FROTO', that one of the respondent's shareholders Mr. Riaz Mohamed being a former employee of the applicant knew or ought to have known about the plaintiff's enormous market reputation in Uganda hence its decision to produce/manufacture and distribute the beverages with similar or same shape, color and size as that of the plaintiff in order to cause confusion in the market by representing their beverages as those of the plaintiff whereas not, that the respondent's target has at all times been the applicant's customers and distributors, that the applicant has

been compelled to incur unnecessary costs in trying to protect his registered trademark which damages cannot be atoned in monetary terms, that the applicant has instituted Civil Suit 819 of 2020 against the respondent seeking various orders among which is the Anton pillar order which has a strong prima facie case with a likelihood of success, that there is clear evidence that the respondent has in her custody products that infringe on the applicant's trademark and there is a likelihood that the same may be destroyed before an application interparty can be made and that it is in the interest of justice that the application be allowed.

[3] The application raises two issues;

1. Whether this application fulfills the grounds for the grant of an Anton pillar order

2. Whether this application fulfills the grounds for the grant of a temporary injunction

Resolution of Issues

Issue 1.

[4] In **Uganda Performing Right Society Vs. Mega Standard Supermarket M. A No. 1042 of 2015**, Kainamura J, while relying on **Anton Piller K-G Vs Manufacturing Processes Ltd & Others M9761 ALL ER 779** stated that; for an Anton Pillar order to succeed, it must meet the criteria laid out in the above case where Lord Denning stated;

> *".....it seems to me that such an order can be made by a Judge ex parte but should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties and when, if the defendant forewarned there*

is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden or taken beyond the jurisdiction, and so the ends of justice be defeated and when the inspection would do no real harm to the defendant's case. "

- [5] Kainamura, J further stated that as per **Anton Piller K-G Vs Manufacturing Processes Ltd** (supra) the three essential preconditions for the grant of an Anton Pillar order were stated to be; *1. That there must be an extremely strong prima facie case.*
- *2. The damage, potential or actual must be very serious to the plaintiff. 3. There must be clear evidence that the defendant has in its possession incriminating documents or things and that there is a real*
- [6] The basis for the application before Court is Section 79 of the **Trademarks Act, 2010** which is couched in the following terms;

possibility that it may destroy such material.

1. A person whose rights under this Act are in imminent danger of being infringed or are being infringed may institute civil proceedings in the court for an injunction to prevent the infringement or to prohibit the continuation of the infringement. 2. Upon an ex-parte application by a right owner, the court may in chambers make an order for the inspection of or removal from the infringing person's premises or control, of the right infringing materials, which constitute evidence of infringement by that person.

[7] What is clear from the facts presented is that the applicant is the owner of the registered trademark 'FROTO' which was registered in 2015 under which it has been distributing beverages countrywide. That the respondent subsequently started distributing beverages under the

name 'FROOTI' which is visually, phonetically and conceptually similar to the applicant's trademark. That the respondent's target market are the customers and distributors of the applicant. These facts therefore present a prima facie case and actually point to the fact that the applicant is in imminent danger of losing its customers over a similar product. Clearly, this would result into enormous losses to the applicant. The evidence available so far persuades me that the applicant has a strong prima facie case. This is further compounded by the fact that one of the shareholders of the respondent is a former employee of the applicant. All the three essential preconditions are present and proved to the satisfaction of the court. In the circumstances therefor,

issue ¹ is answered in the affirmative.

Issue 2.

- [8] The applicant also seeks further orders that a temporary injunction pending disposal of the main suit doth issue restraining the respondent / defendant and his agents/servants from; infringing the applicant's trademark, selling, distributing and offer to sale all products arising out of the infringement of the applicant's registered trademark and disposing of or destroying all materials or articles and or products relating to the infringement of the applicant's trademark. Injunctions are largely equitable remedies given at the discretion of the court. Following the reasoning of Kiryabwire Ag. J (as he then was) in **Uganda Performing Right Society Ltd Vs Fred Mukubira, M. A No, 818 of 2003** this court would decline to grant the application for temporary injunction ex-parte in a case like this one. Needless to state that in all fairness the respondent should be given opportunity to participate in the proceedings for the order of temporary injunction.
- [9] In conclusion, the application for Anton piller order is hereby granted to enable the applicant seize the alleged incriminating material in the hands of the respondent which shall be used as evidence in the main case. The following caution by Lord Denning MR in the **Anton Piller K. G. Case** (supra) as also referred to by Kiryabwire, J in **Uganda Performing Right Society** (supra) is worth reproducing;
- > *"an Anton piller order is not a search warrant which entitles a holder to force his way into the defendant's premises against his will. The defendant by the Anton piller order is only enjoined by court to "do permit" the entry, inspection or other direction of the court. The order should be served on the respondent attended by Counsel for the applicant who is and must strictly act as an officer of the court. The respondent must be given an opportunity to consider the order and if necessary consult his/her own Counsel. If entry is refused, the applicant should not force his way in. the applicant however may bring the refusal to the notice of the court, if need be by an application to commit for contempt of court. The respondent should be put on notice of this consequence. "*"
- [10] The Anton Piller order shall therefore be granted in the following terms;
 - (i) That the respondent is ordered to permit the applicant in the company of ONLY its advocates to enter upon its business premises to wit; stalls, ware houses all situate at Block 8, Masaka road, Nateete
 - (ii) The purpose of that entry is to inspect all assets, documents, materials or articles relating to infringement of the applicant's trademarks.
 - (iii) Removing into custody of this court any or all of the items in (ii) above, samples of moulds etc relating to the unauthorized manufacture, compilation, distribution and sale of the applicant's registered trademark for purposes of the inter-party hearing of the main suit (Civil Suit No. 819 of 2020)

- (iv) Costs of the application to be in the main suit.

^I so order

Dated, signed and delivered this 12th day of January, 2021

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