

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO. 773 OF 2004
(Arising from HCCS No. 325 of 2004)**

NAPRO INDUSTRIES LTD:..... APPLICANT/PLAINTIFF

VERSUS

1. FIVE STAR INDUSTRIES LTD]

2. STAR LITE INDUSTRIES]:..... RESPONDENTS/DEFENDANTS

BEFORE: THE HON. LADY JUSTICE M.S. ARACH — AMOKO

RULING:

The Applicant, Napro Industries filed this application by chamber summons under Order 37 Rules 1,2 and 9 CPR for orders that:

1. A temporary injunction doth issue to restrain the Respondent, its servants and/or agents and/or workmen from manufacturing, selling exporting for sale or dealing in any way in steel wool sets.
2. Costs of the application be provided for.

The application is supported by the affidavit of Mr. Rajan Shah, a Director of the Applicant Company, filed in Court on 26/10/2004. The relevant particulars are contained in paragraphs 2 to 8 of the affidavit as follows:

'2. That the Applicant is the manufacturer of steel wool known as NCARISHA and has been trading in the said product in Uganda since 1990 and has acquired substantial reputation for the said product.

2. That the Respondents without any form of authority from the Applicant registered a similar trade mark namely, 'W&ARISHA' and started selling in Uganda (sic) with very similar get up to those of the Applicant. A copy of the trade mark is attached as annexure 'A' and a copy of the offending product and the Applicants product are attached as Exhibit 'P1' and those of the Respondent as "D1".

4. That the Applicant (sic) the Respondent continues to sell its offending products under the 'WGARISHA' trade mark which fall short of the set standards, and which are calculated to cause confusion in the market which passing off is causing irreparable damage and loss to the Applicant, which no damages can atone for.

5. That the Applicants trade mark is in danger of being wasted and damaged by virtue of such use by the Respondent if it is not stopped.

6. That there is a bona fide contention between the Applicant and the Respondent and in the event of success the balance of inconvenience would be with the Applicant.

7. That on the facts before Court, the Applicant is entitled to relief by way of a temporary injunction because the Applicant will suffer irreparable damage for which damages cannot atone if the temporary injunction does not issue.

8. That in the interest of Justice, a temporary injunction should issue against the Respondent to remove and desist from offering for sale the offending products from the market."

The 1st Respondent's Managing Director Ramesh Kennedy filed an affidavit reply to this affidavit dated 25/11/2004 stating as follows:

3. That the 1st Respondent is not aware of the facts stated in paragraph 2 but to the contrary, the 2nd Respondent is the manufacturer of 'NGARISHA' steel wool for

whom the 1st Respondent is the distributor.

4. That in reply to paragraph 3 the 1st Respondent avers that it has never registered any trade mark known as 'NGARISHA' in Uganda, but is informed by the 2nd Respondent which information it verily believes that the 2nd Respondent is the registered proprietor of the said trade mark in Uganda.

5. That in reply to paragraph 4 the 1st Respondent avers that the steel wool which it is marketing and selling on behalf of the 2nd Respondent is of good quality and is in no way calculated to cause confusion in the market or passing off.

6. That in further reply to paragraph 4 the 1st Respondent denies having caused any loss or damage to the Applicant by the sale and marketing of the said 'NGARISHA' steel wool.

7. That the 1st Respondent denies knowledge of the Applicant's trade mark nor any damage or wastage of the same.

8. That the 1st Respondent denies the contents of paragraph 6 and avers that the Applicant has no claim against the 1st Respondent and therefore this application is misconceived and bad in law.

9. That in reply to paragraph 7 the 1st Respondent avers that the Applicant is not entitled to relief by way of a temporary injunction and denied knowledge of any damage to be suffered by the Applicant.

10. That would be an abuse of the Court process if the temporary injunction is granted as the Applicant's claim against the 1st Respondent is frivolous and vexatious.

11. That the word 'NGARISHA' was not conceived or coined by the Applicant as alleged but is a generic Swahili word that means "shining" and the Applicant cannot claim exclusive use to the said word."

The second Respondent's Managing Director - Raj Dharani swore an affidavit in reply on behalf of the 2nd Respondent on the same date stating as follows:

"3. That the 2nd Respondent denies the contents of paragraph 2 and avers that it is the manufacturer in Uganda of steel wool under the trade mark 'NGARISHA'

4. That the 1st Respondent is a marketing and sales agent in Uganda for the 2nd Respondent with respect to the said steel wool.

5 That in reply to paragraph.3 the second Respondent avers that it did not require any authorization from the Applicant to register its trade mark in Uganda, which it duly did in 2002 and obtained a certificate of registration hereto attached as annexure 'R1'.

6. That the 2nd Respondent applied for registration of 'NGARISHA' trade mark and the application was duly gazetted as required by law (copy of the said application and the gazette notice attached here to and marked "R2 and R3" respectively).

7. That in reply to paragraph 4 the 2nd Respondent avers that the steel wool which it manufactures is marketed and sold on its behalf by the 1st Respondent is of good quality and is in no way calculated to cause confusion in the market or passing of

8. That the 2nd Respondent's registered trade mark is distinct and clearly different from the trade mark the Applicant allege is registered in Kenya (copy of representation of the trade mark of the 2nd Respondent and the alleged trade mark of the Applicant attached hereto and marked "R4" and "R5" respectively).

9. That the product alleged to belong to the Applicant does not bear the trade mark similar to that allegedly registered in Kenya and the said product was not before May 2004 known to the 2nd Respondent.

10. That in further reply thereto, the 2nd Respondent denies having caused any loss or damage to the Applicant by the manufacture, sale and marketing of the said 'NGARISHA' steel wool, and avers that instead, it has suffered loss and damage as a result of the Applicants manufacture, sale and distribution of steel wool similar to that of the 2nd Respondent"

11. That the 2nd Respondent denies knowledge of the Applicants trade mark nor any damage or wastage of the same.

12. That the 2nd Respondent denies the contents of paragraph 6 and avers that the Applicant has no claim against the 2nd Respondent and therefore this application is misconceived and bad in law.

13. That in reply to paragraph 7 the second Respondent avers that the Applicant is not entitled to relief by way of a temporary injunction and denies knowledge of any damage to be suffered by the Applicant.

14. That it would be an abuse of the Court process if the temporary Injunction is granted as the Applicant's claim against the 2nd Respondent is frivolous and

vexatious.

15. That the right to registration and protection of a trade mark is territorial in nature.

16. That the 2nd Respondent is the registered owner of the trade mark and shall on the balance of probability suffer more damage than the Applicant.

17. That.... to grant a temporary injunction in this case would amount to disposing of the suit.

18. That the word “NGARISHA” was not conceived or coined by the Applicant as alleged suit is a generic Swahili word that means “shining” and the Applicant cannot claim exclusive use to the said word.

19. That at all times the said product has been recognised as being manufactured and marketed by the Respondents vide the trade mark of ‘NGARISHA’ throughout the media of publicity to traders and the general public throughout Uganda, and all other areas where it is sold.

20. That the 2nd Respondent has as such created its own good will in the market which the Applicant now seeks to take unfair advantage of”

Mr. Yesse Mugenyi represented the Applicant while Mr. Kiryowa and Mr. Ochaya Thomas appeared for the Respondents. They argued the application based on the affidavits on record.

The granting of a temporary injunction is an exercise of Judicial discretion and the purpose of granting the same is to preserve matters in status quo until the questions to be investigated are finally disposed of.

The conditions for the grant are first that the Applicant must show a prima facie case with a probability of success. The current thinking based on a wealth of authorities is however, whether there are serious questions to be tried rather than a prima facie case with a probability of success. This observation was made per incuriam by Odoki J. as he then was, in the case of Kiyimba Kagwa (supra) where he stated inter alia thus:

“It is my humble view that considering the object of an interim, injunction and the nature of proceedings at which it is considered, a more realistic and fair condition would be to satisfy the Court that there is a serious question to be tried rather than a prima facie case with a probability of success; for as Lord Diplock pointed out in the American Cyanamid Case (supra) in the house of Lords,

The use of such expressions as a “probability” “a prima facie case” or “a strong prima facie case” in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object of this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious in other words that there is a serious question to be tried.”

Halsbury’s Laws of England 4th Edn vol. 24 para 858 also has this to say on the serious questions to be tried:

*“855. **Serious questions to be tried.** On an application for an interlocutory injunction the Court must be satisfied that there are serious questions to be tried. The material available to Court at the hearing of the application must disclose that the Plaintiff has real prospects for succeeding in his claim for a permanent in/unction at the trial.” (emphasis mine).*

This proposition has been followed in a number of cases. For instance in HCCS No. 2 17/94 — **Muhamed Yahu —Vs- Abdur Khamis** Ouma J held inter alia that:

“(1) There is no rule that an Applicant for a temporary injunction must first establish that he has a prima facie case because this would lead to trial of the suit without evidence to establish it. It is enough to show that there are triable issues to be investigated on either side and that the suit was not frivolous. The Applicant had

shown that there were triable issues on either side.”

Also in the recent case of **Kikungwe Issa and Ors —Vs- Standard Bank Investment Corporation and Ors** Misc. Appl. No. ... /2004 Arising from CS 409/2004 (per Kiryabwire J.).

I agree with this approach and I have adopted it in this application, because it gives better guidance for the exercise of the Courts discretion.

Secondly, such injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. .Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience. See: **Kiyimba — Kaggwa —Vs- Haji Nasser Katende** [1985] HCB 43.
- **Giella —Vs- Cassman Brown and Co. Ltd** [1973] EA 358.
- **Robert Kavuma —Vs- Hotel International Ltd** CA No. 8/90.

Applying the above conditions to the instant application this is what I have come up with.

Regarding the first issue, the case for the Plaintiff is contained in the plaint filed in this Court dated 21/5/2004 where the Plaintiff averred as follows:

That the three of them are duly incorporated companies, carrying on business in Uganda. At all times, it has been carrying on a well established business of manufacturing and marketing of steel wool and metal fibre know as “NGARISHA”. It has been using the trade name ‘NGARISHA’ since 1986 in relation to the said products at all material times, and the said trade mark has been widely advertised through all known media and the general public, throughout Kenya, Uganda, Tanzania, Congo and other countries as its trade mark. For that reason, the said name has become known in trade and to the general public as signifying the Plaintiff’s steel wool and metal fibre and the Plaintiff has acquired a substantial reputation in the and by the use of the said trade mark.

On the 24/9/2002 the 2 Defendant registered trade mark No. 25196 consisting of the word “NGARISHA”. That registration was unlawful and the Plaintiff objects to it, and gives the particulars of objection. The Plaintiff also contends that as a result of the Defendant’s actions, the 2 Defendants intend to pass off its products as those of the Plaintiff. Particulars of passing off are:

- i. The 1st Defendant has tried to sell off to customers at their premises and warehouse in Kampala and else where in Uganda, products under the name of ‘NGARISHA’.
- ii. The 1st Defendant has tried to pack, advertise its steel wool “NGARISHA” disguised as bearing the same blue and white colour and packing layout and get up as that of “NGARISHA” of the Plaintiff.
- iii. The Defendant has resorted to harassing, and intimidating the Plaintiff’s distribution.

The Plaintiff contends that the passing off by the Defendant has infringed its trade mark. That the Defendant’s acts were at all material times calculated to deceive and mislead and have infact misled the general public into believing that the said ‘NGARISHA’ steel wool is that of the Plaintiffs and to pass off that steel wool as that of the Plaintiff which it is not, and into buying the Defendant’s steel wool as that of the Plaintiff. That the Defendant threatens to and intends, unless constrained by this Court, to repeat the acts and conducts aforesaid and to pass off the said ‘NGARISHA’ steel wool as manufactured by the Plaintiff which is not the case. By reason of the aforesaid, the Plaintiff has been greatly injured in its reputation and has suffered and will continue to suffer loss and damages arising out of the erroneous belief endangered by the Defendants misrepresentation that the Plaintiffs goods are those of the Plaintiff. The Plaintiff pays for:

- a. a permanent injunction.
- b. damages or an account of profit.
- c. delivery up and destruction of all the Defendant's "NGARISHA" steel wool.
- d. rectification of the Registrar of Trade Marks by expunging the Defendant's Trade Mark therefrom.
- e. any other remedies.
- f. costs.
- g. interest.

The Defendants filed a joint written statement of defence in which they deny that they have ever passed off any of the Plaintiff's goods and the Plaintiff will be put to strict proof.

They also contend that the Plaintiff has never registered a Trade Mark in Uganda and deny infringing the same. They also denied harassing the Plaintiff's customers and or distributors; as well as any knowledge of any loss suffered by the Plaintiff and prayed that the suit be dismissed with costs.

The same contentions are repeated in the affidavits of both sides in this application. Mr. Mugenyi pointed out during his submissions that the Plaintiff's case is not based on trade mark infringement, but in passing off under S. 4 of the Trade Marks Act (Cap 217) which

provides that:

“4. - No person shall be entitled to institute any proceedings to prevent, or to recover damages for, the infringement of an unregistered trade mark, but nothing in this Act, shall be deemed to affect the rights of action against any person for passing off goods as the goods of another person or the remedies in respect of those rights of action.”

Mr. Mugenyi also relied on a number of authorities on passing off, including Keerly’s Law of Trade Mark of Edn. At page 263. Where it is stated thus:

“The principle of law may be very plainly stated, that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures, does or does not come up to the proposition enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact, the legal consequence appears to follow”

He also cited a number of E. African cases where this principle has been followed namely:

1. **PJ. Products Ltd —Vs- Haria Industries [1970] EA 40.** In that case, the Plaintiff sued the Defendant for an injunction and damages for passing off, alleging that the packet in which the Defendant was marketing its baking powder deceived purchasers into thinking that it was the baking powder of the Plaintiff. The packets were similar in colour and both had the figure of a chef on them. There was evidence of selling of the Defendant’s products when the Plaintiff’s product was asked for. It was held:

“i. the get up of the Defendants packet was similar to that of the Plaintiff’s.

- ii. *the similarity was such as to lead to confusion and to allow deception.*
- iii. *the Plaintiff was therefore entitled to an injunction and damages. Judgment for the Plaintiff”*

2. Parke Davis & Co. Ltd —Vs- Opa Pharmacy Ltd [1961] EA 556. In that case the Appellant Company had for twenty eight years sold in East Africa tubes of ointment packed in distinctive cartons under the registered trade name “Capsolin”. In 1955 the Respondent Company began selling a similar ointment under the registered name “Capsopa”. In 1959 the Appellant Company sued claiming an injunction to restrain the Respondent company from passing off its products on that of the Appellant Company and damages or an account of the profits made. The trial Judge dismissed the suit finding inter alia that there was no evidence of confusion among the public despite the concurrent sale of the two products and that “Capsopa” was not likely to be confused with ‘Capsolin’. On appeal, it was held inter alia; *“(i) since the first two syllables in the trade name used by each of the parties were identical and there were resemblances in the containers there was a teal probability of confusion and the Appellant Company was ‘entitled to an injunction.’”*

Mr. Mugenyi further submitted that in cases of passing off, the Court is vested with the power to look at the mark to determine the similarities. He relied on the case of **Hassanali M. Sahoo —Vs- Johnhopkin O.V.T [1958] EA 464**, particularly a quotation from Kerly’s book at page 646 cited in the case of **Schweppes Ltd –Vs Gibbens (1905) 22 RPC 113,601** by WARRINGTON, J, whose Judgment was approved by the majority of the Court of Appeal and by the House of Lords when he said:

“It seems to me that each of these cases must be looked at by itself, and the Judge looking at the label, or the get up or the device, whatever it may be that is complained of with much assistance as to the practice of the trade as he can get from witnesses, must decide for himself whether the article complained of is calculated to deceive or not.”

And in **Hennessy & Co. —Vs- Veating (a)** (1908) 25 R.P.C 361 (a trade mark case) where Lord MACNAGHTEN said at page 367:

“The eye no doubt is generally the best test, and you will have to come to a comparison of the marks or labels sooner or later. Generally, but not always, the comparison is enough.”

Mr. Mugenyi also referred to the case of **E. A. Tobacco Co. —Vs- Colonial Tobacco Co.** Ltd [1938] EACA 6. In that case, after the Appellants’ “Crescent & Star” brand of shag tobacco had established a considerable reputation amongst the native peasants of the Eastern and Northern provinces of Uganda, where it is generally known among the illiterate natives as “Chapa ya Feza” or Silver Brand, the Respondents put up on the same market their “Mpanga Brand” of shag tobacco which was sold in packets identical in size, colour and shape with the packets in which the Appellants’ tobacco was sold. The labels of both brands were affixed to the packets in the same manner and position and though they were identical in size and colour. Both brands were sold by retailers to illiterate natives as “Chapa ya Feza”. It was held:

“That if a manufacturer sells goods in a get up which so dearily resembles that of another person’s goods as to enable his own goods to be sold as the goods of that person, the manufacturer puts an instrument of fraud into the hands of the shop keeper. The law will not permit a manufacturer to put a shop keeper in such a position.”

On trade mark, Mr. Mugenyi argued that even though the Defendant has registered the trade mark Ngarisha, section 13 of the Trade Mark Act immediately disentitles the Defendant from the Courts protection. The section provides in the relevant part that:

“13. Prohibition of registration of deceptive etc material shall not be lawful to register as a trade mark or part of a trade mark would, by reason of its being likely to

deceive or cause confusion or otherwise, be disentitled to protection in a Court of Justice, or would be contrary to law or morality, or any scandalous design.”

He further referred to the case of Arcadian Tobacco Co. Ltd —Vs- Sinclair 1933 15. L.R.K, and submitted that the question whether one mark resembles another one and is likely to deceive is a question for the tribunal, that is the Court and not the witnesses. He also submitted that proof of damages is not required in passing off cases. He relied on Parke Davis and Kerly’s text book at page 838. In Parke Davis CRAWSHAW, J.A. relied on the case of **Masengo —Vs- Daily Sketch and Sunday Graphic Ltd (U)** (1948), 65 R.P.C 242 where the House of Lords quoted Kerly’s at page 383 that:

‘Proof of damage is not in every case essential to enable the Plaintiff to maintain his action, for if he knows that the Defendant is acting so as to pass off goods as those of the Plaintiff which are that the Plaintiff’s it will generally be assumed that the Plaintiff is thereby prevented from selling as many of the goods as he otherwise would.’

In that case, his Lordship ended with the following conclusion:

‘I do not think the circumstances of the case negative this assumption, but rather that the actions of the Respondent Company are calculated to injure the Appellant Company.’

I have had the benefit of seeing the two products produced in Court by the Plaintiff’s counsel. I have also read the pleadings and the authorities cited by Mr. Mugenyi. Passing off is a common law tort. Its origins lie in the tort of deception. However, passing off does not now depend upon any fraudulent intent by the Defendant. In Perry —Vs- Truefit (1842) 6 Beav pg 66, the basic underlying principle of a passing off action was stated to be: ‘A man is not to sell his own goods under the pretence that they are the goods of another man ‘ Another summation was given by Lord Halsbury in the case of **Reddaway (Frank) & Co. Ltd —Vs-**

George Banham & Co. Ltd [1896] AC pg 199, HL, where he stated that, ‘nobody has the right to represent his goods as the goods of somebody else’. Over the past century passing off has developed on case by case basis. Different factual situations has led to the expansion of the law as Lord Oliver observed in **Reckitt & Coleman Products Ltd —Vs- Borden Inc** [1990] RPC 341, CA, the Jif Lemon’ case ‘this is not a branch of the law in which reference to other cases is of any real assistance except analogically.’

The classic definition of passing off is in the ‘Jif Lemon’ case, where Lord Oliver endorsed Lord Diplock’s definition and reduced to three key elements: goodwill, misrepresentation and damage. He said:

“First the Plaintiff must establish a goodwill or reputation attached to the goods or services which supplies in the mind of the purchasing public by which the identifying get-up’ (whether it consists simply of a brand name or a trade description or the individual features of labeling or packaging,) under which his particular goods or services are offered to the public, such that the get-up is recognized by the public as distinctive specifically of the Plaintiff’s goods or services. Secondly, he must demonstrate a misrepresentation by the Defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the Plaintiff... Thirdly, he must demonstrate that he suffers or, in a quia timet action, is likely to suffer damage by reason of the erroneous belief engendered by the Defendant’s misrepresentation that the source of the Defendant’s goods or services is the same as the same as the source of those offered by the Plaintiff”

See also: Intellectual Property Law by Jennifer Davis, Butterworths page 161 -164.

I have found some striking similarities in the get up of the two products. There is also no dispute that both the Plaintiff and the Defendant are registered owners of the trademark in question. One is registered in Kenya in 1989 and the other one is registered in Uganda in 2002. Both of them are manufacturing and distributing for sale in the Ugandan

market steel wool under the trade name 'NGARISHA'. There is competition in the market as evidenced by the receipts attached to the pleadings and the correspondence from the Defendants lawyers to the Plaintiffs distributors to the effect that they should stop distributing the said product on the market. The similarity in the get up of the two products is no doubt capable of confusing the public. In the circumstances, I therefore accept the submission by the Applicant's counsel and I find that the Applicants case raises serious issues to be tried by this Court. In other words there is a serious contention between the two parties over the use of the name 'NGARISHA'. The application therefore satisfies the first condition for the grant of a temporary injunction.

On the question of irreparable injury, Mr. Mugenyi submitted that they cannot tell in the circumstances, how much damage has been done or is likely to be done to his client's business. That in cases of passing off, the Courts acknowledge that it is hard to compute damages. That even if the Respondents are eventually told to render an account of the profits, he doesn't think they will be honest enough to tell the Court how much profit they have made. He relied on ruling number 3 in the case of Hassanali Sachoo (*supra*).

Mr. Kiryowa contended that there is no proof passing off in this case; the Applicant has not shown that it will suffer any damage. That even if there is damage, it can be compensated by way of an account of profit. That although it is hard to compute damages, it is not impossible. The Applicant has not proved that it will suffer irreparable damage. It is not therefore entitled to a temporary injunction. I have considered both arguments. I agree with Mr. Mugenyi that the continued use of the Applicant's mark known as 'NGARISHA' by the Respondents is likely to lead to irreparable damage on the side of the Applicant, which cannot be atoned for in damages, if the Applicant succeeds in its action. This is because as Mr. Mugenyi stated, it is not and it will not be easy to compute damages suffered in the circumstances of the case. This was evident in the case of **P.J. Products Ltd —Vs-Hania** (*supra*), where the Judge observed at page 54 that:

"The assessment of damages is no easy task... It would be expected that the Defendants would have kept a careful record of the packets complained of that they withdrew. Mr. Hania said the packets complained of were still in the shops as late as

January this year. It seems to me that it would serve no purpose to order an account.”

The principle to be considered in a case of this nature is, that the circumstance should be such that if the Court does not issue the order, the Applicant would suffer irreparable loss even if he subsequently succeeds in the action. This ground also succeeds for this reason.

On the balance of convenience. The Applicant's Director, Mr. Shah has deponed that the Applicant is the manufacturer of the 'NGARISHA' steel wool and has been trading it in Uganda since 1990 and has acquired a substantial reputation for the said product. This averment has not been controverted by the affidavit of both Respondents' Directors. Respondent's Managing Director simply says he is not aware of this fact. The 2nd Respondent naturally makes a blanked denial of the fact and says it is the manufacturer of NGARISHA steel wool in Uganda.

Mr. Mugenyi argued that the Applicant is being inconvenienced. That it is competing against its own product with another product from made by another person. The Respondents have, since registering their Trade Mark been trying to push out the Applicant's distributors. The matter is therefore serious. Mr. Kiryowa contended that the Court should look at the fact that the Applicant is not trading in Uganda, yet the 2nd Respondent is the Registered owner of the trade mark and is protected by the law. That the Applicants claim in is equity and the Respondents' is in written law.

Secondly, there is a clear difference between the Trade Mark the Applicant claims to own. The Respondent stands to suffer more than the Applicant if a temporary injunction is issued.

With due respect, I think if the circumstances of this case are taken as a whole, the Applicant stands to suffer more if the injunction is not, granted. First of all, it has been in the business since 1990. The Respondents have just recently entered the business in 2002. There is no way the Respondents will render an accurate account of the profits made if the Applicant succeeds. The Applicant's products are competing in the market and are likely to confuse the

consumer. On the balance of probability, I am of the view that the Applicant stands to suffer more if the injunction is refused than what the Respondent would suffer if it is granted. I therefore agree with Mr. Mugenyi learned counsel for the Applicant that his client stands suffer more if the injunction is refused than what the Respondent would suffer.

The technical points of objection raised to the affidavit in support is irrelevant since an affidavit is not a statutory declaration. See: **Col. Dr Kiiza Besigye —Vs- Y. K. Museveni & Anor** Election Petition No. 1 of 2001. Similarly this case is based on passing off and not trade mark. The objection regarding the certificate attached to the affidavit in support does not in my view prevent this Court from allowing the application prayed for.

On that basis and from the reason I, have given, I grant this application and order that the Respondents are restrained from manufacturing, selling or distributing or exposing for sale or dealing in any way in steel wool under the name 'NGARISHA' forthwith pending the determination of the main suit.

Costs of this application shall be in the cause.

M.S. Arach - Amoko

JUDGE

9/12/2004

Ruling delivered in Court in the presence of:

1. Mr. Mugunga for the Applicant.
2. Mr. Kiryowa Kiwanuka for the Respondent.
3. Mr. Okuni - Court clerk.
4. Mr. Kennedy Ramish Representing the Respondent.

M.S. Arach — Amoko

JUDGE

9/12/2004

Date for main suit:

Main suit is set down for scheduling conference.

Mr. Kiryowa: I apply for Court to allow the Respondent to sell off the stock. There are about 400 packets in stock.

Mr. Mugenyi: I have no objection, provided it is and of December because my clients are very concerned.

Ct: In that case, the order is varied as follows:

“The order takes effect from 1st January 2005.” To give time for the Respondents to dispose of the stock.

Sgd: M.S. Arach - Amoko

JUDGE

9/12/2004

Hearing Date: (tentative). Scheduling conference: 21/2/2005 at 10.00 o'clock.

Sgd: M.S. Arach - Amoko

JUDGE

9/12/2004