

O-254-14

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK REGISTRATION 2552097
IN THE NAME OF TARIQ YOUNIS
IN RESPECT OF THE TRADE MARK:**

kilimanjaro

IN CLASS 43

AND

**AN APPLICATION TO RECTIFY THE REGISTER (UNDER NO. 84697) BY
APOLLO APOLLINAIRE OUEDRAOGO**

THE BACKGROUND AND PLEADINGS

1) Registration 2552097 is for the trade mark "kilimanjaro" in respect of various services in Class 43 including "restaurant services". It currently stands in the name of Mr Tariq Younis. An application for rectification was made by Mr Apollo Apollinaire Ouedraogo on 4 March 2013 and relates to a dispute over ownership.

2) Mr Ouedraogo requests that the register be rectified to record himself as the proprietor. He claims to be the rightful proprietor of the mark and that the mark was never assigned to Mr Younis. He claims that the form TM16 used to record a transfer of ownership at the Register was filed without his knowledge. He identifies the following to support his claim:

- It was never signed by himself and his purported signature is a forgery;
- It contains an incorrect e-mail address for himself;
- despite never describing himself as such, he is recorded as being a "director".

3) In his counterstatement, Mr Younis claims that he purchased the mark from Mr Ouedraogo and that this was by way of a verbal agreement. He alleges that Mr Ouedraogo then began demanding more money but when he refused to pay, they "stopped talking" and their "friendship ended there". Regarding the alleged inconsistencies on the Form TM16 (Application to record a change of ownership), he claims that Mr Ouedraogo has various e-mail addresses and does not understand why Mr Ouedraogo would claim it is not the correct one. His explanation as to why Mr Ouedraogo was recorded on the form as a "director" is that he must have copied what Mr Younis had put in respect to himself. Mr Younis also claims he was present when Mr Ouedraogo signed the form and that he took a photocopy of his passport at the time in case "he tried to cause any issue like this".

4) The Registry wrote to Mr Younis stating that the defence appeared to be without merit because it is a requirement of Section 24(3) of the Trade Marks Act, 1994 ("the Act") that an assignment is not effective unless it is in writing. In response, Mr Younis, submitted (and later also provided under cover of a witness statement) a photocopy of a hand written receipt that appears to confirm that he purchased the trade mark from Mr Ouedraogo. The Registry accepted this as addressing its concerns regarding compliance with Section 24(3) of the Act.

5) Both sides filed evidence in these proceedings and both sides ask for an award of costs. The matter came to be heard on 22 May 2014 when Mr Younis did not attend and was not represented and Mr Ouedraogo was represented by Mr Jonathan Moss of Counsel, instructed by Square One Law LLP.

Mr Ouedraogo's Evidence

6) This takes the form of a witness statement by Mr Ouedraogo himself and also a further witness statement by Mr Steven Porter, Management Surveyor with a company called Whittle Jones Chartered Surveyors.

7) Mr Ouedraogo states that he has been approached Mr Younis and his associates on a number of occasions where they made offers to enter into a partnership. Mr Ouedraogo states that he rejected these approaches.

8) In 2011 he began operating a restaurant business named "kilimandjaro" (spelt slightly differently to the mark at issue, with the letter "d" included in the restaurant name but not in the contested mark), Mr Ouedraogo contacted the lease holder of the premises and negotiated a sub-lease and over a period of 12 months, his business became more successful.

9) Following a family bereavement, Mr Ouedraogo decided not to open the restaurant on 5 December 2012. That evening he had a visit from Mr Younis and three other men and Mr Ouedraogo let them in assuming they had come to pay their condolences. Mr Ouedraogo claims that one of the men left the meeting to unlock the front door and let in approximately fifteen police officers. Allegedly, the police officers claimed that Mr Younis was the owner of the restaurant and Mr Ouedraogo was removed from the premises.

10) It is claimed that Mr Younis subsequently changed all the locks, has refused to permit Mr Ouedraogo access or to return personal possessions from the premises, including his passport and "a considerable quantity of Kilimandjaro sauce", the recipe and ingredients of which are secret.

11) Mr Ouedraogo claims that he has subsequently learnt that the premises have been leased to a company called Kilimandjaro Limited, of which Mr Younis is the director.

12) Mr Ouedraogo alleges that Mr Younis has forged the form TM16 to record the assignment on the trade mark register and also the receipt recording the purchase of the mark. He identifies a number of inconsistencies that demonstrate that these documents are forgeries:

Form TM16

- the signature is a forgery;
- his name is incorrectly stated as "Apollinaire Ouedraogo" and not "Apollo Apollinaire Ouedraogo";
- his status is erroneously given as "director" despite the mark being registered in his own name and not in the name of a company.

The receipt

- the signature is a forgery;
- his name is misspelt as “Appollo” in the first mention of his name;

13) He further observes that Mr Younis has provided a photocopy of the receipt and not the original (despite being subsequently directed to submit the original, Mr Younis failed to do so).

14) Mr Rafiq Ali filed a witness statement in support of Mr Younis, where he says he was present at a meeting between Mr Ouedraogo and Mr Younis held at Mr Younis’ office at about 14.30 on 28 November 2012, and where the “exchange” took place (see paragraph 21, below). In response to Mr Ouedraogo denies attending any such meeting and claims that Mr Ali is in collusion with Mr Younis and is the manager of the restaurant at issue and is dependent upon the continuation of that business in Mr Younis’ hands. Mr Ouedraogo points out that Mr Ali is not shown as a witness in the alleged receipt relating to the alleged sale of the mark.

15) In response to Mr Ali’s further claim that he has been the manager of the restaurant since November 2012, this is disputed by Mr Ouedraogo. He explains that he was “unlawfully evicted” from the restaurant only on 5 December 2012 and that he never had any relationship with Mr Ali. He alleges that Mr Ali has falsified the date to support his untruthful evidence that he was involved with the restaurant in time to have witnessed the purported transaction that took place on 28 November 2012. Mr Ouedraogo also observes that Mr Ali refers to the incorrect “kilimandjaro” spelling when referring to the mark.

16) At the time he was allegedly at the meeting with Mr Younis where the mark was sold, Mr Ouedraogo states that he was at a different location attempting to identify a suitable industrial unit for the manufacture of his Kilimandjaro sauce. Mr Porter, in his witness statement, confirms that he met with Mr Ouedraogo at the location. His diary records that the appointment was at 15:00 on the day in question and that Mr Ouedraogo waited in a white car until Mr Porter had finished his previous appointment, after which he showed Mr Ouedraogo two properties. Mr Ouedraogo questions why would he be looking to expand his Kilimandjaro sauce business if he was selling the mark.

17) Mr Ouedraogo also draws attention to two further marks in his name; 2551261 kilimandjaro; and 2536644 KILIMANDJARO sauce (and device). Both are registered. He suggests that if Mr Younis’ version of events are correct then these marks would also have been assigned.

18) At pages 19 and 20 of Mr Ouedraogo’s exhibit are photocopies of several pages of the menu he used in his restaurant. He points out the striking similarities to the menu provided by Mr Younis at his Exhibit TBY6.

19) Mr Ouedraogo also claims that, since commencing these proceedings, he has received death threats from Mr Younis and one of his associates and his car has been vandalised.

Mr Younis' evidence

20) This takes the form of four witness statements, one by Mr Rafiq Ali, manager at Kilimandjaro Limited and three by Mr Younis himself, two dated 17 July 2013 and a third dated 22 October 2013.

21) In his witness statement, Mr Ali states that he was present when the purchase of the "kilimanjaro" mark took place. He claims that this was at approximately 14:30 on 28 November 2012 at Mr Younis' office. He states that £1000 was paid in cash to Mr Ouedraogo.

22) In his witness statements, Mr Younis states that he is managing director of Kilimandjaro Ltd, a company registered on 3 April 2012. He states that the lease for the premises where Mr Ouedraogo based his restaurant "became available" in 2012 because Mr Ouedraogo "was not going to be continuing with the lease". He proceeded to take out the lease from Tim Food Lu, Wong Yuk Li and Just Desserts (North East) Ltd and a copy is provided at Exhibit TBY8. The lease is dated 28 November 2012.

23) Mr Younis explains that he had discussed with Mr Ouedraogo that once the lease purchase was complete, he would purchase the mark from him. He states that this also took place on 28 November 2012. He also states that he took a photocopy of Mr Ouedraogo's passport. At Exhibit TBY7, he provides a photocopy of a hand written receipt shown below:

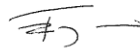
I Apollo Apollinaire Ouedraogo have received
 the sum of £1000 (ONE THOUSAND POUNDS ONLY)
 for the TRADEMARK "KILIMANJARO" from
 Tariq Younis (Purchaser).

Apollo Apollinaire Ouedraogo
 21 The covert
 Coulby Newham
 Middlesbrough
 TS8 0WU



28/11/12

Tariq Younis
 90 Newport Rd
 Middlesbrough
 TS1 5JN



28/11/12

24) In his second witness statement, dated the same day as his first statement, Mr Younis provides evidence of use of the contested mark in 2012 and 2013, and provides some information regarding turnover and promotion costs. He states that as a result of this use, the mark "is uniquely [...] associated with Kilimandjaro Limited".

25) The applicant sought, and was granted leave, to appoint a hand writing expert in an attempt to demonstrate that Mr Ouedraogo's signatures were forgeries on the Form TM16 filed by Mr Younis and on the hand-written receipt adduced by him. Following the granting of this, the Registry directed that Mr Younis provide the original of the hand-written receipt. In response, Mr Younis filed a further photocopy (printed on the reverse side of his letter) and not the original. His third witness statement was then submitted where he states that he believed that he sent the original document with his witness

statement of 17 July 2013 and that he only has a copy on file. He also provided a photocopy of Mr Ouedraogo's passport (at Exhibit TBY1A) for use in comparing the signature thereon with that on the receipt. This exhibit is covered by a confidentiality order.

Additional evidence from an expert in support of Mr Ouedraogo

26) At a case management conference, the applicant was granted leave to instruct a independent hand writing expert to provide a report regarding the authenticity of his signatures as they appear on the Form TM16 and on the hand-written receipt recording the sale of the mark to Mr Younis. Mr Younis was offered the opportunity to jointly appoint such a witness and to bear half the costs, but he declined to do so.

27) The report is by Ms Kate Strzelczyk a Forensic Document Examiner for Forensic Document Examination Services. Ms Strzelczyk explains that she has been a specialist in the field of forensic document for thirteen years and she is a registered forensic practitioner and an expert witness. In particular, she states that she specialises in the analysis of handwriting and signatures, typescripts, typewriters, printed and photocopied documents, suspected counterfeit documentation and the examination of altered, erased and obliterated documents and indented impressions of writing.

28) Ms Strzelczyk was asked to examine the Form TM16 and the photocopied hand-written receipt (the latter shown at paragraph 23 above) and in particular the alleged signature of Mr Ouedraogo and to compare them with the reference signature that appears on a photocopy of the identification page of Mr Ouedraogo's passport as provided by Mr Younis at his Exhibit TBY1A, a new, original UK passport in Mr Ouedraogo's name and a further twelve original pages each bearing a reference signature by Mr Ouedraogo, taken by request for the purposes of the her investigation. Ms Strzelczyk states that, following analysis, she accepts all the reference signatures have been written out by just one person and accepts that they are the signatures of Mr Ouedraogo.

29) Despite the relatively poor quality of the copy (no request was made to access the original held at the Registry), Ms Strzelczyk's opinions in respect to the signature on the Form TM16 are as follows:

- there is only a limited visual similarity;
- there are a number of very significant differences between the shape, style and construction;
- it is most unlikely that the signature is that of Mr Ouedraogo;
- this equates to very strong evidence that the signature is a forgery.

30) In respect to the copy of the hand written receipt, Ms Strzelczyk's opinions are:

- it is difficult to reliably assess the fluency of the signature due to the poor quality of the document;

- there are a number of visual similarities such that the signature must either be genuine or a good attempt to copy it;
- there are a number of differences between the shape, style and construction when compared to the reference signatures;
- given the significance of the differences, there is evidence that the signature was not written out by Mr Ouedraogo and it is unlikely that he did so;
- this equates to moderate evidence that the signature is a forgery.

31) Ms Strzelczyk also states that she is unable to determine if the two contested signatures share common authorship.

DECISION

32) Rectification claims of this manner are governed by Section 64 of the Act. This reads:

“64. - (1) Any person having a sufficient interest may apply for the rectification of an error or omission in the register:

Provided that an application for rectification may not be made in respect of a matter affecting the validity of the registration of a trade mark.

(2) [...]

(3) Except where the registrar or the court directs otherwise, the effect of rectification of the register is that the error or omission in question shall be deemed never to have been made.

(4) [...].

(5) [...].”

33) It is common ground between the parties that at least until 28 November 2012, Mr Ouedraogo was the registered proprietor of the contested mark and he operated a restaurant business under that name. Consequently, he has the requisite interest in this matter sufficient for the purposes of Section 64(1) of the Act.

34) At the hearing, Mr Moss submitted that the evidence of forgery has gone unanswered by Mr Younis, other than by bare assertions. Further, he submitted that the expert evidence alone is sufficient that the rectification should be made, however, he also pointed to a number of additional factors that, he submits, support the proposition that the signatures are forged. In this respect, he identified:

- the name “Apollo” is mis-spelt as “Appollo” on the hand-written receipt;

- the Form TM16 states that Mr Ouedraogo was a “director” despite the mark being registered in his own name;
- Mr Ouedraogo’s own statement confirms that it is not his signature and this has not been challenged by the other side by way of, for example, cross examination;
- The hand-written receipt was only produced by Mr Younis when the Registry informed the parties that Mr Younis’ assertion that the assignment was verbal was not an acceptable ground in light of the provision in Section 24(3) of the Act;
- When directed to do so, Mr Younis was unable or unwilling to provide the original hand-written receipt;
- Mr Ouedraogo’s other two “kilimandjaro” marks linked to the business and brand were not transferred;
- Mr Younis had access to Mr Ouedraogo’s passport and therefore, his signature;
- Mr Younis has a history of conducting dealings in secret and behind Mr Ouedraogo’s back, such as the taking out of the lease without Mr Ouedraogo’s knowledge. This led to Mr Ouedraogo’s exclusion from the premises;
- Mr Ouedraogo was not present at the time when the alleged receipt was signed, as corroborated by Mr Porter;
- A figure of £1000 was not a lot of money for a mark related to such a business.

35) Firstly, in his third witness statement, Mr Younis states that he provided the original of the hand-written receipt at Exhibit TBY7. However, the Registry has only a photocopy on file. Upon closer inspection, the document also has the exhibit number written upon it in what appears to be the same handwriting that appears on the other exhibits. Further, this number is written in pencil indicating that it was a photocopy that was used by Mr Younis with the exhibit number applied to this photocopy. This counters any suspicion that the Registry received the original but misplaced it. There is no reason why, for example, the Registry would have photocopied the original (and then misplaced it) and, even if it had, the exhibit number would have also been photocopied. I have re-checked other copies of the document on file (that were filed outside the formal evidence), and these too are photocopies. Finally, Mr Ali also produced the document at his Exhibit RA1. Once again, I can confirm that this is a photocopy. All of this is potentially significant because Mr Younis was directed to file the original to assist the expert witness in her analysis of the document and his failure to do this lends support to Mr Moss’ submission that this was an attempt to hinder the work of the expert.

36) Mr Ouedraogo’s version of events is that he was expelled from the premises from which he ran his restaurant and has been denied access since, despite personal possessions being on the premises. From that date, Mr Younis would have had access to Mr Ouedraogo’s passport. The Registry first had sight of the hand-written receipt when a photocopy was sent under cover of a letter from My Younis, dated 14 May 2013. This is potentially significant because:

- a. the allegation is that Mr Younis fabricated the document in response to the letter from the Registry, dated 25 April 2013, that stated his originally pleaded defence

that the mark's assignment was conducted verbally did not meet the requirements of Section 24(3) of the Act, and;

- b. the expert's view on Mr Ouedraogo's signature that appears upon the document must either be genuine or a good attempt to copy it. Of course, if Mr Younis, by this time, was in possession of Mr Ouedraogo's passport, then he had a reference signature to copy.

37) Considering the expert evidence, Ms Strzelczyk concluded that there was "very strong evidence to support" the view that Mr Ouedraogo's signature on the Form TM16 is a forgery. Even from a lay-person's perspective, the two signatures are visually very different. In respect to the second allegation of forgery, namely the hand-written receipt, the expert is less conclusive, stating that there is "moderate evidence" that it is a forgery. However, she goes on to state that she considers it unlikely that the signature was written by Mr Ouedraogo.

38) Ms Strzelczyk's opinion regarding these two signatures is, as Mr Moss submitted, sufficient to cast doubt on the whole issue of the assignment. But as Mr Moss pointed out, this is further supported by a number of additional facts and circumstances (see paragraph 34 above). I agree. Individually many of these circumstances can have a plausible and innocent explanation, however, when taken together and also with the opinion of the expert and the corroborative evidence produced by Mr Ouedraogo, collectively they represent a compelling matrix of evidence in support of Mr Ouedraogo's pleaded case. Mr Younis has chosen not to challenge Mr Ouedraogo's evidence that counters his version of events.

39) Taking all of this into account, I have little hesitation in finding that the Form TM16 was filed without the consent or knowledge of Mr Ouedraogo and that he did not sell the mark to Mr Younis. Consequently, I find that Mr Ouedraogo is the correct registered proprietor of the mark and the register should be amended to reflect this. The application for rectification is successful.

COSTS

40) At the hearing, Mr Moss submitted that Mr Ouedraogo should be entitled to his full costs. He argued that if I was to find that the key signatures present in the key documents in the proceedings had been forged, then the rectification would not have been required. He made reference to a schedule of costs that had been provided to the Registry. This has not been received. However, I concur with Mr Moss that this is a clear case where it is appropriate to depart from the published scale of costs. I have found that both the Form TM16 and the hand-written receipt carried forged signatures. In the absence of these documents, the proceedings would not have been required. Mr Younis' actions are a clear attempt to defraud Mr Ouedraogo of his mark.

41) In light of this, I invite Mr Ouedraogo to submit a schedule of costs. He should provide this within 14 days of the date of this decision. Mr Younis will then be permitted

a further 14 days to submit his own comments on the issue of costs. I will then issue a further decision on costs.

42) The date shown below marks the beginning of the period for appeal against my decision on the substantive matters.

Dated this 10th day of June 2014

**Mark Bryant
For the Registrar
The Comptroller-General**