

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

HCT - 00 - CC - CA - 12 - 2005

SHRI CHANDER MOHAN

KAPOOR T/a BRITISH HERBAL COSMETICS APPELLANT

VERSUS

AMIN CHAVANIA T/a JASKAR ENTERPRISES RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

This is an appeal from the ruling of the learned Assistant Registrar of Trademarks (hereinafter referred to as the "Registrar") Ms. Fiona Bayiga in the matter of Trade Mark No. 26496 "Eldena" in the name of Jasker Enterprises. In that matter the Appellant had sought inter alia to expunge the said mark from the Register of Trademarks.

The brief facts of the matter are that the Respondents on the 24th March, 2004 filed an application to register the mark Eldena as cosmetics under part A class 3 of the Trade Mark Act. The mark was advertised in the Uganda Gazette on the 19th March 2004. A company called M/s Euro Kent then wrote to the Registrar expressing their

intention to oppose the registration of the mark but did not formally pursue the matter as required by the Act. The mark was then registered on the 28th July 2004.

Shortly thereafter in a related matter a Civil Suit No. 271 of 2005 was filed in the Commercial Division of The High Court under the names;

Amin Charania T/a

Jaskar Enterprises..... Plaintiffs

Versus

1. Aruu Rastogi

2. Anand Goel both T/a Duvon Impex Defendants

In that suit I issued a temporary injunction against the defendants from trading in the goods pending the disposal of the suit. I however then stayed that suit on learning that there was a pending application before the Registrar of Trademarks (hereinafter referred to as "*Registrar*") to cancel the Registration of the Mark "*Eldena*" which if successful would directly impact on that suit.

It is this application before the Registrar that this appeal lies from. The Appellant in this appeal is Shri Chander Mohan Kapur T/a as M/s British Herbal Cosmetics of India.

The Appellant applied to the Registrar under Section 34 of the Trademark Act for orders for the removal of the Trademark No. 26496 "*Eldena*" from the Register or the rectification of the said register by removing the name Jaskar Enterprises Ltd as proprietor and inserting British Herbal Cosmetics Ltd. The main ground among others is that the current Appellant was the manufacturer of the product "*Eldena*" in India

for which it had a pending mark for registration again in India. It is significant to note that the 2nd defendant in HCCS 271 of 2005 was the one who prosecuted the application before the Registrar for removal by virtue of Power of Attorney given to him by M/s British Herbal Cosmetics.

The Registrar on the 19th August 2005 dismissed the application thus leaving the Respondent as the registered proprietor of the mark. The Appellant has now raised 13 grounds of appeal as follows;

1. The Registrar erred in law when she held that for the Appellant to succeed in a claim of fraud under the Trade Marks Act it had to plead fraud as would have been the case under the Civil Procedure Act when in fact the Civil Procedure Act does not extend to proceedings before a Registrar of Trade Marks.
2. The Registrar erred in law and in fact when she failed to take into account evidence adduced by the Appellant by way of statutory declarations when in fact all evidence before a Registrar of Trade Marks under the Trade Marks Act is by way of statutory declarations in the absence of directions to the contrary.
3. The Registrar erred in law when she rejected the manufacturing licence as presented, a decision made contrary to the provisions of Rules 112 and 113 of the Trade Marks Rules.

4. The Registrar erred in law when she rejected the packaging which was clearly described in the statutory declaration of Mr. Anand Goel dated 27/08/04 in paragraph 5 thereof and a photocopy of which was annexed as "C" to the same declaration, a decision made contrary to Section 53 of the Trade Mark Act.
5. The Registrar erred in law when she rejected the Power of Attorney given to Mr. Anand Goel by the Appellant on the grounds that it was not relevant to the matter thus disregarding the provisions of Section 53 of the Trade Marks Act, 3, 5 and 6 of the Statutory Declaration Act.
6. The Registrar erred in law and in fact when she failed to appreciate that consent from the appellant was essential since the respondent had not demonstrated that he coined the mark "ELDENNA" and was using the same mark before registration thereof exclusively.
7. The Registrar erred in law and in fact when she failed to distinguish between lawful registration of the mark by default and entry made in the register without sufficient cause under S.34 of the Trade Marks Act.
8. The Registrar erred in law and in fact when she rejected the letter from Eurokent which was produced in evidence contrary to the provisions of Section 53 of the Trade Marks Act and Sections, 3, 5 and 6 of Statutory Declaration Act.

9. The Registrar erred in law and in fact when she rejected the Appellants affidavit attested on the 01/12/04 by a Notary Public Contrary to Section 53 of the Trade Marks Act and Rules 112 and 113 of the Trade Marks Rules.
10. The Registrar erred in law and in fact when she failed to find despite the glaring evidence before her, that the invoices from INC3 International Importers and Exporters were proof that the appellant was dealing in the goods under the mark "ELDENNA" prior to registration of the respondent as Proprietor of the same mark in Uganda.
11. The Registrar erred in law and in fact when she failed to put any weight to the form TM - No.2 that was filed by the respondent in his application to be registered as the proprietor of mark "ELDENNA" where as if she had done so she would have arrived at the inevitable conclusion that the form was not representing the true facts on the ground.
12. The Registrar erred in law and in fact when she completely ignored the glaring evidence on the record and arrived at conclusions which were not based on evidence on record.
13. The Registrar erred in law when she failed to deliver her ruling with the sixty (6) days directed by Hon. Justice Geoffrey Kiryabwire in his ruling in Misc. Appl. No. 251 of 2005 arising from H.C.C.S No. 271 of 2005 AMIN CHARANIA T/A JASKAR ENTERPRISES VERSUS 1. ARUN RASTOGI 2. ANAND GOEL T/A DUVON IMPEX dated 19/05/05 without ascribing any reasons in her ruling for such failure.

Mr. A. Kibuuka Musoke appeared for the Appellant and Mr. Kiryowa Kiwanuka appeared for the Respondent.

The grounds of Appeal, I must point out were quite many and in some respects did overlap each other. The first set of grounds relate to procedural matters while the second set relate more to matters of substantive law. In order to better focus my findings I shall first begin by laying out what is required to be successful under S. 34 of the Trade Mark Act. Section 34 (i) of the Trade Mark Act provides;

“General power to rectify entries in register

(1) Any person aggrieved by the noninsertion in or omission from the Register of an entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by an error or defect in any entry in the register, may apply in the prescribed manner to the court or, at the option of the applicant and subject to Section 52, to the Registrar, and the court or the Registrar may make such order for making, expunging or varying the entry as the court or Registrar, as the case may be, may think fit...”

Clearly from the above, a Section 34 (1) rectification gives wide powers to a court or Registrar to make, expunge or vary an entry in the register. To my mind, whereas a S.34 (1) power to rectify is given to both a court and the Registrar concurrently, it would be desirable for one to start with an application before the Registrar then appeal to court under S. 52(b). The said application can be made by any **aggrieved person** on wide grounds ranging from sufficient cause to error. A person aggrieved prima facie covers a wide spectrum of people including people in the same trade and

a business rival (see Halsbury's Laws of England 3rd Ed Vol. 38 para 963 and Re Appolinaris Company's Trade Mark 1890 CA 186). The record of the proceedings before the Registrar and in particular Trade Mark Form No. T.M. 25 entitled "Application to the Registrar for rectification of the register" or removal of the Trade Mark from the register show that application for rectification was for

"...expunging the name of Jaskar Enterprises from the register and instead insert the name of British Herbal Cosmetics as owner and proprietor..."

The grounds for the application were the following;

"...The registration of Jaskar Enterprises was made in error or fraudulently without the consent of British Herbal Cosmetics the owner and proprietor of the mark". (emphasis mine)

In other words the grounds raised are founded on two areas namely error or in the alternative fraud.

I shall now make my findings in light of the above background to the application before the Registrar.

Ground 1 and 2 raise procedural issues as to how an applicant can raise a claim of fraud in a S. 34 (1) proceedings for rectification before a Registrar and the use of statutory declarations in such proceedings. I shall handle these two grounds together since they deal with procedure. Counsel for the Appellant submitted that the learned Registrar erred in law when she found that the Appellant could not succeed in the

claim of fraud because it had not been specifically pleaded. He in particular referred me to pages 8 – 9 of ruling. I shall just refer to her findings in conclusion on the matter where she found.

"...fraud is a serious matter and the party against whom it is alleged should be afforded sufficient notice to enable him answer the allegations (Re: Fam International Ltd & Anor V Mohammed Hamid El-Fathih SCCS No. 16/93). The Applicant did not amend his pleadings to include fraud and I therefore find that he cannot rely on this point..."

Counsel for the Appellant argued fraud had been pleaded in the statutory declaration (para 4) of Mr. Anand Goel dated 15th December 2004. The allegation of fraud therein was that the Respondent did not coin the mark Eldena nor did it manufacture the mark but that it registered the said mark without the Appellant's consent. Counsel for the Appellant took the view that the learned Registrar mixed up the procedure as expected under the Trade Mark Act and rules with that usually followed under the Civil Procedure Act and rules applicable in a normal suit.

Counsel for the Respondent agreed with the findings of the Registrar that fraud had not been pleaded and that it should have been done *"with the utmost particularity"*.

Counsel for the Respondent further submitted that all allegations in the Appellant's statutory declarations were denied. In any event counsel for Respondent submitted the Appellants had admitted the fact of the registration of the mark and therefore were estopped from denying it.

Flowing from the above submissions and arguments is ground No.2. Counsel for the Appellant submitted that the learned Registrar failed to take into account the evidence of the Appellant as adduced by affidavit and yet evidence under the Trade Mark Act in the absence of directions to the contrary by the Registrar (in this case) is by way of statutory declaration. Counsel for the Appellant then goes on to list what he considers to be vital evidence by his client way of statutory declaration that in his view were not challenged by the Respondent and which the Registrar for that reason had no reason to disbelieve. This evidence inter alia was to the effect that the Appellant coined the mark "*Eldena*", had manufactured it in India since 1995 and imported it into the market in Uganda.

Counsel for the Respondent disputes that the learned Registrar did not consider the evidence as alleged. With particular reference to evidence of prior dealing in goods the subject of the mark "*Eldena*" counsel for the Respondent submitted that the evidence showed that a third party called "*M/s Roopa Enterprises Ltd*" and not the Appellant dealt in goods after the mark had been registered. He therefore submitted that there was no evidence that the Appellant dealt with goods prior to the registration of the mark and so the claim was misconceived.

I have perused the record below and before me and also addressed myself to the submissions of both counsel. The procedure to be followed under a S.34 (1) rectification is to be found in **The Trade Mark Rules** statutory instrument 217 – 1.

Rule 82 of the Trade Mark Rules provided that applications to the Registrar under S. 34 of the Act shall be made on Form TM 25 accompanied by a statutory declaration stating the applicants interest and the facts upon which he intends to rely. Rule 83 then for purposes of further procedure, imports mutatis mutandis rule 49 and 50 which allows for evidence also to be adduced by way of statutory declaration. The rules also provide time lines within which all this is to be done. I have not addressed my mind to the technicalities as to whether or not these time lines were followed. I however find that in the main, the parties did follow this procedure. It is my view and finding that the documentation referred to in the said rules would therefore form both the pleadings and evidence before the Registrar.

Now let me address the issue of whether the claim before the Registrar was inter alia founded on fraud. I agree with the position of the Registrar that for a claim before to be found on fraud then it has to be pleaded with particulars. This is the only way the Registrar can properly investigate the allegation. It appears to me looking at the form TM 25 and the statutory declarations the appellant did clearly inter alia base his claim upon fraud. Of course he was limited by the format provided for in the rules which do not necessarily provide for the detail that would be found in say a plaint in a normal suit. That notwithstanding I am of the view that the Appellant provided sufficient particulars of his claim of fraud by virtue of form TM 25 and the statutory declarations for the learned Registrar to make the necessary inquiries. In fact that is in my view what the learned Registrar went on to do at page 5 -7 of her ruling while answering the issue

"whether the Applicant is the proprietor of the unregistered mark in India?"

I therefore with regard to grounds No.1 and 2 agree with counsel for the Appellant and find that his client could rely on the claim of fraud and in fact did give the necessary particulars of the said fraud in the various statutory declarations. As to whether the Appellant discharged the standard of proof in proving the fraud however, that is another matter that would have been handled at the hearing.

On ground No. 3, it is the case for the appellant that the learned Registrar erred when she rejected the manufacturing licence presented to her at the hearing contrary to rule 112 and 113 of the Trade Mark Rules. The Appellant referred me to page 6 of the learned Registrar's ruling on this point. Looking at page 6 of the said ruling under the head

"(b) Manufacturing licence and packaging"

The learned Registrar's quarrel with the said licence was that it was not attached as evidence during the pleadings. She further finds;

"...I would have expected the Applicant to request for time during the pleadings to enable him file the licence and packaging. This would have afforded the Respondent time to examine and responded to these documents. I find that I cannot accept these documents and therefore the Applicant cannot rely on them, as evidence can only be brought in during the pleadings, by way of statutory declaration and not after the close of submissions as in the present case..."

Counsel for the Appellant does concede that the said licence was not attached to the statutory declaration of Mr. Anand Goel. He however, did state that the said licence and its number was referred to therein. His main legal argument to me seems to be that such evidence is permitted by rules 112 and 113 of the Trade Mark Rules which do not fix a time limit when a document is to be put on record.

Counsel for the Respondent submits that evidence cannot be brought after submissions have been made. In the alternative he also disputes the licence as a manufacturing licence but says that it looks like a trading licence instead.

I shall now address these legal arguments. To my mind the issue is not whether the Appellant could rely on rules 112 and 113 of the Trade Mark Rules to adduce evidence of the said licence. It appears to me that the legal argument is at what stage during the proceedings can this evidence be adduced? Counsel for the Appellant seems to suggest that this can be done at any time including after the submissions have closed; in any event the evidence had already been deponed to.

With the greatest of respect I cannot see how the learned Registrar can continue to receive evidence after submissions have been made to her. The Registrar is in a quasi Judicial Status and must apply her mind judiciously with regard to due process fairness and equity. The onus was on the Applicant/Appellant to produce all the evidence he/it sought to rely on during the hearing and not after the submissions. In this regard the learned Registrar found properly with due regard to the law and

practice at hearings. In any event rule 53 (imported by rule 83) of the Trade Mark Rules and in particular rule 53 (2) specifically provides;

“(2) The original exhibits shall be produced at the hearing unless the Registrar otherwise directs...” (emphasis mine).

Clearly this is not what happened as the licence as an exhibit came after the actual hearing.

On ground number 4 it is the case for the Appellants that the Registrar erred in law when she rejected the packaging of Eldena when it had been described in the statutory declaration of Anand Goel with a photocopy of it attached as annex 'C'. Counsel for the Appellant refers me to the Registrar's ruling at para (b) of the page 6 on this ground. A look at the ruling shows as in the case of the licence that the packaging was not attached as evidence with the pleading but was sent after submissions were closed.

Counsel for the Appellant does not agree but states that a photocopy of the packaging was attached as annex 'C' to the statutory declaration. He further argues that the purpose of presenting the packaging during submissions was to enable the Registrar to compare the physical get up of the product with the get up of the registered mark on file.

Counsel for the Respondent denies that Registrar erred as alleged and further submitted that adducing the packaging of the product does not prove its ownership.

These are clearly similar legal issues in ground 4 as they are in ground 3. I have already found that evidence must be presented during the hearing and not at submissions. The only difference in this respect is that a photocopy of the packaging did form part of the statutory evidence which was not the case of the licence.

Rule 53 of the Trade Mark Rules provides how exhibits should be handled. Whereas rule 53(1) does allow for copies and impressions to be used as exhibits to declarations, rule 53(2) also provides that the original exhibits shall be produced at the hearing unless the Registrar otherwise directs.

It is not clear whether the parties and or Registrar addressed themselves to this rule. However, what is clear is that the record does not show that the Registrar gave directions that the parties could rely on the photocopy of the packaging and/or that the actual packaging could be sent later i.e. during submissions. That being the case rule 53(2) was not complied with so the Registrar is correct to insist that the original packaging was not brought at the time of the hearing. I therefore find that the ground too should fail.

As the ground 5 it is the case for the Appellant that the learned Registrar erred when she rejected the Power of Attorney given to Mr. Anand Goel by the Appellant. The Registrar in her ruling found with respect to the Power of Attorney;

"...that the Applicant appointed Mr. Anand Goel as its agent on July 30th 2004, after the Trade Mark had been registered. I find that it is not relevant to the matter at hand because it is a document that was executed after the

registration of Eldena, which is the subject of this application. In addition it does not provide any useful information for the issue at hand..."

Counsel for the Appellant submits that the Power of Attorney allowed Mr. Anand Goel to act as a representative of the Appellant in any action to protect the mark "Eldena". He further submits that the Power of Attorney did provide useful information that the Appellant was the unregistered owner and proprietor of the mark "Eldena" in India.

Counsel for the Respondent also agreed with the Registrar that the Power of Attorney was irrelevant.

Looking at the Power of Attorney I find that the learned Registrar made an over statement in this regard. Whereas the said power does not state much other than appoint Mr. Anand Goel as the agent of the Appellant I find that she went too far in finding that this was irrelevant to the matter before her. I do not place much on the said appointment being after the mark in question being registered as it seeks to appoint Mr. Anand Goel as an agent which inter alia is important for these rectification proceedings. In this regard the Power of Attorney was relevant in defining who the parties to the proceedings were.

Moving away from procedural issues, grounds 6, 7, 8, 9, 10, 11 and 12 all revolve around the substantive issue of who is entitled to be registered as owner of the Trade Mark Eldena. Looking at the grounds together, it is the case of the Appellant that the Respondent did not coin the name or manufacture the Eldena products. It is the case for the Appellant that it coined the name and manufactures the Eldena products in

India and so the Respondent should have sought the prior consent of the Appellant in order to register the mark in Uganda. Counsel for the Respondent submits that the said mark was only registered by default as an initial attempt by M/s Eurokent to oppose it was not effectively done.

Counsel for the Appellant also submitted that the Respondent only asserts ownership of the mark by reason of its registration in Uganda. He further submits that the Respondent does not assert that it coined the word or manufactures the product Eldena. He also submits that there is evidence that other persons were dealing in goods under the mark Eldena in Uganda like

M/S INC3 International

M/S Roopa Enterprises

M/S Eurokent

which is sufficient cause for the Respondent not to have exclusive rights to the mark.

Counsel for the Respondent in general agreed with the findings of the learned Registrar. He submitted that the Appellants had not proved ownership of the mark as alleged. Counsel for the Respondent further submitted that the Respondent properly registered the mark according to the law.

The said grounds raised the legal question as to who is entitled to be registered as a trade mark owner. Section 19 of the Trade Mark Act (cap 217) provides

“(1) ...Any person claiming to be proprietor of a trademark he or she has used or proposes to use who is desirous of registering it must apply in writing to the Registrar in the prescribed manner for registration either in part A or in part B of the register...” (emphasis mine).

According to Halsbury's Laws of England 3rd Ed Vol. 38 para 909 lists inter alia the following persons as entitled or / not entitled to apply.

“...The person who first designed or used the mark is subject to any rights subsequently acquired by others, entitled to claim proprietorship in it. No person is entitled to put the mark of another person on the register.

An agent or representative may not register the trade mark of a principal in his own name..... An importer of goods may register as his own a trade mark used abroad by a foreign manufacturer of those goods but not previously used in the United Kingdom...” (emphasis mine).

The paragraph which interprets S.4(1) of the English Trade Mark Act 1938 which is similar to Section 19 of the Uganda Act (cap 217) goes on to state the following test to be applied on registration.

“...The applicant must have used the trade mark or have a bona fide present and definite intention to use it...”

The present Respondent claims to be an importer of the Eldena products in Uganda and so is entitled to register the said mark as his own. Evidence adduced before the Registrar in the proceedings below shows in the statutory declaration in rejoinder

(interestingly by the Applicant) that the Respondent indeed is an importer (see para 6(iv) thereof) of Eldena products in Uganda at least since 2003 (not too long before the mark was registered in Uganda in 2004). However, the evidence shows that the Respondent imported the Eldena products from a company in India called M/S INC 3 International (annex "C 2") which in turn had previously bought those products from the Appellant also in India (annex "C 1"). The Respondent does not seem to deny this evidence though it does state that its business associate M/S Anchor Industries Ltd (Registered in Uganda) has also applied to have the mark Eldena registered in India which application is still pending. Counsel for the Applicant Mr. Kibuuka Musoke faults the Respondent for not showing (under item (e) of Form T.M 2) in the application to register the mark, whether the said mark was *"being used or proposed to be used"* in Uganda.

As to proprietorship of the mark by the Appellant, the Appellant claims to be the manufacturer of the product Eldena with an application pending for its registration in India since 1995 (annex A1). A receipt of a search in the Government of India Trade Marks Registry dated 29th November 2004 shows three pending applications for the registration of the mark Eldena as a cosmetic under class 3 namely;

- i) No. 504339 by one Neelam Kapur of WP – 505, Ashok Rihar, Shiv Market, Delhi – 110052 (unknown to these proceedings and without a date of application).

- ii) No. 663237 by Shri Chander Mohan Kapur of A – ¼ Mehendroo Enclave, GT Karnal Road, Delhi – 110009 (the applicant in these proceedings who states the application has been pending since 1995).
- iii) No. 130972 by M/s Anchor Industries Ltd of P. O. Box 12580 Kampala Uganda East Africa (evidence shows that this application was made on or about the 16th September, 2004).

Clearly none of the above is the registered proprietor of the Trade Mark Eldena in India. That notwithstanding, clearly there is, as the case in Uganda, a scramble to have the mark registered in India. I don't understand why this has taken long to be resolved in India.

However, looking at the evidence as a whole it is reasonable to reach the finding that the Appellant and not the Respondent is the manufacturer of the said Eldena products.

Under the law broadly therefore, both the Respondent as a trader/Importer and the Appellant as a manufacturer are both entitled to claim proprietorship of the mark and register it. As to the test of having *"...have(ing) used the Trade Mark or have(ing) a bona fide present and definite intention to use it ..."* (emphasis mine), in Uganda in my view would revolve around how one would interpret the term "use" or "used". Even though the Respondent did not properly fill in the application form TM 2 in this respect, there is evidence that he had used the product, al beit for a short time, by way of importing it into Uganda.

The Appellant on the other hand of course did not import the goods into Uganda nor directly export them either. (The evidence shows that third parties in India like INC 3 International and Savachem Surfactants (P) Ltd were the direct exporters but they in turn also got the products from the Appellant). Can it therefore be said for those reasons the appellant has not used the goods in Uganda? I think in trade matters such as these you cannot afford to give such a narrow interpretation to the term "use". I think the Appellant can rightly claim that its products Eldena are used in Uganda, and therefore can also claim to be an aggrieved person within the meaning of S.34 of the Act.

So the real question is, whether it therefore boils down to which of the two entitled person registers the mark first i.e. first come first register. The law allows under S.21 of the Trade Mark Act for a mark which has been applied for but

- a) Which has not been opposed within the required time.
- b) Opposed but decided in favour of the Applicant
- c) Not accepted in error.

to be registered. On the evidence in the proceedings before the Registrar and this court I find that the mark though initially resisted was properly registered.

However that does not mean that the mark will necessarily stand, after the said registration. Registration can subsequently be challenged by an application for rectification. Halsbury's Law of England Vol 38 (supra) at para 951 states

"...An application to rectify is the proper method of raising the question of ownership of a trade mark..."

This is the procedure that the Appellant has taken. Looking at the evidence as a whole I find that there was sufficient cause to raise doubt and confusion as to the true owner of the mark. Whereas I see that the appellant did not technically produce all the evidence he wanted, what was on record before the Registrar was enough. There is evidence for example that the Respondent imports Eldena products from M/S INC3 International in India who in turn buys the Eldena products from the present Appellant.

In these circumstances the court is enjoined under S.34 of the Trade Mark Act to make such orders as it may think fit. I interpret this to mean that court is to make such orders as it thinks are "just and equitable".

Halsbury's Law of England Vol. 38 (supra) at para 967 states

"Hearing of application for rectification

If the applicant establishes his case, the tribunal ("or court" addition mine) may order the mark to be expunged, the registration to be varied or limited, or transferred... a disclaimer to be entered, or an assignment to be registered or expunged. The tribunal has, however, a discretion as to making an order, and will not in general order a mark to be expunged if it could validly be re-registered..."

Taking all the evidence and authorities into consideration I find that it is fitting that the mark be registered a fresh so that the proprietor and in particular the manufacturer of products "*Eldena*" be allowed to register the said mark.

The last ground No. 13 that the learned Registrar did not deliver her ruling within the 60 days as directed by this court was abandoned.

That being the case and taking my findings into account I hereby order that the register with respect to trade mark No. 26496 "*Eldena*" be rectified by canceling the present registration but allowing its re-registration by its proprietor who is the manufacturer i.e. M/S British Herbal Cosmetics.

I further order, pursuant to Section 34(4) of the Trade Mark Act (cap 217) that a notice of this order of rectification be served on The Registrar of Trade Marks to rectify the register accordingly.

Since the Appellant has been successful I grant the costs of the appeal to the Appellant.

Geoffrey Kiryabwire

JUDGE

Date: 31/10/2007

31/10/07

11:30am

Judgment read in open court and signed in the presence of:

- Kawuma h/b for K. Kiwanuka for the Respondent

In Court

- Amin Chavania
- Rose Emeru – Court Clerk

.....
Geoffrey Kiryabwire

JUDGE

31/10/07