

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**COMMERCIAL COURT DIVISION**

**HCT – 00 – CC – MA – 142 – 2013**

*(Arising from Civil Suit No. 102 2013)*

**MUSE-AF ENTERPRISE CO. LIMITED:::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**BILEN GENERAL TRADING LIMITED:::::::::::::::::::::::::::::::::RESPONDENT**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

The applicant brought this application *ex parte* under the provisions of sections 33 & 38 (1) of the Judicature Act, Cap. 13, the Trademarks Act 2010, sections 22, and 98 of the Civil Procedure Act Cap. 71, Order 52 rules 1, 2 and 3 of the Civil Procedure Rules and the Trademark Rules S1 83-2 seeking for orders that;

1. The respondent does permit the applicant to enter upon its business premises, stores, warehouses or such other parts thereof as may be deemed necessary for the purpose of:-
  - (a) Inspecting all goods and items to wit, sold and branded under the trademark of “PAN SUPER” batteries, documents, materials or articles relating to the infringement of the applicant’s trademark over the said battery products; and
  - (b) Removing into the custody of this Honourable court all unauthorised products, documents, materials or articles relating to the manufacturing,

unauthorised production, reproduction, distribution and sale of the applicant's goods under its trade name, style and marks.

2. Provision be made for the costs of the application.

The grounds of this application as stated in the Chamber Summons are that the applicant is the registered owner of trademarks of all "PANASUPER" products to wit; batteries and other accessory products. Secondly, that the applicant has filed a suit against the respondent in this court seeking various orders including the seizure (Anton pillar) order. Thirdly, that the applicant has a strong prima facie case against the respondent with high chances of success. The fourth ground is that the damage, potential and actual is very serious that the respondent's activities and or omissions shall occasion the applicant. The fifth ground is that there is clear evidence that the respondent has in its possession or control and custody incriminating documents or things and there is real possibility that it may destroy or dispose such material before any application inter parties can be made. Lastly, that the dictates of natural and substantive justice would be best served with allowing of the application.

The application is supported by an affidavit deposed by Mr. Muse Afework, a director in the applicant company.

The test that this application must pass was established in the case of **Anton Pillar KG v Manufacturing Processes Ltd & Others [1976] 1 All ER 779** 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".*

Kiryabwire J. applied the same test in the case of **Uganda Performing Rights Society Ltd v Fred Mukubira Misc. Application No 818 of 2003 arising from HCCS No 842 of 2003.**

The three essential pre-conditions for the grant of an Anton Pillar order as stated by Ormrod LJ in **Anton Pillar KG v Manufacturing Processes Ltd & Others** (supra) are:

1. 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 possibility that it may destroy such material before any application inter-parties can be made.

As to whether the applicant has an extremely strong prima facie case, counsel for the applicant submitted that the applicant as the registered owner of the trademark deserved the protection of the law and more so against an infringer of its trademark. This court was referred to annexure C and D to the affidavit in support as evidence that the respondent at various locations in Kampala is passing off its products as those of the applicant and as a result the applicant is losing market share as well as profits as shown in paragraphs 6 and 7 of the affidavit in support. It is the applicant's case that being the lawful owner and registered proprietor of the trademark and name "PANASUPER" as evidenced in annexure "A", the applicant has not permitted the respondent to use its trademark and name for any of its goods yet the respondent is selling batteries under the "PAN SUPER" mark.

It was contended that the respondent's goods bear similar features as those of the applicant for example the combinations colour, artwork and arrangement, the packaging and get up as well as the markings on the product. It was therefore argued for the applicant that there is a prima facie case. This argument was supported by a passage from **Mulla on the Code of Civil Procedure, 16<sup>th</sup> Edition LexisNexis Butterworths at page 3716** which states that a prima facie case implies the probability of the plaintiff obtaining a relief on the materials placed before court.

From the facts of this case and the evidence available on court record referred to by counsel for the applicant, I am convinced that the applicant has an extremely strong prima facie case that its trademark is being infringed by the respondent. This court is therefore satisfied that the applicant has fulfilled the 1<sup>st</sup> pre-condition for grant of this application.

On the second pre-condition, the applicant's counsel referred to paragraph 13 of the affidavit in support and submitted that the respondent's engagement in the sale of unlawful/unauthorised goods under the applicant's trademark and name is for its monetary gain but without any colour of right, approval or permission. The court's attention was also drawn to paragraph 14 of the affidavit in support where the deponent

states that due to the respondent's infringement of the applicant's trademark it has lost market share and revenue.

I have considered the decision in **Uganda Performing Rights Society Limited v Fred Mukubira** (supra) where Kiryabwire J. held that loss of revenue can cause serious damage to the applicant. I am persuaded by that decision and convinced that loss of revenue to the applicant due to the respondent's acts is bound to cause serious damage to the applicant. Thus this application has also met the second pre-condition.

On the third pre-condition, the applicant's counsel submitted that the content of paragraphs 6, 7 and 9 of the affidavit in support is evidence that the respondent is in possession of incriminating materials. He particularly singled out paragraph 7 where the deponent states that pursuant to a search and investigation he conducted through various selling points of the infringing products, it was established that the respondent was in possession of "PAN SUPER" batteries. Counsel further submitted that in paragraph 8, it is the applicant's evidence that the respondent removed details of his shop from the get up of the mini cartons so as to disguise his unlawful activities. It was contended based on paragraph 17 of the affidavit in support that if this court does not intervene, there is a high likelihood that the respondent may dispose off the unauthorised goods being passed off as those of the applicant thereby defeating and or perverting the course of justice and rendering any decree or order that may be passed in the main suit nugatory.

I do agree with the submission of the applicant's counsel that based on the evidence annexed to the affidavit there is prima facie evidence that the applicant has in its possession incriminating goods and there is a real possibility that the respondent may dispose of such materials before any application inter parties can be made.

Accordingly, I find that this application has satisfied all the essential pre-conditions for grant of an Anton Piller Order and I so grant it in the following terms.

1. The respondent is ordered to permit the applicant in the company of his advocate to enter the respondent's shops/stores and warehouse behind William Street on Kikuubo Lane, Plot No. 38 Shop No. T-11 and the building opposite Plot 50/52 William Street. The purpose of that entry is to inspect all goods and items sold and branded under the trademark "PAN SUPER" batteries, documents, materials and articles relating to the said battery products.
2. The applicant shall take an inventory of the alleged right infringing materials found within the premises and remove into the custody of this court some of them which shall constitute evidence of infringement by the respondent at the trial. I am

unable to order removal into the custody of this court all the alleged right infringing materials as prayed since they may be too many to be accommodated within the court premises. However, the applicant is at liberty to apply for a temporary injunction to restrain the respondent from dealing with those materials in any way and from further manufacturing, producing, distributing and or selling the alleged rights infringing goods.

3. Upon entry, inspection, taking inventory and removal into the custody of this court some of the alleged right infringing materials, both parties shall appear before me for an inter parties hearing in any case not later than one week from the date of execution of this order.
4. Costs of the application shall be in the main cause.

Before I take leave of this matter, I wish to categorically state in accordance with the caution by **Lord Denning MR** in **Anton Pillar KG v Manufacturing Processes Ltd & Others** (supra) that the above order is not a search warrant. It does not authorise the plaintiff and its advocate or anyone else to enter the defendant's premises against its will. It neither authorises the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendant. The plaintiff must therefore get the defendant's permission and if permission is refused the only remedy would be an action for contempt of court.

I so order.

Dated this 12<sup>th</sup> day of April 2013.

Hellen Obura

**JUDGE**

Ruling delivered in chambers at 11.00 am in the presence of Mr. Jason Kigundu who was holding brief for Mr. Brian Kaggwa counsel for the applicant.

**JUDGE**

12/04/2013