

IN THE SUPERIOR COURTS OF THE GAMBIA



IN THE HIGH COURT OF THE GAMBIA

HC/715/20/CO/096/C1

BETWEEN

MALICK CAMARA (Trading as Nyanga Bantang

General Merchant and Sports

Partner Sport Saller German).....PLAINTIFF

AND

OUSMAN JALLOW.....1ST DEFENDANT

EBRIMA JALLOW.....2ND DEFENDANT

CASE CALLED: TUESDAY 31ST OCTOBER, 2023.

BEFORE HON. JUSTICE F. A. ACHIBONGA

PLAINTIFF – ABSENT

DEFENDANT – PRESENT

M.O.S BATCHILLY WITH ADAM H.J FAAL FOR THE PLAINTIFF

I. JALLOW FOR THE DEFENDANT – PRESENT

JUDGMENT

INTRODUCTION

On 09/12/20, the plaintiff filed a writ of summons against the defendants seeking the following reliefs:

1. General Damages for wrongful imitation of the plaintiff's Trademark; SALLER bearing registration Number GM/M/2006/00254.
2. An injunction to restrain the 1st and 2nd defendants whether by their directors, officers, servants, agents or otherwise howsoever from using or continue to do the following acts namely:
 - i. Infringing the plaintiff's registered Trademark Number GM/MM/2006/00254 SALLER sporting articles.
 - ii. Use of the plaintiff's trademark SALLER sporting articles on Gambia National Football Team jersey depicting The SALLER Logo.
 - iii. Passing off or attempting to pass off the sporting articles on Gambia National Football Team jersey depicting The SALLER Logo coloured white on a red jersey of the defendants as for the plaintiff's jersey.
3. An order for delivery up to the sheriff and destruction of all of the defendants goods bearing the Trademark SALLER sporting articles on the Gambia National Football Team jersey depicting The SALLER Logo coloured white.
4. An inquiry as to damages or an account of profits and payments of all sums found due upon taking such inquiry or account.
5. Interest at the rate of 25% per annum on all amounts found to be due pursuant to section 7 of the laws of England application Act. Cap 5:01.
6. Cost
7. Further or other reliefs.

Relief 2 (iii) has been left out on purpose as it is a repetition of relief 2 (ii).

On 30th June 2023, the court struck out the name of the 2nd defendant from the suit and the suit continued against the 1st

defendant only. This judgment is therefore between the plaintiff and first defendant.

After the 1st defendant was served with the originating processes and the time limited for him to file his defence had lapsed and no defence filed by him or on his behalf, the plaintiff pursuant to the 2013 Amendment Rules – order 23 (14) 5 (as amended) filed a motion on notice on 6/10/22 for judgment, but before the plaintiff's case for judgment could be heard, the 1st defendant filed an application on 25/10/22 seeking to dismiss Relief 1 endorsed on the writ of summons on grounds that it discloses no cause of action against the applicant and that it is scandalous, frivolous, embarrassing to the applicant and an abuse of the court process. On 14 February 2023, this court dismissed the said application.

This Judgment is therefore in respect of the application for Judgment filed on 6/10/22 and is therefore a Judgment on the merits pursuant to Order 23 (14) 5 of the High Court (Amendment) Rules, 2013.

BURDEN OF PROOF

Being a Judgment on the Merits, the Plaintiff can only succeed if he is able to discharge the burden of proof cast upon him under the Evidence Act, particularly under sections 141-143. By section 142 of the Evidence Act, the burden of proof lies on the person who will fail if no Evidence at all were given on either side.

Since the Defendant has not filled a defence and no evidence is given by him or on his behalf and he has therefore made no assertions or claims before the Court, the Plaintiff who has a Claim and made assertions before the court will be the one to

fail if no evidence were led by him and thus bears the burden of Proof as regards his claim. This is the burden of producing evidence or the evidential burden and when same is cast upon a party, it places an obligation on that party to introduce sufficient evidence to avoid a ruling against him on an issue or claim or assertion. It is true that this burden is not static and does shifts but it only shifts when the party with the initial burden is able to successfully discharge that burden.

In this case therefore since the Defendant has not filed a defence and no evidence led by him, there won't be a scale to balance the respective claims and or assertions by the parties, but since the Judgment is one on the merits, the Plaintiff still bears at least the evidential burden of producing sufficient evidence to avoid his claims or any of them failing. The case of the Plaintiff as per his claim, exhibits, affidavit statements and the cross examination done for and on behalf of the defendant shall be analysed bearing this in mind.

The Defendant has not filed a defence and ordinarily no issues are joined between the parties and the Plaintiff's claims are deemed not to have been denied by the defendant and so ordinarily the Plaintiff's claims ought to be deemed admitted and the Plaintiff be entitled to Judgment. It is however not as straight forward as that. This is not a default Judgment simpliciter that can be set aside if just cause is shown and the case subsequently determined on the merits. In this case, the Judgment is one on the merits, which can only be subject to Appeal or Review, unless of course if it turns out the Judgment is void. Being a judgment on the merits, the Plaintiff must be entitled to same based on the sufficiency and cogency of the evidence on record and not merely because the suit is uncontested. Thus where the Plaintiff fails to introduce sufficient evidence on an issue to warrant the burden shifting to

the Defendant, the Plaintiff must fail on that issue and of course, being a civil suit, the standard of proof is that on the balance of probabilities.

EVALUATION OF EVIDENCE

The plaintiff's case is that he is the sole distributor of SALLER products in The Gambia and that he registered the trademark SALLER under the industrial property Act and the industrial property Regulations 2010. Being the registered owner of the trademark, SALLER, he in 2019 signed a partial sponsorship agreement with The Gambia Football Federation, where he was to supply the federation, SALLER sporting articles at a partial discount. The plaintiff contends that in June 2020, he came across an advertisement on face book, advertising the sale of the National team jersey with the SALLER logo purporting to be coming from a German company, which jerseys appeared to be the exact replica of the jerseys he has exclusive right of distributorship over. According to the plaintiff, the defendant subsequently contacted the general manager of his business, one Mikailu T. Secka and admitted to him he was the one selling the imitated SALLER sporting goods on Facebook and that at the time he was bringing the goods he did not know it was illegal to do so and that even though Mikailu advised him to stop, the use and circulation of the fake jersey persist. The plaintiff contends further that whilst he sells an original SALLER jersey for D1000, the imitated jersey is being sold for D350.

By Section 27 of Cap 95:01, a person or entity can only have an exclusive right to a mark by registering the said mark in accordance with the provisions of Cap 95:01. Once a person or entity register's a mark under the Act, he or she is entitled to

certain rights conferred on him or her by virtue of section 31 of the Act. By section 31 of the Act, a registered mark owner is protected against the use of the registered mark by another person or entity other than the registered owner without the latter's agreement, which right can be enforced in court by the registered owner against any such person or entity who infringes the registered trademark by using same without his or her agreement or who performs acts which makes it likely that the infringement will occur. The fact of registration of a mark is a question of fact not law.

In this case, the plaintiff tendered into evidence exhibit A in which the plaintiff was permitted to be the sole distributor of SALLER products in The Gambia. The plaintiff also tendered into evidence exhibits B – E1 in support of his case. Exhibit C is an application by the plaintiff for the renewal of the registration of a mark dated 16th June, 2020. The description of the mark for which the application for renewal was made is SALLER. By exhibit B, the registration of the said trade mark was renewed for an additional term of 10 years from the expiry of the previous term which from both exhibits B and C is 27th June, 2020. Per exhibit B, the owner of the SALLER logo was stated to be Nyanga Bantang General Merchandise, the plaintiff herein. Thus, though the plaintiff did not tender the original registration of the trade name SALLER into evidence, exhibit B is conclusive that it has previously been registered; all exhibit B did was to renew it before it expires so it can continue to have validity. It has to be noted that the fact of registration of the SALLER name in favour of the plaintiff has not been denied or challenged by the defendant.

I am satisfied on the totality of the evidence before me that the plaintiff is the registered owner of the trade name SALLER and

he is the sole distributor of SALLER products in The Gambia and I so hold.

The next issue is whether or not the defendant sells jerseys with the SALLER logo.

The plaintiff contends that the defendant advertised and has been selling jerseys with the SALLER logo as national team jerseys without his consent. The plaintiff tendered into evidence exhibits D, D1-D3 being samples of the original SALLER jerseys he sells and exhibits E and E1 being the jerseys brought into the country by the defendant and sold in The Gambia.

A cursory look at exhibits E and E1 shows clearly that they have the SALLER logo inscribed on them and they could easily pass off as the jerseys per exhibits D, D1-D3. The fact of exhibits E and E1 having been advertised on Facebook and being sold in The Gambia has not been denied nor challenged by the defendant. On the contrary, exhibits E, E1 and the evidence of pw1, corroborates plaintiff's evidence on the issue, if same requires corroboration.

The plaintiff in paragraph 14 of the statement of claim avers that the defendant contacted his manager, Mikailu T. secka and admitted to him that he was the one selling the imitated SALLER sporting goods on Facebook. Also, in paragraph 15 of the statement of claim the plaintiff averred further that the defendant also informed the said Mikailu that at the time he imported the goods from China to The Gambia, he did not know it was illegal to do so. The plaintiff called the said Mikailu as pw1 and he gave evidence confirming the averments in paragraphs 14 and 15 of the statement of claim. In any case, the defendant did not file a defence to the plaintiff's claim and therefore the averments contained in the statement of defence

are not denied and are deemed to be admitted by the defendant. This is more so when the plaintiff and his witness have not been challenged on the issue under cross examination. The principle of law is that where averments are not denied or when a party has given evidence of a material fact and was not cross examined on that fact by the other party, that is where same is not challenged under cross examination; the latter is deemed to have admitted that fact and the party needs not call further evidence of that fact – **See *The Ghana cases of Fori v. Ayirebi [1966] GLR 627, SC, Edmund Danso v. Moses Adjei [2013] GMJ 71 and Daneilli Construction Ltd v. Mabey & Johnson Ltd [2007-2008] 1 SCGLR 60.***

The defendant having failed to deny the averments in the statement of claim nor challenge the plaintiff or PW1 on the fact that he admitted to bringing the goods as per exhibits E and E1 to the Gambia, he is deemed to have admitted that fact and no burden is therefore cast upon the plaintiff to call further evidence in prove of that fact.

I am mindful of the exceptions to the rule on failure to cross examine/challenge evidence under cross examination as in the case of a party not represented by counsel against whom the fact is alleged in evidence or even if represented by counsel by advance notice to the opponent that the allegation of fact will be vehemently resisted. Suffice it to say though that none of the exceptions to the rule on failure to cross examine on an issue is applicable in this case. Indeed, in appropriate cases, even the mere assertions of a single witness on oath will suffice to discharge the burden of proof if the witness is credible. Thus in the Ghana Case of ***Takoradi Flour Mills v Samir Faris (2005-2006) SCGLR 882***, it was held that “*a tribunal of fact can decide an issue on the evidence of only one party. A bare*

assertion on oath by a single witness might in the proper circumstances of a case be enough to form the basis of judicial adjudication. The essential thing is that the witness is credible...”

In this case, having seen the witnesses for the brief period they were in the box coupled with the processes filed by the plaintiff and the exhibits, I have no basis to doubt the credibility of the plaintiff and his witness.

On the totality of the evidence before the court, I hold that it is the defendant who distributes and or sells jerseys with the SALLER logo as per exhibits E and E1 within The Gambia without the plaintiff's consent as the registered owner of the SALLER logo and is therefore liable to the plaintiff.

CONCLUSION

The plaintiff claims among other things general damages for the wrongful use of his trademark SALLAR. Having found that the defendant distributes and sells jerseys with the SALLER logo on them without the consent of the plaintiff, the latter is entitled to damages.

General damages are such as the law will presume to be natural or probable consequences of the defendant's act. They arise by inference of the law and need not be proved by evidence. Special damages on the other hand are such a loss as the law will presume to be the consequences of the defendant's act, but depend, at least on the special circumstance of the case. They must therefore always be explicitly claimed on the pleadings and specifically proved – ***See the Ghana cases of A.G v. Faroe Atlantic Co. Ltd (2005-2006) SCGLR 271 at 290 per Dr. Twum, Jsc and***

Delmas Agency Ghana Ltd v. Food Distributors Int. Ltd (2007-2008) 2 SCGLR 748. The plaintiff did not lead evidence on the damage or loss occasioned him by the conduct of the defendant, but that in itself should not deprive him of a claim for general damages as the law will presume same to be the natural or probable consequence of the defendant's act; the caveat however is that in such circumstance only nominal damages can be awarded. In the circumstances of this case and given the nature of goods involved and the prices at which they were sold, I award the plaintiff D30,000 as general damages against the defendant.

By relief 4 as claimed, the plaintiff is seeking an inquiry as to damages or an account of profits and payments of all sums fund due upon taking such inquiry or account. I do not know if by this claim the plaintiff is requesting the court to order an enquiry under its supervision. If that is the case, no information has been furnished the court as to who is competent to carry out such an inquiry. More so, I do not see how the court can supervise the enforcement of such an order, if made and since the courts do not make orders they can not enforce, I decline to make such an order.

On the issue of an order for accounts of profits as an alternative, there is no material or evidence before me to warrant the making of such an order. In my view relief 4 is speculative and this court should not be lured into making speculative orders. Relief 4 is dismissed.

Relief 5 is a claim for interest at the rate of 25% per annum on all amounts found to be due pursuant to section 7 of the law of England Application Act cap 5:01. Having rejected relief 4 as stated above, I exercise my discretion under section 7 of Law of England application Act to refuse the award of interest on the

general damages awarded above per relief 1. Relief 5 is also dismissed.

In sum, save reliefs 4 and 5 as endorsed on the writ of summons, the plaintiff's claim succeeds and same is hereby granted. For the avoidance of doubt, the plaintiff is entitled against the defendant the following;

1. General damages in the sum of D30, 000
2. The defendant , whether by himself, directors, officers, servants, agents or howsoever described are hereby restrained from using or continue to infringe the plaintiff's trademark SALLER and in distributing and or selling any sporting articles of goods with the SALLER logo in The Gambia; provided the registration of the trademark SALLER by the plaintiff remains valid.
3. It is hereby ordered that the defendant delivers up all goods and sporting articles bearing the SALLER logo in his possession to the sheriff within 10 days for purpose of destruction in a manner to be determined by the sheriff.
4. Costs in the sum of D20,000 is awarded in favour of the plaintiff against the defendant.

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HON.JUSTICE F.A. ACHIBONGA
(JUDGE)
31/10/2023

**ISSUED AT BANJUL UNDER THE SEAL OF THE COURT AND THE
HANDS OF THE PRESIDING JUDGE THIS 31st OCTOBER, 2023**