

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT 1035/95

ABERCOMBIE & KENT LTD..... PLAINTIFF

- VERSUS -

ABERCOMBIE & KENT (UGANDA) LTD & OTHERS..... DEFENDANT

BEFORE: THE HONOURABLE LADY JUSTICE C.K. BYAMUGISHA

JUDGMENT

The plaintiff Abercombie and Kent Ltd filed this action against the defendant claiming the following reliefs: -

- (a) General damages for passing off;
- (b) A permanent injunction restraining the first, second and third defendants from carrying on business under a name constituted of the words “Abercombie and Kent” or any semblance thereto;
- (c) An order directing the 4th defendant to strike the first defendant’s name off the register;
- (d) Costs of the suit.
- (e) Any other and further relief as this court may deem fit in the circumstances.

A resume of the facts leading to these proceedings is as follows:- On the 15th day of December 1992, the plaintiff was incorporated as a company in Uganda. The defendant was also incorporated earlier on the 30th day of September 1992. Both companies were or are supposed to carry on tourist business. The plaintiff claims that it has acquired intervation

reputation in the tourism business and it was unaware at the time of incorporation that the first defendant had been incorporated and registered with a similar name and similar objectives. It is therefore the plaintiff's contention that the second and third defendant in incorporating the first defendant acted fraudulently and with a view to deceive the public that their company (the first defendant) was the same as or related to the plaintiff. In the alternative it was averred that the second and third defendants acted as a front for a person or persons who had the intention to pass off their business as the plaintiff.

The first and third defendants filed a joint written statement of defence in which they denied the allegations contained in paragraphs 1,3,4,5,6,7,9, 10,11,12,13 and 14 of the plaint and vowed to put the plaintiff to strict proof for all of them. They also denied having infringed on the use of the plaintiffs name as alleged. In particular the two defendants averred that on the 10th April 1991 they wrote to the Registrar of companies applying that the name Abercombe & Kent (Uganda) Ltd if available be reserved for their intended company. In return the Registrar confirmed that the name was available and duly reserved the same for use by the second and third defendants. Copies of the said letters were annexed to the written statement of defence.

It was the defence case that on 30th September 1992, the first defendant became incorporated in Uganda as a limited liability company. After incorporation on 15th December 1992, the plaintiff according to the defence, started trading and passing itself off as the first defendant. On 11th September the plaintiff through its lawyers Messrs Shonubi, Musoke & Company Advocates wrote to the Registrar of Companies acknowledging the facts that the plaintiff was registered after the first defendant and sought the Registrar's guidance on the matter. On 13th September the Registrar responded and stated that the registration of the plaintiff was irregular and an oversight on the Registrar's part and he directed the plaintiff to change its name to some other name that was not similar or closely near that of the first defendant. It is averred that the plaintiff refused to heed this directive and it has continued to trade/pass off as the first defendant and therefore if there is any passing off and trade libel as alleged in the plaint it is the plaintiff which has transgressed against the first defendant.

In the counter-claim the first defendant repeats the various heads of contention in the defence and counter-claims against the plaintiff and the Registrar of companies and seeks the following orders: -

- a) A permanent injunction to restrain the plaintiff (whether by its director's servants, employees or agents or any of them or otherwise) from using in connection with their business the name Abercombie & Kent (Uganda) Ltd or Abercombie and Kent Ltd or any other name/style so clearly resembling the name of the first defendant/counter claimed as to be calculated to lead to members of the public utilising the services of the plaintiff in the belief that it is the first defendant/counter/claimant's business and generally from passing off or attempting to pass off the plaintiff's said business as that of the first defendant and counter-claimant's business.
- b) Delivery for destruction of all materials and documents including all business cards, letter heads, business stationery and other matters the use of which would be a breach of the injunction prayed for;
- c) General damages for passing off and trade libel and/or an account of all profits accrued by the plaintiff as a result there from.
- d) An order compelling the Registrar of Companies to strike off the name of the plaintiff from the Registrar of Companies.
- e) Costs of the suit.

Particulars of infringement and Passing off were of tabulated in paragraph 9 thereof.

Particulars of loss and damage were contained in paragraph 13.

The plaintiff made a reply to the written statement of defence and counter-claim in which it contended that prior to the 30th September, 1992, the name “Abercombie and Kent” was used in Uganda by its promoters in course of trade and this fact was known to the first defendants agents and/or directors. It is also contended that the first defendant has not carried on at any time the business of tourism or any other business and thus has no population or good will with the business or in the name “Abercombie and Kent” or any variations or Semblance of the name.

The plaintiff admitted the fact of its incorporation but stated that until the 11th September 1992 the plaintiff was ignored of the existence of the first defendant and it incorporated itself in good faith and without any intimation from the Registrar of Companies that a similar name existed on the register.

In reply to the counter-claim, it is denied that the counter-claimant has suffered any loss or damage and that the name “Abercombie and Kent is the exclusive property of the plaintiff.

At the commencement of the trial, the following were the agreed issues:-

1. whether the plaintiff was carrying on business in Uganda in 1991 to the knowledge of the first offender or its agents.
2. whether there was any passing off and or trade libel, and or fraud by either the first or the third defendant.
3. if so whether the plaintiff is entitled to the remedies claimed.
4. whether the plaintiff infringed and or passed off and or used the first defendant's name as its own.

5. whether the first defendant and 3rd defendants are entitled to the remedies claimed in the counter-claim.

The plaintiff called two witnesses. The defendants called none from the testimony by the plaintiff's witnesses, the following facts are not in dispute. The plaintiff is engaged in the tourist business in many countries. According to certificates of incorporations (exhibit P1) it has sister companies in the limited Kingdom, United States, India, Zimbabwe, Austraria, Botswana, Tanzania, Hong-Kong, and Kenya. Before its incorporation in Uganda in 1992, it carried out business through an agent called Captain Collion Stuart who was the proprietor of Hot Ice Ltd. This company was also engaged in the tourist business. The first defendant was incorporated as a company with Collin Stuart as one of the promoters. Since its incorporation the first defendant has not carried out any business. On the other hand, the plaintiff has been bringing tourism Uganda and has made some investments in Bwindi Impenetrable forest. The plaintiff encountered problems while negotiating concessions with Uganda National Parks because Collin Stuart as the then chairman of Uganda Tour Operators Association claimed that Mr. & Mrs. Kent were passing off a company which they did not own.

The legal basis for an action of passing off is that it is wrong for the defendant to represent, for trading purposes, that his/her goods on the market or the business is that of the business is that of the plaintiff. it is immaterial whether the representation made is effected by direct statements or by using the badges or get ups by which the goods or business of the plaintiff are known by the ordinary consumers. This principle was broadly stated in the case of Parker-Knoll Ltd vs. Knoll International Ltd [1962] P.P.C.265 where the court said:-

“In the interests of fair trading and in the interests of all who may wish to buy or sell goods the law recognises that certain limitations upon freedom of action are necessary and desirable. In some situations the law has had to resolve what might at first appear to be conflicts between competing rights. In solving the problems which have arisen there has been no need to resort to any abstruse principles but rather --to the straight forward principle that trading must not only be honest but must not even unintentionally be unfair.”

In the matter now before court, I think the plaintiff has established that it has a business reputation which it has built over the years under the name of “Abercombie & Kent” and therefore it has a right to restrain anyone else from injuring its business by using that name. Therefore the first and second issue will be answered in the affirmative. The plaintiff is accordingly entitled to the reliefs claimed in the plaint i.e. a permanent injunction to restrain the first second and third defendant from carrying on business under any name constituted of the words “Abercrombie & Kent” or any semblance there to as to be likely to deceive or cause confusion. The plaintiff will have costs of the suit. Since the defendants did not prove their claim against the plaintiff, no reliefs will be given and the same is dismissed with costs to the plaintiff. There will be judgment in those terms.

C.K. Byamugisha

Judge

30/11/99