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THE TRADE MARKS ACT CAP 506 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TRADE MARK NO. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS) IN CLASSES 16 AND 41 IN THE NAME OF JOSEPH MUYALE INZAI AND EXPUNGEMENT PROCEEDINGS THERETO BY KENYAN BOYS CHOIR

RULING BY ASSISTANT REGISTRAR OF TRADE MARKS

Background

On 26th February 2010, Joseph Muyale Inzai (hereinafter referred to as "the Proprietor") filed an application to register his trade mark no. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS) (hereinafter referred to as "the mark") before the Registrar of Trade Marks. The application was filed in international classes 16 and 41 of the International Classification of Goods and Services for Purposes of Registration of Marks in respect of various goods and services.

The Registrar duly examined the mark in accordance with the provisions of the Trade Marks Act, Cap 506 of the Laws of Kenya. The mark was approved and published in the Industrial Property Journal of 31st July 2010, on page 24. Upon expiry of the sixty-day statutory period, the mark was entered in the Register

of Trade Marks with effect from 26th February 2010 and a Certificate of Registration was issued to the Proprietor.

On 5th April 2011, Kenyan Boys Choir (hereinafter referred to as “the Applicants”) filed an application for expungement of the mark. The application was comprised of the prescribed Form TM 25 and a Statement of Case. The Applicants claimed to be aggrieved by the entry of trade mark no. KE/T/2010/67586 “KENYA BOYS CHOIR” (WORDS) in the Register of Trade Marks in Kenya for various reasons including:

- (a) The Applicants are the true owners of the mark “KENYAN BOYS CHOIR” which is virtually identical to the Proprietor’s mark, “KENYA BOYS CHOIR”;
- (b) The Kenyan Boys Choir was started in 1997 as the Aquinas High School Choir and was later changed to “KENYAN BOYS CHOIR”, with the Proprietor as the Choir Master and the Applicants as members;
- (c) Since then, the Applicants have created immense goodwill in Kenya and abroad especially in the United States of America where the Applicants have a huge following and fan base. This is the goodwill that the Proprietor is seeking to ride on and take unfair advantage of by registering the mark “KENYA BOYS CHOIR” in his own name;
- (d) In 2010, the Applicants obtained registration of their Business Names, “THE KENYAN BOYS CHOIR” and “THE BOYS CHOIR OF KENYA” under the Registration of Business Names Act, Cap 499 of the Laws of Kenya;
- (e) The Proprietor has no or valid claim to the mark and his mark is not entitled to protection in a court of justice since it is capable of causing confusion or deception among the member of the public; and

- (f) Registration of the mark “KENYA BOYS CHOIR” by the Proprietor which was fraudulent, could be used by the Proprietor as a means of preventing or hindering the bona fide use and registration of the Applicants’ mark “KENYAN BOYS CHOIR” which comprises the Applicants’ registered Business Names.

For the above reasons, the Applicants sought to have the Register of Trade Marks rectified by having the Proprietor’s trade mark no. KE/T/2010/67586 “KENYA BOYS CHOIR” (WORDS) expunged from the Register under the provisions of section 35 (1) Trade Marks Act.

The application was duly forwarded to the Proprietor who filed his Counter-Statement on 19th July 2011. In the Counter-Statement, the Proprietor claimed to be the bona fide proprietor of the mark “KENYA BOYS CHOIR” in respect of which he had been legitimately trading and conducting business since 2004, thereby creating substantial goodwill in the Kenyan market. In addition, the Proprietor denied all the allegations of the Applicants in their application and stated that;

- (a) the Proprietor was the true creator of the distinctive trade mark “KENYA BOYS CHOIR”, had used the mark for more than seven years before making the application to register the mark which was approved by the Registrar of Trade Marks and entered in the Register of Trade Marks for a period of ten years with effect from 26th February 2012;
- (b) all the performances that the Applicants claim to have attended in Kenya and abroad were organized by the Proprietor and all the intellectual property rights that related to the performance of the KENYA BOYS CHOIR, including songs and dances never vested in the Applicants since they were legally owned by the Proprietor, the Founder and Director of the KENYA BOYS CHOIR;

- (c) the Applicants' participation in the KENYA BOYS CHOIR was merely contractual and the Proprietor honoured all his obligations under the tenure of the contracts;
- (d) the Applicants made the application as an afterthought since the proceedings were filed after registration of the mark and the Applicants were therefore guilty of laches; and
- (e) the Applicants' application does not present any cause of action under the provisions of the Trade Marks Act and that no cause exists for the Register of Trade Marks to be rectified with respect to the Proprietor's trade mark no. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS).

For these reasons, the Proprietor prayed that the application to rectify the Register of Trade Marks with respect to trade mark no. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS) be dismissed with costs to the Proprietor.

The Counter Statement was forwarded to the Applicants who filed two Statutory Declarations on 3rd November 2011. The first Statutory Declaration was jointly sworn by five persons, some of the proprietors of the Kenyan Boys Choir, the Applicants herein. The five persons confirmed on oath the Applicants' claim as indicated in the Application to expunge trade mark no. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS) from the Register of Trade Marks and the Statement of Case. The Applicants stated that the Proprietor was not the creator of the mark "KENYA BOYS CHOIR" (WORDS) and that the Proprietor was not actually a member of the Kenya Boys Choir but a hired Choir Master. They averred that it was during a performance tour of the Choir to the United States of America in the year 2004 that it was resolved that the Aquinas High School would be transformed into a national choir to be known as the Kenya Boys Choir. They also attached copies of various documents to prove their case, including newspaper cuttings which featured the Applicants,

Certificates of Registration of the Business Names, THE KENYAN BOYS CHOIR and THE BOYS CHOIR OF KENYA under the Registration of the Business Names Act, Cap 499 of the Laws of Kenya and documents relating to their performance tours abroad, dated between 2004 and 2011. The Applicants claimed to be persons aggrieved by the entry of the Proprietor's trade mark no. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS) in the Register of Trade Mark in Kenya and sought to have the Register rectified with respect to the mark as provided for under section 35 (1) of the Trade Marks Act.

The second Statutory Declaration was sworn by one Dr. Fred Onovwerosuoke of St. Louis Choir in the United States of America who swore on oath confirming his dealings with the Applicants and the Proprietor as a benefactor for both parties.

The Statutory Declarations were duly forwarded to the Proprietor who filed his Statutory Declaration on 24th January 2012. The Proprietor confirmed and swore on oath the contents of the Counter-Statement and denied the contents of the Statutory Declarations that were filed with the Registrar of Trade Marks on behalf of the Applicants. He stated that he had worked as a Choir Master with a number of schools including the Aquinas High School as well as his own Adult Choir, Hamjambo Africa Choir. He attached documentary evidence indicating the recognition accorded to him in Kenya and abroad as the Founder and Director of the Kenya Boys Choir. He also stated in details how they had met and had worked with Dr. Fred Onovwerosuoke of St. Louis Choir. The Applicants averred that the Statutory Declaration of Dr. Fred Onovwerosuoke should be expunged from the records at the records at the Registry of Trade Marks because neither the declarant nor St. Louis Choir would be considered to be a party in the expungement proceedings related to trade mark no. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS) and lacks locus standi in the proceedings.

The Statutory Declaration was forwarded to the Applicants who filed their Statutory Declarations In Reply on 28th May 2012. The first Statutory Declaration was jointly sworn by five persons, some of the proprietors of the Kenyan Boys Choir, the Applicants herein. The five persons denied the contents of the Proprietors' Statutory Declaration and attached copies of various documents indicating the payments made to the Proprietor by Aquinas High School Choir as the Trainer of the Choir. The second Statutory Declaration was sworn by one Dr. Fred Onovwerosuoke of St. Louis Choir who reiterated the contents of his Statutory Declaration that was filed at the Registry of Trade Marks on 3rd November 2011. He also denied the averments of the Proprietor in the Statutory Declaration that was filed at the Registry of Trade Marks on 24th January 2012.

This marked the close of the pleadings that were filed in the expungement proceedings. Thereafter, a hearing date was agreed upon by the parties subsequent to which it was agreed that the expungement proceedings would proceed by way of written submissions. The Applicants filed their written submissions on 14th March 2014, the Proprietor filed his written submissions on 15th April 2014 while the Applicants filed their written submissions in reply on 4th June 2014.

Ruling

I have considered the application made herein by the Applicants and the Counter-Statement filed by the Proprietor together with the evidence adduced by both parties herein by way of their respective statutory declarations. I have also considered the written submissions made by Ms. J. K. Muchae & Company Advocates for the Applicants and Ms. Simba & Simba Advocates for the Proprietor. I am of the view that the following are the issues that should be determined in these expungement proceedings:

- 1. Did the Proprietor have a valid and legal claim to the mark “KENYA BOYS CHOIR” (WORDS) before applying to register the mark as provided for under section 20(1) of the Trade Marks Act?**
- 2. Are the Applicants aggrieved persons in accordance with the provisions of section 35 of the Trade Marks Act?**

The following is a consideration of each of the said issues:

- 1. Did the Proprietor have a valid and legal claim to the mark “KENYA BOYS CHOIR” (WORDS) before applying to register the mark as provided for under section 20(1) of the Trade Marks Act?**

It is apparent that the Proprietor’s mark “KENYA BOYS CHOIR” and the Applicants’ mark “KENYAN BOYS CHOIR” are virtually identical conceptually, phonetically and visually. The only difference is that the word “KENYA” in the Applicants’ mark has an additional “N” at the end. Further, the goods and services in respect of which the Proprietor’s mark has been registered and the goods and services in respect of which the Applicants’ mark has been used are goods and services of the same character and description. Both the Proprietor and the Applicants belonged to the same Choir, as Director/Choir Master and members respectively, which means that they would seek to retain the same customers. Consequently, their respective services, in the form of choral performances would be offered to the same audience. It would therefore be contrary to the provisions of the Trade Marks Act for the two marks to co-exist in the Register of Trade Marks and the market place, both in Kenya and internationally.

It is imperative that the issue of whether or not the Proprietor, who made a trade mark application at the Registry of Trade Marks and was issued with a certificate of registration, had a valid and a legal claim to the mark “KENYA

BOYS CHOIR” by the time he made the application to register the mark in accordance with the provisions of the Trade Marks Act.

It is the Proprietor’s case that he is the rightful and legal owner of the trade mark “KENYA BOYS CHOIR”. The Proprietor claims to have founded the Kenya Boys Choir in 2004 and has directed the Choir in a number of performances in Kenya and internationally, thereby creating substantial goodwill with respect to the trade mark, “KENYA BOYS CHOIR”. The Proprietor also claims that the Applicants were members of the Choir and participated in the Choir under contractual terms and that the Proprietor honoured all his obligations under the contracts.

On the other hand, the Applicants claim that they are the owners of similar trade marks “THE KENYAN BOYS CHOIR” and “THE BOYS CHOIR OF KENYA” in respect of which they have obtained registration as Business Names, under the provisions of the Registration of Business Names Act, Cap 499 of the Laws of Kenya.

Section 20(1) of the Trade Marks Act states as follows:

“A person claiming to be the proprietor of a trade mark used or proposed to be used by him who is desirous of registering it shall apply in writing to the Registrar in the prescribed manner for registration either in Part A or in Part B of the Register.”

The learned author of the book Kerly’s Law on Trade Marks, 12th Edition, states on page 28 paragraph 4-02 that the claim for proprietorship of a trade mark should be a justifiable one and that where such a claim cannot be made by the proprietor of the mark in good faith, then such a mark would be liable for expungement from the Register of Trade Marks.

In the *Vitamins Trade Marks Case* [1956] RPC I, Justice Lloyd stated on page 11 that an applicant for registration of a trade mark must have a proprietary right to the mark which the applicant can sufficiently substantiate if called upon to do so.

Prior to making an application for registration of a mark with the Registrar of Trade Marks, an applicant must have a valid and legal claim as the proprietor or owner of such a mark. The applicant must also be able to show that the mark under consideration can act as a badge of origin for the respective goods or services as stated by Kerly's Law on Trade Marks, 14th Edition at page 8 paragraph 2-002.

Upon receiving an application to register a mark, the Registrar of Trade Marks examines the same and has to be satisfied that the same is distinctive and adapted to distinguish the goods or services of the Applicant in accordance with the provisions of section 12 of the Trade Marks Act. Section 12(3) of the Act provides as follows:

“In determining whether a trade mark is adapted to distinguish, the court or the Registrar may have regard to the extent to which

- (a) the trade mark is inherently adapted to distinguish; and
- (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish.”

Upon consideration of all the facts surrounding these expungement proceedings and the documents availed by both the Applicants and the Proprietor, I am of the view that the Kenya Boys Choir was derived from the Aquinas High School Choir in which the Proprietor was a hired Trainer and Director. This change of name and form was actually referred to in a letter dated 29th March 2004 that the Proprietor has attached to his Statutory Declaration and marked “JM 4”. The letter is addressed to the Principal of Aquinas High School, care of the

Proprietor, by one Dr. Fred Onovwerosuoke of St. Louis Choir inviting the Aquinas High School Choir to perform in the United States of America. Paragraph two of the letter states in part “During this period the Boys, representing Kenya as the Boys Choir of Kenya ...” The Proprietor’s irrefutable commitment to the Kenya Boys Choir has been acknowledged and recognized both in Kenya and internationally. However, this recognition does not amount to transfer of the intellectual property, including trade marks, associated with the Choir to the Proprietor as an individual. Over the ten years that the Choir has been in existence, it has morphed into a national entity which should therefore belong to all Kenyans who qualify as members, according to the laid down rules, but not to an individual.

The Proprietor adopted the mark “KENYA BOYS CHOIR” to distinguish his goods and services under classes 16 and 41 of the International Classification of Goods and Services for Purposes of Registration of Marks. Thereafter, the Proprietor made an application before the Registrar of Trade Marks to register the mark and a certificate was duly issued to the Proprietor as an individual.

Having adapted a mark that is identical to the name of a national entity, the Kenya Boys Choir, the Proprietor cannot be said to have a valid and legal claim to the mark “KENYA BOYS CHOIR” under the provisions of section 20(1) of the Trade Marks Act. As stated by the learned author of the book Kerly’s Law on Trade Marks in the paragraphs quoted above, I am not convinced that the Proprietor can make a claim to the mark in good faith.

Further, it is my view that the alleged proprietary right of the Proprietor’s mark “KENYA BOYS CHOIR” has not been sufficiently substantiated in these proceedings as required by law, for a number of reasons. For instance, one of the documents produced by the Applicants herein is the Tripartite Agreement dated 18th February 2010 relating to a Tour that the Kenyan Boys Choir was scheduled to undertake out of the country. The Agreement was entered into

among Universal Music Classical Management & Production Limited of London, the Proprietor, indicated as “trading as (T/A) the Musical Arts Academy of Nairobi” and the Applicants, among other members of the Kenyan Boys Choir, described as “together professionally known as The Kenyan Boys Choir”. It is instructive to note that the Proprietor signed the Agreement, not as a member or proprietor of the Choir that he claims to have founded and legally owned but in his individual capacity as Joseph Muyale Inzai, T/A as the Musical Arts Academy of Nairobi. In addition, it has been indicated in paragraph 2 of the Agreement that the parties acknowledged that there was a dispute between the Proprietor and the Applicants. The grounds of the dispute between the two parties have not been revealed but it is noteworthy that while the agreement was dated 18th February 2010, the Proprietor made the application to register the trade mark “KENYA BOYS CHOIR” on 26th February 2010, a mere eight (8) days after. A consideration of the application made and the Certificate of Registration issued indicates that the Proprietor made a claim to all the variants of the term “KENYA BOYS CHOIR” by stating as follows:

“the words of the trade mark can be used interchangeably or in the reverse order, i.e. “Kenya Boys Choir”, “Kenyan Boys Choir”, “Boys Choir of Kenya””.

In my view, the conduct of the Proprietor indicates an attempt to ensure that the Applicants are barred from using any of the possible variants of the term “KENYA BOYS CHOIR”, notwithstanding the fact that the members of the Choir had been described in the Tripartite Agreement that the Proprietor was a signatory to, “together professionally known as “The Kenyan Boys Choir”. Such an attempt would not be termed as one that was made in good faith, thereby making the Proprietor’s claim to the mark “KENYA BOYS CHOIR” (WORDS) invalid.

In addition, a cursory search on the World Wide Web reveals that there exists a website, <http://kenyanboyschoir.com/>, where the activities and the music albums of the Kenyan Boys Choir are featured. Some albums produced between the years 2004 and 2014 are displayed and are offered for sale at Amazon.com

and iTunes. The website and the albums all feature prominently the trade mark “THE KENYAN BOYS CHOIR”. Having adapted for his registration and use a trade mark that is identical to one that is used by the Applicants, the Proprietor’s mark cannot be said to be qualified as a badge of origin for his goods and services. It is worth noting that the Proprietor himself mixes up his own registered trade mark with that of the Applicants at paragraph 34 of his Statutory Declaration that was filed at the Registry of Trade Marks on 24th January 2012. This demonstrates the extent of confusion that would occur among the ordinary members of the public were the two marks to be allowed to co-exist in the Register of Trade Marks and in the Kenyan market or internationally. Consequently, the Proprietor’s mark cannot be said to be inherently adapted to distinguish the Proprietor’s goods and services as provided for under section 12 (3) (a).

For the above reasons, I hold that the Proprietor did not have a valid and legal claim to the trade mark “KENYA BOYS CHOIR” (WORDS) before applying to register the mark under the provisions of section 20(1) of the Trade Marks Act.

2. Are the Applicants aggrieved persons in accordance with the provisions of section 35 of the Trade Marks Act?

Section 35 (1) of the Trade Marks Act provides as follows:

“Any person aggrieved by the non-insertion 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 any error or defect in any entry in the register, may apply in the prescribed manner ... and the court or the Registrar may make such order for making, expunging or varying the entry as the court or the Registrar may think fit.”

The Applicants claim to be aggrieved persons by the entry of the trade mark no. KE/T/2010/67586 “KENYA BOYS CHOIR” (WORDS) in the Register of Trade

Marks in the name of the Proprietor for the reason that the latter is not the true owner of the mark “KENYA BOYS CHOIR” that is virtually identical to the Applicants’ registered business names “KENYAN BOYS CHOIR” and “BOYS CHOIR OF KENYA”. The Applicants also state that they have been using their marks for more than ten years and they are aggrieved persons for the reason that the Proprietor has already started contacting their clients urging them to stop dealing with the Applicants with respect to their performances and deal only with the Proprietor as the legal owner of the trade mark “KENYA BOYS CHOIR”.

On the other hand, the Proprietor states that the Applicants are not aggrieved because they do not qualify as a person as envisaged under the provisions of the Companies Act, Cap 486 of the Laws of Kenya and the Trade Marks Act. The Proprietor notes that the five Applicants registered the business names “KENYAN BOYS CHOIR” and “BOYS CHOIR OF KENYA” as individuals and they are not representatives of the rest of the members of the Choir as they claim. The Proprietor is of the view that the Application to rectify the Register of Trade Marks with respect to trade mark no. KE/T/2010/67586 “KENYA BOYS CHOIR” (WORDS) was made as an afterthought since his application was duly approved, published and registered without opposition proceedings being filed. The Applicants are therefore guilty of laches and do not deserve exercise of discretion as aggrieved persons under the Trade Marks Act.

In the Kenyan case of *Saudi Arabia Airlines Corporation v Saudia Kenya Enterprises Limited* [1986] eKLR, the Court held that the Appellant was substantially interested in having each mark removed from the Register of Trade Marks in Kenya and that its interests would be damaged were the trade marks to remain on the Register. The Court stated that if the latter would occur, then the Respondents would be irregularly gaining an advantage since they were not entitled to the marks and this made the Appellants to qualify as aggrieved persons for purposes of the provisions of section 35 of the Trade Marks Act.

The learned author of the book Kerly's Law on Trade Marks and Trade Names, Tenth Edition, page 203, paragraph 11-02 defines aggrieved persons as the persons who would be interested in having a mark removed from the Register of Trade Marks "including all persons who would be substantially damaged if the mark remained, and all the trade rivals over whom an advantage was gained by a trader who was getting the benefit of a registered trade mark to which he was not entitled".

In the UK case of *Powell v The Birmingham Vinegar Brewery Co Ltd*, (1894) A.C. 8, the Court held that an aggrieved person includes any person who may have his legal rights limited due to the fact that a mark that ought not to be in the Register of Trade Marks remains in the Register.

In the Australian case of *Health World Ltd v Shin-Sun Australia Pty Ltd*, [1946] HCA 29; (1946) 75 CLR 487, the Court defined an aggrieved person to include the person who would be concerned about the purity of the Register of Trade Marks that contains an accurate record of trade marks which are capable of performing their statutory duty of indicating "the trade origins of the goods to which it is intended that they be applied." The persons aggrieved are unlike the persons who would want to make an application to rectify the Register of Trade Marks as busybodies who have no interest in the purity of the Register and would make such an application to gratify "an intellectual concern".

After considering all the relevant circumstances of these expungement proceedings, I am of the view that the Applicants qualify as aggrieved persons under the provisions of section 35 of the Trade Marks Act for the following reasons:

- (a) I have already considered the issue of whether or not the Proprietor has a valid and legal claim to the mark "KENYA BOYS CHOIR" international classes 16 and 41 of the International Classification of Goods and Services for

Purposes of Registration of Marks. I have determined that the Proprietor has no valid and legal claim to the mark for the reason that his ownership of the mark was not sufficiently substantiated as required by law. In the Australian case of *Kraft Foods Inc (Previously Known As Kraft General Foods, Inc) v Gaines Pet Foods Corporation* [1996] FCA 1337 (22 March 1996), the Court cited the case of *Paine and Co v Daniells and Sons' Breweries* RPC 1893 X 71 in which it was stated that where the attention of the court is drawn to registration of a mark whose entry on the register cannot be justified in law, then the respective applicant qualifies as an aggrieved person and the Register ought to be purified by having the mark expunged thereof, in the interest of trade.

When the Proprietor made an application to register the mark “KENYA BOYS CHOIR” in the international classes 16 and 41 of the International Classification of Goods and Services for Purposes of Registration of Marks, it was an indication that he had a legal and valid claim as the proprietor of the mark. However, since I had stated earlier that the Proprietor did not have such a legal and valid claim to the mark, it means that the registration of the mark was obtained irregularly. The Applicants are therefore aggrieved persons and have a right to seek the purity of the Register by having the Proprietor’s trade mark no. KE/T/2010/67586 “KENYA BOYS CHOIR” (WORDS) expunged therefrom because the same “cannot in law be justified as a trade mark”;

- (b) I had earlier considered the Applicants’ and the Proprietor’s marks and I had stated that the two marks are virtually identical. I had noted that in his Statutory Declaration, the Proprietor had actually confused the two trade marks which means that entry of the two marks in the Kenyan Register of Trade Marks would be contrary to the provisions of section 14 of the Trade Marks Act. Consequently, as long as the Proprietor’s trade mark no. KE/T/2010/67586 “KENYA BOYS CHOIR” (WORDS) remains in the Register,

the Applicants cannot register their trade mark “KENYAN BOYS CHOIR”. This amounts to a limitation of the legal rights of the Applicants and makes the Applicants qualify as aggrieved persons under the provisions of section 35 of the Trade Marks Act as it was held in the aforementioned case of *Powell v The Birmingham Vinegar Brewery Co Ltd*. As some of the members of the Kenyan Boys Choir, the Applicants have a legal right to seek to have the mark “KENYAN BOYS CHOIR” entered in the Register of Trade Marks. This right would not be exercised since the Registrar of Trade Marks would not allow the two identical marks to co-exist in the Register of Trade Marks; and

- (c) Once a trade mark has been entered in the Register of Trade Marks, one of the rights that the proprietor acquires is the right to enforce the trade mark. According to the documents filed in these expungement proceedings, the Proprietor of trade mark no. KE/T/2010/67586 “KENYA BOYS CHOIR” (WORDS) contacted the Applicants’ clients urging the latter to halt dealings with the Applicants with respect to their performances and deal only with the Proprietor as the legal owner of the mark. As it was stated in the aforementioned case of *Powell v The Birmingham Vinegar Brewery Co Ltd*, the attempt by the Proprietors to interfere with the Applicants’ use of the trade mark that they have been using for a period of more than ten years makes the Applicants qualify as aggrieved persons who would justifiably seek to have the register of Trade Marks purified by expunging the Proprietor’s mark from the Register. As long as the Applicants cannot use the name of the Choir that they have participated in for more than ten years, then they are qualified as aggrieved persons in accordance with the

provisions of section 35 of the Trade Marks Act.

I am of the view that the Applicants have an interest in seeking to ensure the purity of the Register of Trade Marks and I am convinced that the Applicants are not mere busy bodies. I do not agree with the contention of the Proprietor that the Applicants are not aggrieved persons because they did not oppose registration of the Proprietors' mark.

The law of trade marks allows a person who did not get an opportunity to oppose registration of a mark to make an application to rectify the Register. It is for this purpose that the provisions of section 35 were included in the Trade Marks Act. This is the opportunity that the Applicants herein are appropriately utilizing. I am of the view that the Applicants qualify as aggrieved persons in accordance with the provisions of section 35 of the Trade Marks Act.

Conclusion

- (a) For the above-mentioned reasons and on a balance of probabilities, I have come to the conclusion that the Applicants have succeeded in these expungement proceedings;
- (b) I hold that the Proprietor's trade mark no. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS) was entered in the Register of Trade Marks without sufficient cause and in error since the Applicants were not entitled to the same as required by law;
- (c) The Register of Trade Marks is hereby rectified by expunging the said trade mark no. KE/T/2010/67586 "KENYA BOYS CHOIR" (WORDS) from the Register under the provisions of section 35 of the Trade Marks Act; and

(d) I award the costs of these expungement proceedings to the Applicants.

Eunice Njuguna

Assistant Registrar of Trade Marks

27th Day of February 2015

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

A handwritten signature in black ink, appearing to read 'Eunice Njuguna', with a stylized flourish at the end.

Eunice Njuguna

Assistant Registrar of Trade Marks

27th Day of February 2015