

Brand Protection in Kenya as Relates to Trademarks

To differentiate the products and services businesses offer from those of their competitors in the market, businesses use distinctive marks or signs on their products and services. For instance, a business dealing in electronics might use a specific logo and colours to distinguish its products from those of competitors in the same industry and locality. Such differentiation through the use of marks is important given that in the long run businesses develop a brand reputation which they may wish to protect so as to reap benefits accruing from such reputation. Moreover a reputable brand name can be sold off with its value dependant on the protection its owners accorded to it by legal means like registered trademarks in addition to other factors.

A trademark is a distinguishing sign which may consist of a letter(s), words, colours, numbers, drawings, a symbol or a combination of all these that can be used to identify the goods or services of a business or entity from others in the market place. Competitors or even new entrants into an industry may want to unethically ride on the good will and reputation which a business or individual strove hard to build. The benefit of registration of a trademark is

that the owner can sue a person who infringes on it. Trademark infringement takes a variety of forms. The common form being that occurring when a legitimate business in the same industry uses a trademark that is confusingly or deceptively similar to that of a rival in a bid to ride on the good will of the rival.

Benefits of registration of marks used in business

The importance of a business taking the time to register its distinctive marks is illustrated in the case of the trade mark of “**Mololine Services Limited**”. Mololine is a well-known company within the transport and parcel services business here in Kenya. Mololine Services Limited has developed good will over time which has seen it attract many customers and also seen some competitors within the transport industry seek to unfairly ride on the company good will.

A new entrant into the transport business sought to do this by using a deceptively similar name to open a booking office within the same location as Mololine Services Limited. **Moline** had registered a trademark that had striking similarities to Mololine in a way that made it highly likely that a member of the public would be misled into confusing the new business for Mololine Services Limited.



Being aggrieved by the unlawful actions of the competitor, Mololine Services Limited proceeded to the High Court in the case *Mololine Services Limited Versus Moline Limited and the Registrar of Trademarks*.

The court in its verdict found in favour of Mololine Services Limited in that the new competitor, Moline's name and mark used in the transport industry and at a locality proximate to that of Mololine Services Limited created a high likely hood of causing confusion among members of the Public.

The law recognizes that one of the implications of a trademark infringement on the owner of the mark is loss of revenue. An aggrieved person is therefore entitled to sue seeking an account of profits made out of the infringement of the trade mark. Such inquiry enables the court establish loss for purposes of compensation. Other remedies may include an order for delivery and destruction of the infringing products

together with order for an injunction together with a variety of damages.

Some of the matters looked at by the court in establishing trade mark infringement

The case of *Reckitt & Coleman Properties Ltd Versus Borden* set the elements that must be present for a successful claim of trademark infringement or passing off. First, the complainant has to establish that the goods and services have a good will or reputation attached to them which the purchasing public associates them with and are recognised by the public as distinctive to the complainant's goods or services. Secondly, the complainant must demonstrate a misrepresentation made by the defendant to the public (whether or not intentionally) leading or likely leading the public to believe the goods or services offered by him are the goods or services of the plaintiff.

