

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

HCT – 00 – CC – MA – 136 – 2013

(Arising from Civil Suit No. 96 of 2013)

PASTIFICIO LUCIO GAROFALO S.P.A

Through a duly authorised Agent

MUSE-AF ENTRERPRISE CO.

LIMITED:.....:APPLICANT

VERSUS

CHARLES KIGEMUZI

T/A SEMWANGA GENERAL

ENTERPRISES :.....:RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

The applicant brought this application *ex parte* under the provisions of Sections 33 and 38 (1) of the Judicature Act, Cap. 13, Sections 22 and 98 of the Civil Procedure Act Cap. 71 and Order 52 rules 1, 2 and 3 of the of the Civil Procedure Rules, Trademarks Act 2010 and the Trademarks 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 “SANTA LUCIA” pasta or spaghetti, documents, materials or articles relating to the infringement of the applicant’s trademarks over the said pasta products; and removing into the custody of this court all unauthorised products, documents, materials or articles relating to the manufacturing, unauthorised production, reproduction, distribution and or 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 Notice of Motion are that:-

- the applicant is the registered owner of trademarks of all “SANTA LUCIA” products to wit; pasta or spaghetti and other accessory products,
- the applicant has filed a suit against the respondent in this Court seeking various orders including the seizure (Anton Piller) order which has an extremely strong prima facie case against the respondent with high chances of success,
- the damage, potential and actual is very serious that the respondent’s activities and or omissions shall occasion the applicant,
- 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 they 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 the allowing of the application.

The application was supported by an affidavit deposed by Muse Afeworki, a director of the duly authorised sole agent of the applicant.

The test that this application must pass was established in the case of **Anton Piller 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 **H.C.C.S. No. 842 of 2003**.

There are three essential pre-conditions for the grant of an Anton Piller Order, namely;

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 there is a real possibility that they may destroy such materials before any application inter-parties can be made.

Before considering the merits of this application vis-à-vis the above essential conditions, I wish to observe that the applicant claims to be suing through an authorised agent M/S Muse-AF Enterprises Ltd. Order 3 rule 1 allows a party to a suit to appear in person, by his or her recognised agent or by an advocate duly appointed to act on his or her own behalf. Rule 2 of that Order defines the recognised agents as (a) “*persons holding power of attorney authorising them to make such appearance...*” or (b) “*persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts*”.

In the instant case, the applicant has a duty to prove that M/S Muse-AF Enterprises Ltd is its recognised agent by showing this court either a power of attorney or an agency/distributorship agreement or any other instrument by which the appointment was effected. However, I have thoroughly perused the plaint and all its annexures as well as this application and all the annexures to the affidavit in support and failed to locate either a power of attorney or an agency/distributorship agreement between the applicant and the alleged recognised agent or any other instrument to that effect. I am therefore left wondering whether indeed the so alleged authorised agent has capacity to represent the applicant in this application.

In the case of ***Mugoya Construction and Engineering Ltd vs. Central Electrical International Ltd, Misc. Application No. 699 of 2011(arising from Civil Suit No. 203 of 2009)*** Madrama, J. considered a similar situation where an advocate had deposed an affidavit in his capacity as an authorised agent without attaching any proof that he was duly appointed as such in accordance with order 3 rules 1 & 2 of the CPR. The Learned Judge found that the deponent of the affidavit did not have the capacity to do so in the absence of a written authority by the client and held that the affidavit was defective.

I do not find the situation in the instant case any different. The affidavit in support of this application was deposed by a one Muse Afeworki, a director of the alleged duly authorised sole agent of the applicant. The applicant and its alleged authorised agent had the duty to adduce documentary proof of that relationship which they failed to do. I therefore find that in the absence of proof that M/S Muse-AF Enterprises Ltd is the authorised agent of the applicant its director is not competent to swear the affidavit in support of the application.

In the premises, the affidavit is incurably defective and the application it purports to support is incompetent. For that reason the application is dismissed without considering its merits.

I so order.

Dated this 28th day of February 2014.

Hellen Obura

JUDGE

Ruling delivered in chambers at 10.00am in the presence of Mr. Patrick Kabagambe who was holding brief for Mr. Enock Barata for the applicant.

JUDGE

28/02/14