

THE UNITE REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL APPEAL NO. 8 OF 1992

WELLA A. G.....APPELLANT

VERSUS

HALAIS PROCHEME INDUSTRIES..... RESPONDENT

J U D G M E N T

BAHATI, J.

This is an appeal by WELL A.G against the decision made on 2/11/92 by the Principal Assistant Registrar of Trade Marks (herein after called the "Registrar" in the matter in which the appellants opposed the registration of Trade Mark Application no. 20916, 20918, 20930, 20933, 20936 and 20937. There are 10 grounds of appeal listed in this memorandum of appeal. In his written submission to the court, Mr. Uzanda, learned counsel for the appellants, said that the appellants are the registered proprietors of Trade Marks no. 17710 WELLA and divided in class 3 registered on 18th December, 1978 in respect of:

"Breaching preparations and other substances for laundry use, cleaning, polishing, souring and abrasive preparations, soaps, perfumery,

essential oil cosmetics, hair lotions, dentifrices, preparations for cleaning, conditioning and embellishing the hair"

Mr. Uzanda reminded the court that there were 7 separate oppositions before the Registrar and Mr. Uzanda had filed a notice of oppositions against each trade mark applications as required by the Trade Marks ordinance (Cap. 394). He cited section 21 and Rules 46-52 of the ordinance and said that each notices of oppositions must be regarded as a separate proceeding throughout.

Underground 1 Mr. Uzanda submitted that the respondents filed counter statements which were so gravely defective in substance and in form that the Registrar should have rejected them. He referred to section 21 (4), Rule 48 and Form 7 of the ordinance. Section 21(4) reads in parts;

"The applicant shall send to the Registrar, in the prescribed manner, a counter statement of the grounds which he relies for his application"

He said that both Rule 48 and Form 7 had a similar provision. He referred also to KAISHA'S application (1958) SRPC 112, at 115 and 116, which illustrates this principle. Mr. Uzanda submitted that none of the counterstatements filed contains any statement as to how any of his Marks were devised or adopted nor why they are registrable.

Mr. Uzanda further argued that the counter statement must contain at least one of the essential particulars contained in section 12(1). He said that the failure by an applicant to demonstrate a proprietary right in the opposed Mark and how the Mark came to be adopted has always been the mark of the opponent. Mr. Uzanda concluded ground no. 1 by submitting that it was

necessary for the respondents to have explained why they adopted the words WELLA and BELLASONS, the woman's head and the parallel horizontal lines rather than some other mark and they should have demonstrated that the words BELLA and BELLASONS as well as their devices are registrable under section 12. Since they did not even attempt to give any ground for adopting the marks, the Registrar should have rejected the counter statements and allowed the opposition.

On the second ground of appeal, Mr. Uzanda submitted that the Registrar should have held that all the statutory declarations were in breach of Rule 50. He said that all the statutory declarations were mere regulations of the allegations of the opponent instead of containing evidence in support of the application. Mr. Uzanda went on to submit that even the JURAT in all the declarations is incorrect as it does not comply with the Oaths (Judicial Proceedings) and Statutory Declarations Act, 1966. Mr. Uzanda castigated the Registrar's ruling on the sufficiency and correctness of the counter statements and referred to section 21(4) and Rule 48 and Form 7 again. He prayed that the statements declarations and the counter statements should be rejected.

On ground 3 Mr. Uzanda referred again to section 21(4), Rule 48 and Form 7 which require the respondents to state the grounds on which they rely as supporting their application and not to set up a defence to the opposition. He submitted that the Registrar ignored all the submissions under section 23 made before him by Mr. Uzanda. He said that this omission totally invalidates the Registrar's Ruling which should be set aside.

Mr. Uzanda went on to examine a few of the Respondent's Marks to demonstrate that they do not comply with section 12. He referred to the Trade Mark application no. 20920 "BELLA" and said that the word "BELLA" does not fall under any of the paragraphs of section 12(1) nor do the Respondents claim to have invented it. He said that his means that the Respondents must have derived it somewhere i.e. from "WELLA" which is the appellant's Mark and hence "BELLA" which is not registrable. He argued further that there are clear and obvious phonetic and visual resemblances between "WELLA" and "BELLA". He referred to the case of Berlei (UK) Ltd v. RALI Brassiere Co. Ins. [1969] 2 ALL E.R 812, which held that phonetic similarities are a very likely cause of deception and confusion. Mr. Uzanda even referred to the parallel line in "Bella" which are found in "WELLA" as proof of imitation more so since there was no explanation by the respondents as to why or how they adopt the parallel lines.

With regard to the mark being distinctive. He referred to "PERFECTION" case [1910] 1 CH 130 which held that even if a Trade Mark falls squarely under any of items (a) to (e) of section 12(1) of the Ordinance, it is not registrable unless it is also shown that the mark is also distinctive i.e. a demonstration that there is a visual or other clearly perceptible connection between the mark applied for and the proprietor. Mr. Uzanda submitted that there was no visual or other connection between "BELLA" and the proprietor.

The next trade mark examined was "WELLASON'S". Mr. Uzanda said that an analysis of this mark led to the same conclusions as in the case of "BELLA". He referred to Minnesota [1924] 41 RPC-237 at 240 as authority

for the propositions that the date which distinctiveness of a mark must be established is the date of the application.

With regard to ground no. 4, Mr. Uzanda referred to Form TM8 which is the written notice required to be given to the Registrar that a party intends to attend hearing of an opposition and a filing fee of shs. 5000/- is paid for each opposition. He also referred to section 21 and item 3 of Schedule I to show that each application opposed constitutes an opposition.

Mr. Uzanda argued that the respondents filed TM8 for one Trade Mark application only i.e. TMA no. 20916. He said that that was the only opposition in which they had a "Locus standi" and not in the other 6 oppositions. But he said, the Registrar ignored the appellant's application to him that he should rule that the respondents had no locus standi in the other 6 oppositions for which no payment was made by the respondent as required by item 3(b) of the schedule I to the subsidiary Legislation made by G.N. 256 of 1958 as amended by various GNs subsequently.

Mr. Uzanda said that the appellants paid US \$125 for each of the seven oppositions, whereas the respondents paid only shs. 5000/= despite the requirement of Rule 54 that fees to be paid for hearing of each opposition. He referred to the case of R V. Roberts [1901] 2 KB 177 on the interpretation of the word "may"

Ground no. 5 states that the Registrar failed completely to understand the very crack of the oppositions. He said that the word "WELLA" confers distinctiveness to the mark of the appellants as well as provide the necessary visual and phonetic connection between the Mark and its proprietor who is

WELLA A. G. Mr. Uzanda referred to *Word v, Butler* (1836) 3 RPC 81. He submitted that the Registrar was totally incorrect when he held that (a) the word "WELLA" is basically a device Mark and (b) the word "WELLA" is forming part of the name of the opposition, he argued that a word can never be a deceive in Trade Marks law unless it is written in a special form. He concluded that the word WELLA does not form part of the name of the appellants but it is the whole name of the appellants.

In ground 6 Mr. Uzanda submitted that the Registrar was wrong in failing to hold that the word "BELLA" so nearly resembles the word "WELLA" that the use of the two marks on the same goods or goods of the same description is likely to deceive or cause confusion. He said that the resemblance is bot phonetic and visual and he set out a list of marks which have been held by the courts to resemble so closely that they were either refused registration or found to have infringed the other mark. Mr. Uzanda submitted further that the resemblance is not just in the four letters "BELLA" but also in the devices i.e. woman's head and horizontal lines. He said that the main features of the appellant's mark are the word" WELLA", the woman's head and the horizontal lines. He said that all these 3 features had been copied by the respondents. He referred to the case of *De Cordova v, Vick Chemical Co.* [1950] 68 RPC 103 to 106. Finally, he submitted that the Registrar did not consider the nature of the goods to be sold under the respondents' marks as opposed to those of the appellants, nor the customer likely to purchase them which was a flaw in his decision.

Mr. Uzanda went on to submit that ground no. 7 was based on the passage from the Registrar's Ruling at page 5 which reads;

I would now like to dwell on the alleged worldwide fame of the mark "WELLA". I have no reason to dispute the allegation that the opponent is world famous. Yet no evidence has been brought to me that any member of public has been in fact misled by the use of the applicant's marks "BELLA". Mr. Uzanda found the Registrar to have confused issues in the above passage i.e. consideration of the fame of the mark Wella with the resemblance issue being considered together. Mr. Uzanda also found the Registrar had disregarded the principle that in opposition cases it is the applicant for registration who must satisfy the Registrar or the court that his mark raises no reasonable probability of deception. He referred to Kerly's Law of Trade Marks & Trade Names 9th Edition at page 173 in support of this submission above and also at page 474 for the proposition that neither in opposition cases nor in suits of passing off deception. He also referred to Kaisha's Application [1950] 5 RPC 112 which held that the onus on the applicant for registration is even heavier when the appellant's mark is new. Finally, on ground 7 he referred to Chesebrough-Ponds Inc. v. Gupyaka [1982] TLR 111 for the principle or rule that in opposition cases the onus is invariably on that there is no likelihood of confusion.

In ground 8 Mr. Uzanda submitted that the appellants opposed 7 applications for registrations and in accordance with section R.21 AND form TM6, the appellants filed 7 notices of opposition. Therefore, there were 7 oppositions and the Registrar should have considered each opposed mark separately, he added. He argued further that the Registrar should have compared each opposed mark with the mark of the appellants separately and considered the laws and facts thereon in order to arrive at 7 separate decisions. He went on

to argue that each opposed mark is different from each other not only visually but also in the terms under which each was accepted for registration. Some were accepted subject to disclaimers, others were not, hence the law applicable to each is not the same, he said. He referred to applications no. 20930, 20920, 20918, 20916 which were accepted subject to a disclaimer.

Furthermore, Mr. Uzanda pointed out that the goods of the opposed marks are not the same. He mentioned the goods to include perfumes, baby powders, body lotions, hair tonics and petroleum jelly. Mr. Uzanda submitted that if the Registrar had ever considered whether or not to decide the seven oppositions together, then the parties should have been consulted for their views and Ruling made rather than decide suo moto the various causes together as they were one single cause. He submitted that the Registrar appears to have regarded the oppositions as a single opposition in his decision which is incorrect.

Finally, Mr. Uzanda dealt with grounds 9 and 10. Mr. Uzanda submitted that since the Registrar had arrived at the conclusion that the appellants' Trade Mark has high reputation he had the duty to protect that Mark. He said that all signatories to the Paris Convention on for the Protection of Industrial Property 1882 of whom Tanzania is one, have a duty to protect well-known Trade Marks. He concluded after referring to Article 10 of the Paris convention that by their applications to Registrar "BELLA" and "BELLASONA" the respondents were merely attempting to "borrow" or "take a free ride" on the appellants' well established reputation for high quality goods and based on efforts, expense and investment of the appellants. He prayed the appeal be allowed with costs.

In reply Mr. C. H. Ngalo learned counsel for the respondents submitted that the appeal is legally incompetent and it should be dismissed. He said that during the application (or is it oppositions) was incompetent. He reiterated his argument before the Registrar which was in essence that the notice of oppositions was filed out of time i.e. long after the allowed period of 60 days since advertisement of the respondent 's Trade Mark in the Gazette. He went on to state that the appellant was supposed to file his Notice of opposition by 24/10/89 but he filed it on 7/12/89. On 4/11/89 the appellant wrote the Registrar requesting for extension of time to file the notice on 15/12/89.

Before the Registrar had responded the appellant filed the notice on 7/12/89. He argued that the appellant did not act on the authority of the Registrar's letter of 8/12/89 extending the time on 15/1/90/

Moreover Mr. Ngalo went on, on I. A. Imani who signed this letter of extension was not authorized officer as he is a mere clerk in the Registrar's office.

Mr. Ngalo further argued that the Registrar ruled that the oppositions was out of time, but went on to consider the issues raised in Mr. Uzanda's opposition and then rejected it with costs.

Mr. Ngalo further submitted that extension of time to file notice of application is a judicial proceed exercisable only by the person vested with the power to exercise it. He compared this situation with that in the courts where a clerk cannot grant extension. He said that Mr. Imani's letter to the appellant did not state that he had been instructed by the Registrar to write

it, which meant that he wrote it on his own motion and in his capacity. He referred to Rule 55 which states that the Registrar may extend time for filing notice of opposition. He submitted that the Registrar should have dismissed the opposition he found the same to be time barred as it was incompetent.

The other reason why the proceedings were incompetent, Mr. Ngalo argued, was that Trade Marks 20918 and 20933 was registered on 28/11/89 and so the question of opposing their registration was no longer relevant. He referred to the Registrar's letter to the appellant lawyers to that effect. He said further that the Registrar had considered his own letter he would have entertained the notice of oppositions in respect of Trade marks 20918, 20933 and 20936, and would have dismissed the opposition on proceedings.

Finally, Mr. Ngalo submitted that in the unlikely event of the court holding otherwise, he was addressing the court on the legal position regarding the Trade Marks WELLA and BELLA. He posed the question whether a person buys a product by hearing its name or by seeing it. He answered it that the buyer has to see what he is buying he posed another question whether a person seeing a label "WELLA" can confuse that with "BELLA" phonetically. He answered the question by saying that there is no phonetic similarity between the two words and that the representation between those marks is so distinct from each other that the possibility of confusion does not arise. Then he referred to the Trademarks "Bellason's BABY POWDER" and "BELLASON'S BABAY LOTION" resemblance between those marks and WELLA.

In reply to the above Mr. Uzanda submitted that the contention that the oppositions were incompetent had no merit. He submitted that the Registrar had wide discretionary powers to extend the time for doing any act or taking any proceeding under the Rules and that when the appellants filed their notices of opposition of 7/12/89 the Registrar did not reject them, but he formally accepted them apart from extending time on 8/12/89. He referred to the Registrar's letter of 30/12/89 which was signed by Assistant Registrar who subsequently heard the oppositions.

With regard to Mr. Imani who signed the letter of extension of time, Mr. Uzanda submitted that Mr. Imani was a gazette Registry Officer and that even if he had no authority to sign a letter extending time then the Assistant Registrar's letter of 30/12/89 and his subsequent conduct fully endorsed, approved and ratified the act of Mr. Imani, which the Registrar clearly had authority to do even apart from Rule 108. He submitted further that moreover Mr. Imani signed for the Registrar and that in accordance with the maxim "OMNIA PRAESUMUNTUR RITE ESSE ACTA", the fact that Mr. Imani signed for the Registrar at worst raises a rebuttable presumption that he was duly authorized by the Registrar to extend the time. This, he said, the respondent has not even attempted to rebut.

Mr. Uzanda went on to argue that if this court is inclined to hold that Mr. Imani had an authority to extend time then in the same vein it should hold that Trade Marks of the respondent were not duly accepted for registration because it was Mr. Imani who signed all the letters of acceptance. They should be rejected or there should be an order that they be expunged from the register, he submitted. Mr. Uzanda referred to section 20(2) for the

power to accept and the Rules for the power to extend time. He argued further that even the respondent was granted certain extensions of time through letters signed by Mr. Imani. Mr. Uzanda conclude that extension of time may be implied. He referred to A. I. R Commodities on the Indian Code of Civil procedure, 6th Edition Vol. 2 page 1783 and cited the principle which is as follows:

“No express order is necessary for extensions of time Such extension may be inferred from the fact that the court has actually allowed a thing to be done beyond the prescribed time”

He submitted that had the Registrar not granted an extension of time he would not have accepted the Notices of the opposition and confirmed that acceptance by a letter nor would have the heard the oppositions on merits. He argued further that an extension of time under the Trade Marks Rules cannot be judicial act. In any case, he said in Nanjibhai Prabhadas &Co. Ltd v. Standard Bank Ltd [1968] E.A 670 at 683 the Court of Appeal said (por Sir. Charles Newbold)

The courts should not treat any innocent act as a nullity, with the consequences that everything founded thereon is itself a nullity, unless the incorrect act is of most fundamental nature. Matters of procedure are not normally of a fundamental nature.

Then he cited Mano v. Arusha General Store [1970] E.A 137 at 138 the same Judge said:

“we have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that

once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in the vitiating of proceedings.”

Mr. Uzanda submitted that extension of time was such a minor procedural provision that it could hardly vitiate any proceedings.

With regard to the respondent’s contention that the Registrar made a finding that the Notices of opposition were out of time, Mr. Uzanda said that that was not true as the Registrar was merely recapitulating the respondent’s submission.

Then with regard to the merits of the applications, Mr. Uzanda referred to this letter to the Registrar of 16/1/90 and submitted that the Registrar must have reviewed his earlier decision with regard to TMA no. 20918, 20933 and 20936 with regard to Notice of opposition before registration of the same. He said that even if the three marks are still on the register the Court has power under section 35 of the Ordinance to order that by reason of their being likely to deceive or cause confusion they should be expunged from the register. He referred to the case of Berlei (UK) Ltd. V. Bali Brassiere Co. Inc. [1969] 2 ALL ER- 812.

With regard to deceptive resemblance, Mr. Uzanda referred to his earlier submission. He referred to Kenly’s Law of Trade Marks and Trade Names, 11th Edition pg. 407. He submitted further that one important test was whether the essential features of one mark have been copied or imitated by another trader. He said that since the respondent had taken, copied and

imitated the essential features of the appellant's Trade Mark "WELLA" and Device and had failed to give any explanation on how he came to adopt or devise his marks, all 8 Marks of the respondent ought to be refused registration. He prayed for the appeal to be allowed with cost.

I propose to deal first with the preliminary points raised by Mr. Ngalo. First there is the point that the appeal is incompetent because the notice of opposition was filed out of time. I do not see any merit in this point because the oppositions were entertained by the Registrar and a decision rendered albeit in favour of the respondent. There cannot be any argument now on whether the oppositions were filed out of time. The Registrar by implication ruled that the oppositions were on time and hence his dealing with them. The respondent did not cross-appeal against the Registrar's ruling that the oppositions were on time. He cannot raise this issue of time limitation now. Furthermore, I agree with Mr. Uzanda that the Registrar did not reject the opposition but he accepted them.

The other point raised by Mr. Ngalo is that the Registrar ruled that the oppositions were out of time but went on to consider them. There is nowhere in the Registrar's ruling where it is held that the oppositions were ruled to be out of time.

With regard to the argument that one Mr. Imani who is not even an Assistant Registrar gave extension of time to file the oppositions. I agree with Mr. Uzanda that Mr. Imani must be taken to have been acting under the Registrar's directive and that there was no legal requirement for the Registrar himself to sign on the letter, extending the time. I also agree that

the fact that the Registrar decided to deal with the opposition shows that he had granted the extension of time asked for. There is no evidence to the contrary and the Latin Maxim "OMNIA PRAESUMUNTUR RITE ESSE ACTA" is relevant here. The A. I. R Commodities on the Indian Code of Civil procedure, 6th edition Vol. 2 page 1783 referred to by Mr. Uzanda is pursuant. The principle cited is as follows;

"No express order is necessary for extension of time Such extension may be inferred from the fact that the court has actually allowed a thing to be done beyond the prescribed time"

I agree with the above principle which when applied to this case means that since the Registrar did not object to the oppositions being dealt with, it means that the extension of time asked for by the appellant had been granted. Even the case of Nanjibhai Prabhadas &Co. Ltd v. Standard Bank Ltd [1968] E.A 670 at 683 is relevant. It was held in the above case thus;

"The courts should not treat any innocent act as a nullity, with the consequences that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature, matters of procedure are not normally of a fundamental nature."

With respect, I agree with the above holding by the court of Appeal which is in any case binding this court. The same view was repeated in the case of cited Mano v. Arusha General Store [1970] E.A 137 at 138.

It follows from the above that there is no merit in the argument by Mr. Ngalo concerning extension of time granted.

The other point canvassed by Mr. Ngalo is that the proceedings are incompetent in respect of Trade Marks 20918, 10933 and 20936 as the same have already been registered and any opposition to them is irrelevant. But Mr. Uzanda challenged the above submission by stating that even if the above Trade Marks had been registered, that would not prevent anyone applying that the same be expunged from the register by virtue of section 35 of the Trade Marks Ordinance and under the authority of Berlei (UK) Ltd. V. Bali Brassiere Co. Inc. [1969] 2 ALL ER- 812.

I have no doubt that the submission of Mr. Uzanda is correct. Section 35 already gives the aggrieved party the right to apply for the expunging or varying the entry in the register, regarding registration of any trade mark. Therefore, it cannot be argued convincingly that the trademarks already registered cannot be challenged by the applicant. According to section 35 of the Trade Marks Ordinance they can be challenged.

So much for the preliminary points raised by Mr. Ngalo for the respondent. I will now tackle Mr. Uzanda's preliminary points. The first one is contained in the first ground of appeal namely that the learned Registrar erred in law in failing to hold that the counter statements filed by the respondents were defective in substance and in form and contained no proper grounds in support of the applications. I have considered the argument put forward in support of this ground of appeal. I have not been persuaded that the counter statements are so defective as to warrant being

struck off. The counter statements may not have been framed with all that which is required of a counterstatement but in my view they contain sufficient substance to satisfy the essential requirements of a counterstatement.

The other ground of appeal which is by way of a preliminary point is that the Registrar erred in failing to hold that the statutory declarations were defective in substance and in form and contained no evidence in support of the respondent's applications. I have read the statutory declaration of the respondents. The evidence given in the statutory declarations may not be the best for establishing the ownership but it is evidence all the same. I think the Registrar was justified in accepting the statutory declarations so that he could consider the matter in greater detail after hearing each party. Again hold that this ground of appeal fails.

The other ground of appeal which is by way of preliminary point is contained in ground no. 4. It states that the respondent having filed Form TM6 in respect of Trade Mark application no.20916 only, the Registrar should have hold that the respondent had no locus standi in respect of the oppositions to the proposed registration of TMA Nos. 20918, 20930, 20936 and 20937. I agree with Mr. Uzanda that a filing for shs 5000/= ought to have been paid for each opposition filed and heard by the Registrar. Item 3(b) and Form TM8 stipulate that for each opposition heard each party has to pay fees. In this case, it is only in respect of Trade Mark 20911 that the fee of 30 F/F was paid vide receipt no. 957855 of 15/10/90.

Since no filing fees were paid for the opposition by the respondent, the Registrar should have held that the respondent had no locus standi in respect of them. The respondent should not have been heard in respect of TMA nos. 20918, 20933, 20936 and 20937. What took place in respect of the above TMA is invalid and hence null and void.

I come now to ground no. 3. It reads that the Registrar erred in failing to hold that the respondents had failed to comply with the minimum statutory requirements for registration of Trade Marks and that therefore the opposed marks were not registrable. There is no doubt that section 21(4) of the Trade Marks Ordinance requires the applicant to send to the Registrar, after a notice of opposition, a counterstatement of the grounds on which he relies for his application, and if he does not do so, he shall be deemed to have abandoned his application. This is also the import of Rule 48 made under the Ordinance. Did the applicant comply with this requirement? In view of what I have said above, there was such attempt only in respect of TRADE Mark application no. 20911. According to Rule 50 the applicant is further required to leave with the Registrar much evidence by way of statutory declaration as he may desire to adduce in support of his application and to deliver to the opponent copies thereof. The applicants do not appear to have done so. Besides the notice of opposition filed the appellant left with the Registrar evidence by way of statutory declaration in support of the oppositions in compliance of Rule 49.

The attempt by the respondent to comply with section 21(4) and Rule 48 was not good enough as they did not state the grounds on which they relied for their own application for registration but were setting up a defence

to the opposition. There was therefore no compliance of both section 21(4) and Rule 48 let alone Rule 50. The Registrar should have hold that the applicant is deemed to have abandoned his applications if the counter statements had both been filed by payment of the fees. Ground 3 therefore succeeds.

This would appear to be enough to dispose of this matter and to allow the appeal. But for the sake of completeness, I will deal with the other grounds of appeal just in case I am among on the preliminary points. Ground of appeal no. 5 states that the Registrar erred in holding that the appellant's marks was essentially a device mark and that "the word WELLA, forming part of the name of the opponent, is therefore not an important characteristic of the mark."

I agree with Mr. Uzanda that the appellant's name is Wella A. G and that therefore the word WELLA is instantly distinctive. I also agree with the dictum in Word v Butler (1886) 3 RPC 81 where Lindley L. J. said:

"A distinctive Trade mark must mean same mark which distinguishes the goods to which it is attached as there made by the person who uses the mark."

Since the appellants are WELLA A. G. the word "Wella" connotes the goods instantly with the proprietor. The word WELLA provides the necessary visual and phonetic connection between the mark and its PROPRIETOR. This ground succeeds.

Ground 6 reads that the Registrar failed to hold that the word BELLA so nearly resembles the word WELLA that the use of the two marks on the

same goods or goods of the same description would be likely to deceive or cause confusion. I have no doubt that the word "BELLA" so resemble the "WELLA" that the use of the two Marks is likely to deceive or cause confusion since there is only the initial letters as the difference. As for the devices the respondents have used the woman's head and the horizontal lines just like the appellants. There is therefore also resemblance between the Appellant's and the respondent's Marks. This ground of appeal also succeeds.

Ground no. 7 states that the Registrar erred in failing to hold that the burden of proof was at all times upon the respondents to satisfy the Registrar that the respondent's Marks were not likely to deceive or cause confusion.

Kerly's Law of Trade Marks and Trade Names (9th edition) provides that the onus of proving that there is no reasonable probability of deception is cast on an applicant for registration of a mark. This is what was said in Chesebrough-Ponds Inc. v. GUPYAKA [1982] TLR 111. It is therefore wrong to put the burden of proof on the opponents as the Registrar did in this case. That is what was also decided in "Kaisha's Application" [1958] 5 RPC 112. Furthermore, the respondent did not prove that there is no reasonable probability of deception in the two Trade Marks WELLA and BELLA. I therefore agree that the Registrar erred and this ground is allowed.

Ground no. 8 reads that the Registrar erred in failing to consider each opposed Trade Mark separately. I agree with Mr. Uzanda that each opposed mark should have been compared with the mark of the appellants separately in accordance with section 21 of the Trade Marks Ordinance. Each opposed

mark forms one application. If the Registrar wanted to consolidate the applications, he should have sought the views of the parties before doing so.

Finally, I come to grounds no. 9 and 10. These read that the Registrar erred in failing to properly direct himself on the effect of the admitted fact that Trade Mark WELLA is a famous Mark, and he erred in deciding the oppositions against established principles of law relating to registration of Trade Marks. There is no doubt that the Registrar had a duty to protect a well-known Trade Mark in accordance with the Paris Convention for the Protection of industrial Property (1983), after the Registrar had acknowledged that WELLA was world famous. I agree with Mr. Uzanda that the respondent by their applications to register "BELLA" and "BELLASONS" were merely attempting to borrow on the appellants' well established reputation for high quality goods. This was certainly unfair competition.

All in all, this appeal succeeds. The Ruling of the Registrar is set aside and judgment entered in favor of the appellants by refusing registration to all the opposed Trade Marks of the respondents. Costs awarded in favour of the appellants in this court and before the Registrar.

A. BAHATI

JUDGE

1/7/1994

Coram: Bahati, J.

Parties: -absent-served

Cc: Joyce Ndondo

Order: Judgment delivered in the absence of the parties who were duly served.

A. BAHATI

JUDGE

1/7/1994

I certify that this is a true copy of the original Judgment.

SENIOR DEPUTY REGISTRAR

HIGH COURT