

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 62 OF 2006

CMC AUTOMOBILES LIMITED PLAINTIFF

VERSUS

**CMC HUGHES LIMITED (ALSO KNOWN AS COOPER
MOTORS CORPORATION (TANZANIA) LIMITED.....1ST DEFENDANT
THE REGISTRAR OF COMPANIES2ND DEFENDANT**

JUDGMENT

LUANDA, J.

Let me state from the outset that the centre of dispute in this case revolves around the use of a business name COOPER MOTORS CORPORATION otherwise it is referred to as CMC. The above named plaintiff claimed that the said names are of his company. The plaintiff is contending that the use of the trade names of his company by the 1st defendant is not proper hence the filing of this suit against the 1st defendant for that infringement; whereas the 2nd defendant is being sued as a necessary party in order to give effect and implement orders of this court.

The historical background of the case which to a large extent is not disputed is to this effect:- Way back in 1960 a limited liability company going by the name of COOPER MOTORS CORPORATION

company going by the name of COOPER MOTORS CORPORATION (Tanganyika) LTD. was incorporated in the then Tanganyika. The majority shareholders of the company were CMC Holding Company Limited which was incorporated in Kenya.

By resolution of the special Board Meeting passed on 25th OCTOBER, 1977 (Exhibit P3), the company name was changed to COOPER MOTORS CORPORATION (Tanzania) LTD. In 1987 the whole shares in the company were bought by Mr. Abdul Haji (PW1) through his investment holding company known as Haji Brothers and Company Limited. The contents of the sale agreement - cum - letter is reproduced for ease reference:-

Our Ref:

JMB/MC/165/87

5th June, 1987

Mr. Abdul Haji,

Haji Brothers and Company Limited,

P.O. Box 219,

DAR ES SALAAM,

TANZANIA.

Dear Mr. Haji,

Since receiving your letter of 19th March, 1987 reference HB. 47/48/87 we have had several discussions on your proposal to acquire from us our share holding in Cooper Motor Corporation (Tanzania) Limited (CMC (T) LTD.) and as advised to you we have pleasure in confirming that our Board of Directors have to sell to your principals the whole share capital of CMC (T) Ltd. for US \$ 2.4M paid in Kenya.

As explained to you by both the writer and Mr. Lord we cannot guarantee the transfer of the franchises held by CMC (T) Ltd. but will use our best endeavours to ensure that no changes take place in the representation of those franchises. We anticipate no difficulties and either the writer or Mr. Lord will be happy to accompany or your representative to the United Kingdom and Germany to introduce you to our principals there and ensure that the operations of CMC (T) Ltd. continue with no change.

It was agreed between us that you will be responsible for all necessary permissions in Tanzania to enable the transfer of shares of CMC (T) Ltd. to your company to take place.

On receipt of payment for shares in the sum of US \$2.4 m we will advise Messrs Conrico Overseas Limited that effective from the date of payment all transactions will be for the

account of the new shareholders. Mr. Ludin is aware of the Mechanics of the arrangement between CMC (T) AND Conrico Overseas Limited.

It was further agreed that your principals will take over the company and retain all the existing staff and that the company will continue to operate as a constituted entity.

The CMC Group Logo which is a registered trade mark in Kenya must not be used once you have paid for and acquired the shares in CMC (T) Ltd. While we appreciate the convenience of retaining the name CMC (T) Ltd. we feel that there would be advantages in portraying a wholly Tanzanian image and would like to suggest that within a period of five years the name of the company be changed so as to reflect that image.

We hope our two companies will continue to cooperate closely to the mutual benefit of both.

We wish you the very best in your efforts to develop the business on your new acquisition.

We should be glad if you would sign one copy of this letter on behalf of your principals indicating your agreement to the above conditions.

*Yours sincerely,
CMC HOLDING LIMITED*

*Sgd.
J.M. Benzimra
GROUP CHIEF EXECUTIVE*

Signature Sgd Date 5th June, 1987.

.....
[Underscoring Mine].

Currently the company shares are being held by Haji Brothers and Company Limited and Laghat Holding Limited, a Swiss Investment Company.

In 1988 the company changed its name to CMC Motors Limited (Exh. P4). In 1992 the company yet again changed its name to CMC Land Rover (T) Ltd. (Exht. P5) And finally in 2002 the name was changed to CMC Automobiles Ltd. The company conducted its business as usual of selling motor vehicles.

It is the evidence of Abdul Haji (PW1) that he made efforts to revamp the company which was collapsing. He traveled to the United Kingdom and Germany to see the principal dealers of landrovers and volkswagons. PW1 claimed that he managed to revamp the company. PW1 went on to say that CMC Holding Company Limited by their letter of 8/5/2003 requested him to relinquish the use of CMC Group Logo and the name CMC (T) Ltd. as earlier agreed. PW1 did not respond. A reminder was sent, he did not make any reply.

Sometime in February/March, 2006 he came across to a weekly news paper called The Arusha Times. Inside the said news papers (Exht. P6) he saw some articles about CMC. For instance, he said page 3 contained the following,

- *The CMC Hughes Limited is back in Tanzania hoping to make great impact.*

And page 7 also had a title – Enters CMC with new vigour. PW1 further went on to say he saw an advertisement for employment in the Guardian news paper of 21st August, 2006 (Exht. P7) whereby Cooper Motors Corporation (Tanzania) Limited invited suitable persons to apply for vacancies enumerated therein. And although the interested persons were required to channel their application through the Managing Director – Cooper Motors Corporation

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(Tanzania) Limited P.O. Box 711 USA River, yet some like Gregory Kingu forwarded his application (Exht. P8) to the plaintiff's office in Dar es Salaam.

That is not the end of the story, PW1 also came across a number of advertisements in the Daily News and Guardian news papers. For instance those of 4/12/2006 and 6/12/2006 of Daily News (Exhbt. P9) and The Guardian (Exht. P10) respectively which announced the start of Cooper Motor Corporation (Tanzania) Limited operations at Usa River, Arusha Region.

It is the evidence of PW1 that for quite a long time he has been using those trade names in his business and people know him as the Chairman of CMC or Cooper Motors Corporation. To support that version he produced some documents like Express Courier Services Limited from Masumin Printways and Stationeries Limited (Exht. P15) and an invitation card of the 9th East Africa International Trade Exhibition held in Diamond Jubilee Hall, Dar es Salaam from 9 – 12 March, 2007 (Exht. 14). It is his case that to allow the 1st defendant use the trade names of CMC Hughes or Cooper Motor Corporation will confuse the public. They thus complained to the 2nd defendant through a letter. The 2nd defendant through their letter of 30th November, 2005 (Exht. P16) which was copied to them directed the 1st defendant to change its name. The letter was written by one Andrew Mkapa (PW2) Senior Assistant of Registrar of Companies with

the 2nd defendant. And indeed Andrew Mkapa (PW2) confirmed this piece of evidence. However, Mr. Mkapa (PW2) went on to say the 1st defendant protested. They then wrote another letter, this time through Mr. Fred S. Ringo advocate. Mr. Mkapa (PW2) told the court that they stuck to their guns by informing the 1st defendant through yet another letter of 13th March, 2006 (Exhit. P17) that the two names will confuse the public. The name of the company of CMC Hughes Limited was finally changed to Cooper Motors Corporation (Tanzania) Limited. The name became effective from 29/6/2006. Mr. Mkapa (PW 2) was quick to point out that he was not the one who signed the certificate of change of name. It was signed by one Noel Shan.

The plaintiff is still dissatisfied, hence this suit. In this suit, the plaintiff prays for the following reliefs.

- 1. That the 1st defendants be prevented by an order of this court from using the acronym CMC or words Cooper Motors in its name.*
- 2. That the 1st defendant be compelled to change its name pursuant to section 31(2) and (3) of the Companies Act, 2002 within a time limit to be fixed by this Hon. Court, failing which the second*

defendant be ordered to strike out the 1st defendant Company from the Register.

- 3. An injunction against the 1st defendant restraining it from promoting itself as CMC or Cooper Motors in its trade or otherwise.*
- 4. An injunction against the 1st defendant preventing it from selling or in any manner dealing with Land Rover and Ford Motor vehicles in Tanzania or interfering with the plaintiff's exclusive dealership rights in Tanzania territory.*
- 5. An order for punitive and general damages against the 1st defendant.*
- 6. Costs of this suit.*
- 7. Any other relief the court deems fit to grant.*

That in essence is the plaintiff's case.

The 1st defendant called one witness one Sobakchand Zaverchand Shah (DW1) one of the directors and shareholder of the 1st defendant. The other shareholders are CMC Holdings Limited the

majority shareholders and Martin Henry Foster. DW1 is in a group financial directorate in the CMC Holdings Limited. And he is in that company for a considerable time.

It is the evidence of DW1 that the 1st defendant deals with selling and servicing of new Holland tractors, NAD agriculture implements, Nissan diesel tractors and buses Mazda and volkswagon vehicles. He claimed that the 1st defendant have a franchise over the above named vehicles in Tanzania. They don't have a landrover franchise in Tanzania. In Tanzania it is the plaintiff who has the franchise for land rovers.

DW1 went on to say firstly their offices were situated along Ally Hassan Mwinyi Road in a Peugeot house in Dar es Salaam. And then in October, 2006 they shifted to USA River, Arusha. DW1 knows very well what an acronym is. He went on to say an acronym for the plaintiff is CAL; whereas theirs is CMCTL. He confirmed to have advertised in the Guardian newspapers of 21st August, 2006. (Exht. P7) for various posts in the company. However, they denounced the logo put in the advertisement. They wrote a letter (Exht. D2) protesting. The Guardian through their letter of 27/10/2006 apologized (Exht. D3). Basically DW1 is contending that the use of the words Cooper Motors Corporation with those of CMC do not confuse the public. That is the 1st defendant's case. The 2nd defendant did not call any witness though they submitted.

Before we commence hearing this case thirteen issues were framed. But some issues are not essential to the determination of the case. Be that as it may in this case Mr. Kesaria learned advocate represented the plaintiff; the 1st defendant was represented by Dr. Kapinga and Prof. Mwaikusa learned counsel – whereas the 2nd defendant was represented by Mr. Kakwezi learned Assistant Registrar of Companies.

In this case I prefer to discuss the issues along with the written submissions. I start with issue number one:

1. Whether or not the first defendant can rely upon or enforce the terms and conditions stated in paragraph 4 of the 1st defendant's Written Statement of Defence in being allowed to use the name "Cooper Motors Corporation (Tanzania) Limited or its acronym "CMC (T) Limited".

The basis of this issue is a letter – cum – agreement (Exht. D1) reproduced earlier in this judgment. In their written submission, the 1st defendant stated that that was not an issue at all. They said there is nowhere in the plaint where a complaint has been raised about the use of the terms "CMC (T) Ltd. – whether a purported acronym, as a name or otherwise.

The plaintiff through Mr. Kesaria was quick to point out that that issue was raised in the Written Statement of Defence. However, Mr. Kesaria went on to say and rightly so that the 1st defendant cannot rely upon that document because she was not a party to that contract. It follows therefore that, the 1st defendant cannot rely upon that document. So issue No. 1 is answered in the negative:

2. Whether the number of units of land rover vehicles sold in Tanzania is the result of the dedication of and hard work by the plaintiff's shareholders.

In their final submission, the 1st defendant submitted that this issue has no bearing on the real issue before the court. They went further to say whatever decision the court takes, it would not affect substantive justice of the parties.

Mr. Kesaria on the other hand said the issue was proposed by the 1st defendant. And he went further to say there is evidence to show how the plaintiff revamped the collapsing company. It is Mr. Kesaria's assertion that there is evidence to that effect.

First and foremost the issue was raised in the plaint (see para 6). And the 1st defendant denied (see para 5 of the Written Statement of Defence). In short the matter was pleaded. Second, there is evidence showing how the company was revamped. So there is ample evidence to show it was the dedication of and hard work by the plaintiff which resulted the selling of a good number of landrovers. Though this is not the real dispute between the parties I answer this issue in the affirmative –

3. Whether "CMC" is an acronym of the plaintiff's name.

It is the evidence of Mr. Haji (PW1) that people referred his company as Cooper Motors Corporation or CMC. The two are being used interchangeably.

In their final submissions, the 1st defendant submitted that the plaintiff's name is CMC Automobiles Limited and that is acronym is "CAL" as suggested by Mr. Shah (DW1). In short they are saying that is not the plaintiff's acronym.

The plaintiff on the other hand submitted that the word CMC is synonymous or short of the name Cooper Motors Corporation.

During cross – examination by Mr. Kesaria, learned counsel for the plaintiff, Mr. Shah (DW1) was asked, inter alia, the following question – I reproduce for ease reference:

Mr. Kesaria:

Would you agree with me that what that letter is saying is that CMC TL is one and same as Cooper Motor Corporation Tanzania Limited.?

Mr. Shah (DW1)

Yes.

Mr. Kesaria:

Do you also agree with me that CMC TL is an acronym of Cooper Motors Corporation Tanzania Limited?

Mr. Shah (DW1)

Yes.

And indeed even the letter – cum – agreement (Exht. D1) also refers Cooper Motors Corporation (Tanzania) Limited as CMC (T) Limited.

Strictly speaking CMC is not an acronym of the plaintiff's company namely CMC Automobiles Limited, but it has to do with that name. So for all intents and purposes it is taken as the acronym of the plaintiff's name.

4. Whether there is a Company under the name Cooper Motors Corporation (T) Limited presently in existence in Tanzania other than the 1st defendant.

I think the answer is obvious – there is no other than the 1st defendant's company. I now move to issue No. 5:

5. Whether a Company which has changed its name continue to have proprietary rights over its abandoned name.

This issue was raised by the 2nd defendant. And the 2nd defendant argued that once the Company has changed its name as in our case, then the company which had changed her name has no rights over that abandoned name. He cited Section 30(2) and Section 31(3) of the Companies Act, Cap 212. Mr. Kesaria on the otherhand argued that in absence of any clear provision of law, then each case has to be decided according to its facts.

I have gone through The Companies Act, Cap 212 RE I was unable to see the sections cited by Mr. Kakwezi. Section 30(2) of the Company Act, Cap 212 reads:

30(2) A contract made according to this section shall be effectual in law and shall bind the Company and its successors and all other parties thereto.

There is no Section 31(4) in the Companies Act, Cap 212. So I tend to agree with Mr. Kesaria in that there is no provision in the Company Act touching on abandonment of Company name.

But common sense dictates that if you abandon a company name then that name may be acquired by another subject to some well known principles e.g. whether the name is not identical with any known registered name.

I answer this issue in the NEGATIVE. And in view of the above explanation I also answer issue No. 6 in the negative:

6. *Whether the Registrar of Companies has a duty to reserve the plaintiff's abandoned name*

Having read issues No. 7, 8, 9, 10 and 11 very carefully, I think these issues may be conveniently disposed of together. And indeed here is where the real dispute centres on "lis contestatio":

7. Whether the 1st defendant is using the plaintiff's acronym with intent to cause confusion to the detriment of the plaintiff.
8. Whether the use of the name "COOPER MOTORS CORPORATION" by the 1st defendant has the effect of causing confusion.
9. Whether or not the plaintiff and the 1st defendant are sufficiently distinguished from each other.
10. Whether or not the 1st defendant has the right to use the name "Cooper Motors Corporation (T) Limited.
11. Whether the 1st defendant is using any name or acronym of the plaintiff.

Following their complaint letter they lodged with the 2nd defendant about resemblance of trade names, namely CMC Automobiles Limited and CMC Hughes Limited, the 2nd defendant wrote a letter (Exht, P16) directing the 1st defendant to change the name because the co-existence of the two names will confuse the general public. The 1st defendant protested, hence the second letter (Exht. P17) written by the 1st defendant. Paragraph 2 of the said letter reads:

"The office has gone through your letter, and despite all the arguments advanced in your said letter, the fact remains the same that the co-existence of the two names CMC Automobiles Limited and CMC Hughes Limited brings confusion to the general public, particularly taking into account that both the two companies are in business."

[Underscoring Mine]

She changed to Cooper Motors the same was duly registered. The change has or has not brought any

shows that the words CMC stands for This is the version of Abdul Haji (PW1) (Exht, D1) a letter - cum - agreement. Indeed there is evidence to the effect of CMC Hughes Limited to Cooper Motors public was confused. A case in point is the employment from one Geoffrey Kingu of the 1st defendant, there was confusion published a CMC Logo believing it belongs

THE UNITED REPUBLIC OF TANZANIA EXCHOUER RECEIPT

Type	Station	Warrant Holder	Originator's Reference
K			
4	5	8	11
12	15	18	21
24	27	30	33
36	39	42	45
48	51	54	57
60	63	66	69
72	75	78	81
84	87	90	93
96	99	102	105

RECEIVED FROM Penumbra's Limited

THE SUM OF SHILLINGS (WORDS) Three thousand only

28582380

Receipt No. 28582380

Vote	Sub-Vote	Item	Sub-Item
B	2	A	1000000
45	47	50	54
56	60	64	

IN RESPECT OF Notice of Appeal

BY CASH/CHEQUE NO 25/06

RECEIVING OFFICER'S SIGNATURE [Signature]

TITLE No

DATE 12/06/17

STATION 25/06

AND CENTS

REGISTRAR
HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
DAR-ES-SALAAM

Govt. Press-Dar

to the 1st defendant (Exht. D2 and D3). It was not their logo. The evidence on record shows very clearly that there is actual confusion to the general public taking into account the fact that the plaintiff and the 1st defendant conducts the same line of business. Both are selling motor vehicles.

In views of the foregoing I answer the above enumerated issue as follows:-

Issue No. 7 in the affirmative.

Issue No. 8 in the affirmative

Issue No. 11 in the affirmative.

As regard issues No. 9 and No. 10 I have the following to say; Issue No. 9 the plaintiff and the 1st defendant are not sufficiently distinguished in view of the business they are conducting. And as to issue No. 10 the 1st defendant should not be allowed to use the name of Cooper Motors Corporation (T) Limited.

Lastly is issue No. 12.

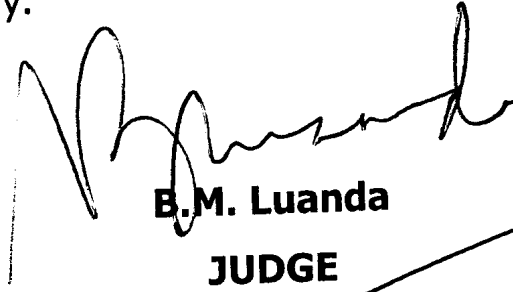
12. Whether the 1st defendant is interfering with any right of the plaintiff to sell Landrover and Ford Motor vehicles in Tanzania.

There is no cognate evidence to substantiate this claim. The same is answered in the negative.

In fine Judgment is hereby entered in favour of the plaintiff as follows:-

1. The 1st defendant is prevented from using the words Cooper Motors Corporation or its acronym CMC.
2. The 1st defendant is ordered to change its name within two months from today. Failure of which the 2nd defendant is ordered to strike out the 1st defendant company from the Register.
3. The 1st defendant is restrained from promoting itself as Cooper Motors Corporation or CMC in its trade.
4. As to damages the plaintiff is entitled to both damages namely punitive and general. As regard to punitive damages the 1st defendant on the available evidence on record was all out to deceive. That behaviour should be deterred by condemning her to pay TSh. 40m/= as punitive damages. The plaintiff also deserves to be paid general damages for inconveniences caused. I award him TSh. 20m/=.
5. The 1st defendant is condemned to pay costs of this suit.

Order accordingly.



B.M. Luanda

JUDGE

26/11/2007.

3,592 words.