



## What's in a Name?: Issues in Conflict of Corporate Names in Nigeria



a.elebiju@lelawlegal.com



e.eferakeya@lelawlegal.com



**CAMA**, “a person or association of persons shall not carry on business in Nigeria as a company, limited liability partnership, limited partnership or under a business name without being registered under this Act.” Thus, the only persons free from this requirement are those individuals who intend to do business as sole proprietors or partnerships using their, or combination of their own names.<sup>3</sup>

E f f e c t i v e l y , c o m p a n y incorporation is the birthing of a new person in law; hence, choosing a name for a company is almost as important as naming a natural person. As for natural persons, it is names that will distinguish one company, from other companies. Unsurprisingly, many promoters apply their creative gifts to come up with distinct, unique and memorable names, subject to legal restriction



### Introduction

As at March 2019, Nigeria reportedly had 3.1 million registered companies, business names and incorporated trustees.<sup>1</sup> It is trite that upon incorporation, companies become, in law artificial persons with separate legal personalities from their directors and shareholders.<sup>2</sup> By **section 863**

1. Aliyu Kwaifa, ‘Nigeria Has 3.1 Million Registered Companies - CAC’, Daily Trust, 29.03.2021: (accessed 08.06.2021). According to the news report: “The Corporate Affairs Commission (CAC) has revealed that Nigeria has a total of 3.1 million registered companies. ... Speaking at a customer forum held in Abuja, Lady Azinge said a total of 618,309 business entities was registered by the Commission from 2016 to 2018. ... She further stated that 248,914 were limited liability companies, and 327,676 were business names while 41,719 were incorporated trustees. Lady Azinge told participants at the forum that since inception to date, most of the companies registered were limited liability companies.” In this article, depending on the context, the authors sometimes use “company” loosely to cover all forms of registrations with the CAC – companies, business names (sole proprietorship/partnerships), limited liability partnerships (LLPs), limited partnerships (LPs).

2. See **section 42 Companies and Allied Matters Act No. 3 of 2020 (CAMA)**: “As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may become members of the company, shall be a **body corporate by the name contained in the memorandum**, capable of exercising all the powers and performing all the functions of an incorporated company including power to hold land, and having perpetual succession, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.” This provision used to be **section 37 Companies and Allied Matters Act Cap. C20, Laws of the Federation of Nigeria (LFN) 2004 (CAMA 2004)**; and **section 41 CAMA, Cap. 59 LFN 1990 (CAMA 1990)**; and **section 15(2) Companies Act 1968 (CA 1968)**. Cf. with **section 43(1) CAMA**: “Except to the extent that the company’s memorandum or any enactment otherwise provides, every company shall, for the furtherance of its business or objects, have all the powers of a natural person of full capacity.” These provisions have been variously applied in Nigerian cases such as *Ramachand v. Ekpeyong* (1975) 5 SC 29, *Union Bank (Nigeria) Ltd v. Penny-Mart Ltd* [1992] 2 NWLR (Pt. 240), 228 at 237, etc. following the *locus classicus* of *Salomon v. Salomon* [1897] AC 22.

3. **Section 815 CAMA**. Like companies and LLPs, to enjoy perpetual succession and legal personality, etc trustees of an association must be registered as Incorporated Trustees under the **CAMA: section 823(2) and 830**.

on certain words.<sup>4</sup> Having crafted a 'nice' name, should the relevant parties not be entitled to the full benefits of their creativity?<sup>5</sup> The fact that a registered business name does not confer separate legal personality is not a bar to the right of the business name owner or the CAC to prevent improper use of such name through wrongful registration.<sup>6</sup>

This article after examining the reasons corporate names are, and should be fiercely protected, considers issues generated by having similar/conflicting corporate names in Nigeria, and the all-important role played by regulators, especially the Corporate Affairs Commission (CAC), given applicable **CAMA** provisions.<sup>7</sup> We conclude by stressing the need to keep doing more in this regard as 'orderliness' around registration and protection of corporate names in Nigeria, is part of the 'optics' on ease of doing business, sending out the right

signals to the investment community.

### Protection of Corporate Names – Raisons d'etre

The core aim of every business is to make profits. To achieve this end, a company has to be distinguishable from other similar companies with a name that is easily identifiable by customers, business associates and the general public.<sup>8</sup> A company's name also protects the interests of its customers as it ensures the distinction, which is useful for making their choices, amongst similar brands.

Hence, companies expend

substantial funds on advertising, Corporate Social Responsibility (CSR) and philanthropy, in order to make customers familiar with their names. Names are chosen amongst other reasons, for distinctiveness - to stand out from competitors, and have potential to evoke or build loyalty, have emotional ties with target customers, especially where quality and pricing are also favourable.<sup>9</sup> Consequently, a name plays a very important role in the corporation's growth and perception,<sup>10</sup> as it not only captures the attention of potential customers; but is also a summation of the essence of its business.



4. **Section 852(1) CAMA** absolutely prohibits the use of a name that is capable of misleading the public as to the: nature of the business; the nationality, race or religion of the persons by whom the business is controlled; deceptive or objectionable in that it contains a reference or suggests association with any practice, institution; capable of undermining public peace. **Per section 852(2) CAMA**, no company can be registered without the consent of the Corporate Affairs Commission (CAC) with the words "Federal", "National", "Regional", "State", "Government", "Cooperative", "Group", or "Holding" in their names. More specifically, **section 852(2)(b)** forbids use, without consent of "Government", or any other word which, in the opinion of the Commission suggests or is calculated to suggest that it enjoys the patronage of the Government of the Federation, the Government of a State in Nigeria, any Ministry or Department of Government, or contains the word 'Municipal' or 'Chartered' or in the opinion of the Commission, suggests or is calculated to suggest, connection with any municipality or other local authority". See also **section 9 Seal Lagos State Government Law No. 28 of 2011 (SLL)** which mandates the consent of Lagos State before the word "Lagos" can be used as part of a company's name. Incidentally, the law does not frown against the use of "Nigeria" as part of a company's name – as such simply signifies that the company is a Nigerian company. In practice, in order to obtain approval for a name pursuant to both **SLL** and **CAMA**, the applicant would need to apply to the: (a) Lagos State Government through the Attorney-General for consent; (b) Registrar-General (R-G) of the CAC for 'R-G's Consent', attaching the consent in (a) above, before successfully undertaking the name availability check and reservation process on CAC's portal at: <https://www.cac.gov.ng>. The foregoing finds legal reinforcement in **section 853 CAMA** which empowers the CAC to seek the input of requisite government bodies/agencies as necessary before granting its approval of proposed names under **section 852**.

5. This is the rationale behind the enactment of the **Nigerian Cybercrime Act (Prohibition, Prevention, Etc.) No. 17 of 2015**. **Section 58** states that cybersquatting is the acquisition of a domain name over the internet to amongst other reasons, profit from a similar, identical name to an existing trademark registered with the appropriate government agency or without any intellectual right over the name. Thus the registration of a domain name similar to that of an existing company without any interest in the name is a criminal offence in Nigeria. Cf. an incident prior to the enactment of the Act, whereby some individuals incorporated a company with the name of an international telecoms operator in anticipation of the latter's entry into Nigeria, as core investor in a GSM licensee. They demanded a premium in order to transfer the Nigeria 'affiliate' to the operator, negotiations fell through, and the GSM licensee rebranded with the initial of the international operator as the first letter of its name, to mark the entry of the new core investor/manager. As we show subsequently, such fiasco could have been avoided with the CAC insisting on its practice of requiring a letter of consent from promoters that want to incorporate Nigerian companies bearing international brand names, to show affiliating with such brands. See also, Titilola Oludimu, 'Someone Could Become N48 Million Richer From The Newly Unveiled Nigerian Air', *Techpoint.africa*, 20.07.2021: <https://techpoint.africa/2018/07/20/nigeria-air-domain-taken/> (accessed 15.06.2021). The article referred to one Olumayowa Elegbede, who registered the domain names: *NigerianAir.ng* and *NigerianAir.com.ng* a day after the unveiling of the then proposed national carrier, *Nigerian Air*. He then reportedly went to put them up for sale at N24 million each.

6. See for example, **sections 8(1)(a)(ii), 30(4), 41(1)(e), and 852(1) CAMA**.

7. Incidentally, there is hardly any challenge of one person bearing the exact names of another individual, to the extent that there is no impersonation – usually there would still be distinguishing characteristics; people who bear same names will more often than not still look distinguishable. Even identical twins will usually apart from sharing the same surname, not bear the same forenames.

8. Ivan Bulatovic, et al, 'Branding a Business Name', *Ekonomika poljoprivrede (Economics of Agriculture)*, Vol. 63, (January 2016), 1323-1332 at p. 1324: [https://www.researchgate.net/publication/317556277\\_Branding\\_a\\_business\\_name/fulltext/59416372a6fdcc13d688b34a/Branding-a-business-name.pdf?origin=publication\\_detail](https://www.researchgate.net/publication/317556277_Branding_a_business_name/fulltext/59416372a6fdcc13d688b34a/Branding-a-business-name.pdf?origin=publication_detail) (accessed 01.06.2021).

9. Eloise Duguay, 'Successful Brand Names: What the Right Name Can Do for Your Corporation's Reputation', *Nameo*, 11.07.2019: <https://naimeo.com/successful-brand-names/> (accessed 01.06.2021).

10. Adam Fridman, 'Why Your Corporation Name is as Important as Your Corporation Function', *Inc.*, 10.08.2015: <https://www.inc.com/adam-fridman/why-your-corporation-name-is-as-important-as-your-corporation-function-adam.html> (accessed 27.05.2021).



It is not surprising that companies pay great attention to their names, often hinging their substantial investment in building brand equity, on such names, and doing all they can, to avoid reputational risk, with the related negative fallouts: on market perception (and therefore value) of their products/services, and even of their stock prices. It is now common for goodwill to be a substantial part of some companies' assets.

The company or business that built its goodwill is entitled to profit therefrom, whilst legal policy (exemplified by passing off for example), frowns at 'impostors' seeking to profit from where they have not sown. Studies have shown that customers rely on the reputation of corporations in making product and services choices, investment and career decisions, etc.<sup>11</sup> Favourable reputation also enables companies to charge premium prices, and attract top talent and investors.<sup>12</sup> Undoubtedly, reputable companies have an advantage over their counterparts in the same industry.

### Legal Regime for the Protection of Corporate Names in Nigeria

#### Common Law Tort of Passing off

The common law remedy of passing off protects the rights of unregistered companies. Passing

off is the making of false representations to the public by businesses about the source or origin of their goods or services.<sup>13</sup> It is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the product or business is that of another.<sup>14</sup> The foundation for the law of passing off is as enunciated in **Perry v. Truefitt**<sup>15</sup> that: "a man is not to sell his own goods under the pretence that they are the goods of another man." The same principle was reiterated in **Reddaway v. Banhan** thus: "nobody has the right to represent his goods as the goods of somebody else."

The tort of passing off in Nigeria was described by the Court of Appeal (CA) in **International Tobacco Nig. Ltd v. British American Tobacco Nig. Ltd**<sup>16</sup> to: "consists of the making of false representation to the public, or to a third person(s), which is likely to induce them to believe that the goods and services of another are those of the plaintiff. The applicable test is not whether a customer can distinguish the two marks when placed side by side but whether when he has only his own recollections of the one he likes to go by, he may not accept the other in mistake for it."

Where a company's name is so similar to another and likely to deceive the public about the relationship between two

businesses, the common law of passing off would apply to protect the earlier company. In **Niger Chemists Ltd v. Nigeria Chemists**,<sup>17</sup> the Plaintiff had established a chemist business using the name "Niger Chemist". The Defendant also started a chemist with the name "Nigeria Chemist", on the same street as the Plaintiff. The Plaintiff sued the Defendant claiming that the name was too similar and likely to deceive the public.

The Court agreed and granted an injunction restraining the Defendant from using the name "Nigeria Chemist" holding that "in an action to refrain the Defendant from using a business name similar to that of the Plaintiff it is not necessary to prove either intent to deceive or actual deception. The Plaintiff need only prove that the name used by the Defendant is so similar to his own as to be likely to cause confusion in the mind of the public."<sup>18</sup>

In order to sustain a claim for the tort of passing off, the Plaintiff must prove that:<sup>19</sup>

I. He has acquired a reputation in respect of the trademark. In other words, that the mark has become distinctive of his product and his customers and public have come to associate the mark with their business;

11. Grahame Dowling, 'Managing Your Corporate Image', *Industrial Management* Vol 15, No. 2 (1986), pp. 109-115.

12. Paul Milogram and John Roberts, 'Relying on the Information of Interested Parties', *Rand Journal of Economics*, Vol. 17, No.1, (Spring 1986), <https://web.stanford.edu/~milgrom/publishedarticles/Relying%20on%20the%20Information%20of%20Interested%20Parties.pdf> (accessed 1.06.2021).

13. Adejoke Oyewunmi, 'Nigerian Law of Intellectual Property', (Unilag Press, 2015), p. 297.

14. Gilbert Kodilinye and Oluwale Aluko, 'Nigerian Law of Torts', (Spectrum, 1999), p. 221.

15. (1842) 6 Beav. 66.

16. [2009] 6 NWLR (Pt. 1138), 577 at 646E-G.

17. (1961) 1 All NLR 171.

18. *Supra*, p. 180. Incidentally, there was no prior relationship (such as employer-employee), between the parties. Similarly, in **Ogunlende v. Babayemi** (1971) 1 UILR 417 it was held that "Mercury Builders" and "Mercury Builders (Nigeria) Ltd." were so similar as to be likely to be mistaken for each other.

19. **International Tobacco Nig. Ltd v. British American Tobacco Nig. Ltd** (*supra*), p. 647-649; **Defacto Works Ltd. v. Odumotun Trading Co.** (1971) UILR 417; **Trebtor (Nig.) Ltd. v. Associated Industries Ltd.** (1972) NCLR 471.

ii. The Defendant had engaged in acts which are capable of misleading the Plaintiff's customers or members of the public into believing that the Defendant's business and that of the Plaintiff are connected;

iii. There is the likelihood of deceit. In other words, the Plaintiff ought to prove that the Defendant's conduct was calculated to deceive but not necessarily that there must be evidence of actual deceit before the requirement can be met. Once it can be shown that there is likelihood or possibility of deception, the tort is consummated and the intention of the Defendant is irrelevant.

Passing-off is not only of common law origin, but it also has statutory backing in Nigeria. The common law action is preserved in **section 3 Trade Mark Act (TA)**<sup>20</sup> that states thus: "...nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

#### Protection under the **Trade Mark Act of Nigeria**

A company's name that has been registered as a trade mark under the **TA** is afforded statutory protection from all infringement; with registration generally conferring exclusive right to the use of that name. **Section 67 TA** stated that trade mark means "except in relation to a certification

*trade mark a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person."*

In **Ferodo Ltd v. Ibeto Industries Ltd**,<sup>21</sup> the SC held that "A trade mark if registered gives its proprietor the exclusive right to use the trade mark in marketing or selling his goods. And without his consent, if anyone else uses an identical mark; or any mark so nearly resembling it as to likely deceive or cause confusion between his own goods and the proprietor's goods, will entitle the proprietor to sue for infringement of the trademark, or to sue in action for passing-off or both."

An infringement of a trademarked corporate name occurs where a company other than the owner of the trademarked name, uses a name identical with it or resembling it as is likely to deceive, or cause confusion.<sup>22</sup> What the Courts consider in determining whether there is an infringement is if there is a semblance between the basic idea of the infringed trademark and the other name and the Court does this by placing both of them side by side for comparison.<sup>23</sup> It is the offending name that is considered such that whether a person who sees the name in the absence of the trademarked corporate name, is likely to be deceived into thinking that the name is the trade mark.<sup>24</sup>

Thus, a trademarked corporate name cannot be used by another.

In a case for the infringement of a trade mark name, the motive behind the adoption of the offending name need not be fraudulent or intended to deceive.<sup>25</sup> All that is relevant is the effect the offending name would have on members of the public. If the name is likely to confuse, the likelihood of deceit is deemed to be present irrespective of whether or not the company intended to be present.

#### Exceptions to the Protection Afforded by the **TA**

An exception to the exclusive use of a trademarked name is where there is proof of continuous use of a similar name prior to the registration of the trade mark. **Section 7 TA** recognises and protects the right of owners of unregistered names similar to registered trademarks if they have been in continuous use from a date previous to the use and registration of the trade mark. This was the upheld by the SC in **American Cyanamid Co v. Vitality Pharmaceuticals Ltd**<sup>26</sup> thus: "Concisely stated, the proprietor or registered user of a trade mark, is not entitled to interfere with an existing trade mark, even if identical with or nearly resembling his own if it has been in continuous use before the use of or registration of his own trade mark."

20. *Cap. T13, LFN 2004*; and *Patkun Industry Ltd. v. Niger Shoes Manufacturing Co. Ltd* [1988] 5 NWLR (Pt. 93), 138.

21. [2004] 5 NWLR (Pt. 866) 317, at 347D-G.

22. *Section 5 TA; Ferodo Ltd v. Ibeto (supra)*.

23. *Bell & Sons Co. Ltd. v. Aka* (1972) All NLR (Pt. 1), 33.

24. *Alban Pharmacy Ltd v. Sterling Products International Inc.* (1968) All NLR 300.

25. *United Kingdom Tobacco Co. Ltd. v. Carreras* (1931) 16 NLR 1.

26. (1991) LPELR-461(SC), at 32-34G-A.

Other exceptions are provided in **section 13 TA**. For instance, registration of similar trade marks by more than one proprietor may be allowed in a case of honest concurrent use, or any other special circumstances which, in the opinion of the Court or the Registrar, make it proper so to do.

#### Protection under the CAMA

**CAMA** is the primary legislation governing the formation, management and liquidation of companies in Nigeria. It provides for the protection of already registered companies names with the CAC. By **section 852(1)**:

**“No company, limited liability partnership, limited partnership, business name or incorporated trustee shall be registered under this Act by a name or trade mark which-**

*a. is identical with that by which a company or limited liability partnership in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except where the company or limited liability partnership in existence is in the course of being dissolved and signifies its consent in such manner as the Commission requires.*

*b. ....*

*c. ....*

*d. in the opinion of the Commission, would violate or conflict with any*

*existing trademark or business name registered in Nigeria or body company formed under this Act unless the consent of the owner of the trade mark, business name or trustees of the body company was obtained.”<sup>27</sup>*

The above section underpins the CAC's practice of rejecting for registration, any name that resembles an already existing name of a registered company/business or association in Nigeria. However, occasionally CAC inadvertently registers a name similar to that of a company already in existence; and the pertinent question then is: 'what happens in such a scenario?'

**Section 30(1) CAMA** provides the answer thus: **“if a company through inadvertence or otherwise, on its first registration or on its registration by a new name, is registered under a name identical with that by which a company in existence is previously registered, or nearly resembling it to be likely to deceive, the first mentioned company may with the approval of the Commission, change its name, and if the Commission directs, the company concerned shall change its name within six weeks from the date of the direction or any such period as the Commission may allow.”<sup>28</sup>** The CAC is also empowered to request the Company to change its name if it discovers that its name conflicts with an existing trademark or business name prior to the

registration, and the consent of the owner of the trademark or business was not obtained.<sup>29</sup>

The CA, whilst interpreting **section 30 CAMA** in **Mustapha v. CAC**,<sup>30</sup> held that: *“the provisions of Section 30(1) & (2) of the Act regarding the prohibition and restriction of names of companies are very clear and unambiguous. The criteria for such do not include consideration and application of English meanings of the words used in names of proposed companies. All that need be established is similarity in names as are likely to cause confusion in the mind of the public. It is a settled principle of law that statutes are to be given their simple and clearly unambiguous meaning. The Courts are enjoined in the discharge of their duties of interpretation to avoid going beyond the meaning and intendment of the legislator.”<sup>31</sup>*

A similar situation occurred in **Maersk (Nig) Ltd. & Anor. v. Maersk Nig. Ltd. & Anor.**<sup>32</sup> The 1<sup>st</sup> Appellant Company was registered on 26th January, 1998. CAC registered the 1<sup>st</sup> Appellant after it confirmed that no other company bears the proposed name of Maersk Nig. Ltd. Thereafter, the 1<sup>st</sup> Respondent laid claim to the same name, contending that it was registered first in time to the 1<sup>st</sup> Appellant, as a company formerly known as Niger Nordic Ltd. in 1988, which it later changed to Maersk Nig. Ltd. in 1991. It therefore instituted an action against the 1<sup>st</sup> Appellant.

27. Emphasis supplied to show that restrictions on use of names applies to all registrations under the CAMA, not just companies. Cf. **section 868(2)**: *“The Registration of a business name under this Act shall not be construed as authorising the use of that name if, apart from such registration, the use could be prohibited.”*

28. Emphasis supplied.

29. **Section 30(4) CAMA**. See also **section 855** which empowers the CAC to give direction for change of name where misleading information was given for purposes of a registered name; however such direction must be given within five years of such registration and specify the period within which the name change must be consummated, albeit this may be extended by a further direction. Default exposes each of the company, LLP, business name or incorporated trustee and the officers, directors/shadow directors, partners, trustees (as the case may be), to a stipulated daily penalty for the period of non-compliance. Per **section 856(1) and (2)**, the CAC may direct change of name if it believes the name *“is misleading as to the nature of its activities as to be likely to cause harm to the public”*, and the *“direction must be complied with within six weeks from the date of the direction or such longer period as the Commission may deem fit.”* Default also attracts a daily penalty on each of the company, business name, LLP, incorporated trustee and its *“officers”*: **(856(3))**.

30. [2009] 8 NWLR (Pt.1142), 35.

31. *Supra*, p.54.

32. (2017) LPELR-43578 (CA).



The CA held that “...the admission by the 2nd Respondent that it made a mistake in registering the 1st Appellant as ‘Maersk Nigeria Limited’, albeit belated, cannot be overlooked. It sufficiently answered the question of: which of the Companies between the 1st Respondent and the 1st Appellant was registered first in time by the 2nd Respondent, CAC. Clearly, this is precisely the mischief that Section 30(1)(a) & (c) of the Companies and Allied Matters Act, 1990 was designed to address.”<sup>33</sup>

#### Supervisory Role of the Corporate Affairs Commission

The CAC is the body saddled with the responsibility of registering company names in Nigeria.<sup>34</sup> The CAC is a body corporate with perpetual succession and a common seal. Its functions includes the administration of the Act including the registration, regulation and supervision of the formation, incorporation, management, striking off and winding-up of companies amongst others.<sup>35</sup> Thus, the CAC plays a central role in conflict of company names. In fact, CAC is the decider on whether or not a name conflicts with an existing name. It is mandated by **CAMA** to refuse the registration of a conflicting name and also to direct the change of a conflicting name.

In *Mustapha (supra)* the Plaintiff presented the names of three proposed companies to the CAC for registration/reservation. The CAC refused to reserve the names on

the grounds that there were in existence registered companies with identical or similar names. The Plaintiff, not satisfied with the CAC’s decision, filed a writ of certiorari praying the Court to quash same and compelling acceptance of the names for registration. The Court held per Aboki JCA, thus:

“It is clear from the provisions of Section 30(1)(a),(b),(c) and (d) that the Respondent is under a mandatory duty to refuse to register any company in Nigeria with a name identical or so resembling another company already registered. In carrying out this duty, the Respondent is required to compare names from the list of companies already registered and stored in its data bank with the proposed names seeking to be registered. Where in the course of such comparison it is discovered that there are already names registered which have semblance or identical features with the proposed names, the Respondent has the responsibility to refuse to register such names. The Statute did not place any duty on the Respondent to undertake an etymology of the words used in formulating the names to be registered in ascertaining whether they are identical as to mislead or deceive people as to the identity of the names already registered. All that is required of the Respondent by law is a comparative analysis of the names from the ways they look or sound in the mouth and ears of ordinary citizens on the street of Nigerian towns and cities and in particular those doing business in

markets in the commercial cities who may be potential business customers of these companies.”<sup>36</sup>

Given the unsavoury effects including financial, and particularly the embarrassment that could result from wrongful company name registrations, the CAC needs to up the ante, on its processes for ensuring near nil occurrences of such scenario. We are aware that the CAC maintains register of companies, LLPs business names, in Nigeria, pursuant to **sections 8(1), 805, 811, 816 CAMA**. The Register needs to be updated real time and relevant algorithms employed so that artificial intelligence also aids the CAC’s leverage on the human factor in the discharge of its duty to approve company, business names and those for incorporated trustees.

Whatever its back office arrangements are, the desirable outcome-expectation of the investing public is that any conflicting name with an already existing business name, would not successfully scale CAC’s name reservation/approval stage. This is more so that the CAC now aims to complete the registration of new companies within three (3) hours.<sup>37</sup>



33. Per Sankey, JCA at 23.

34. Section 1 CAMA.

35. Section 8(1)(a)(i) CAMA.

36. *Mustapha v. CAC (supra)*, at 12-15D-C. See also *Daily Need Pharmaceutical Industries Ltd. v. Daily Needs Industries Nigeria Limited & Anor. (1997) 1 NCLC 154*.

37. Mary Izuaka, ‘CAC Aims to Register New Company within Three Hours’, Premium Times, 14.04.2021: (accessed 01.06.2021).

In addition, the import of the first part of **section 30 CAMA** implies that the CAC ought to be aware of trademarked corporate names in Nigeria.<sup>38</sup> The CAC ought to have access and should cross-check the register of Trademarks in Nigeria against a proposed name submitted for registration before approval of same for registration.<sup>39</sup> Preventing wrongful registration is more efficient and therefore preferable, to 'after the fact' regularisation or salvage efforts, envisaged by **section 30(4) CAMA**.

#### Is There a Regulatory Duty of Care?

We submit that the CAC owes a duty of care to companies not to register another company with a similar name that is likely to confuse the public as held in **Dikko & Sons Ltd. v. CAC**.<sup>40</sup> The jurisprudential basis of such duty of care would be statutory/public duty (for example, *per section 8(1)(d) CAMA*).<sup>41</sup> Perhaps a stronger and more direct basis is **section 41(1)(e) CAMA** that prohibits the CAC from registering memorandum and articles where

*"the proposed name conflicts with or is likely to conflict with an existing company, trade mark or business name registered in Nigeria."*<sup>42</sup> Thus, although the **section 41(2) CAMA** remedy<sup>43</sup> can only be leveraged by the prospective registrant of the proposed name, the question could arise whether the CAC owes a higher duty of care to the first company or to the subsequent one? In our view, **section 41(1)(e)** favours the former – which also presumably might have been in business earlier and therefore enjoys the equity of being the first in time.<sup>44</sup> However, as we show subsequently, a higher duty to the first party does not mean that CAC's duty to the other (subsequent registrant), is totally erased.

Additional reinforcement of the need to protect the name owner's rights can be seen in **section 857(1)** and **(2) CAMA** whereby "A person ('the applicant') may object to the registered name on the ground that it is - (a) the same as a name associated with the applicant in which he has goodwill; or (b)

sufficiently similar to such a name that its use in Nigeria would be likely to mislead by suggesting a connection between the [prospective registrant] and the applicant. (2) The objection must be made by application to the Administrative Proceedings committee established under this Act."<sup>45</sup> **Section 587(4)** outlines relevant considerations for responding to the objection.<sup>46</sup> By **section 587(5)**, "If the facts mentioned in subsection (4)(a) or (b) are established, the objection shall nevertheless be upheld if the applicant shows that the main purpose of the respondents (or any of them) in registering the name was to obtain money (or other consideration) from the applicant or prevent him from registering the name."<sup>47</sup>



38. See particularly **section 30(4) CAMA**: "Nothing in this Act precludes the Commission from requiring a company to change its name if it discovers that such a name conflicts with an existing trade mark or business name registered in Nigeria prior to the registration of the company and the consent of the owner of the trade mark or business name was not obtained." Emphasis supplied. A **section 30(4) CAMA** scenario would only arise, upon failure of the **section 41(1)(e)** obligation.

39. This is moreso that both agencies are under the oversight of the Federal Ministry of Industry Trade and Investment (FMITI), which also supervises the Nigerian Investment Promotion Commission (NIPC). In terms of the Executive Order On the Promotion of Transparency and Efficiency in the Business Environment of the signed by then Acting President Osinbajo in May 2017, the Federal Government envisaged more robust inter-MDA cooperation for seamless public service delivery, as part of the initiative to improve the ease of doing business in Nigeria. For some discussion see, Chuks Okoriekwe, *Executive Order on Ease of Doing Business in Nigeria: Knuckling Down to Get Business Done*, LeLaw Regulatory Alert, June 2017, at p.3 ('One Government'): [https://lelawlegal.com/add111pdfs/Executive\\_Order\\_on\\_Ease\\_of\\_Doing\\_Business\\_in\\_Nigeria\\_-\\_Knuckling\\_Down\\_to\\_.pdf](https://lelawlegal.com/add111pdfs/Executive_Order_on_Ease_of_Doing_Business_in_Nigeria_-_Knuckling_Down_to_.pdf) (accessed 16.06.2021).  
40. (2014) LPELR-23730(CA).

41. See **section 8(1) CAMA**: "The functions of the Commission shall be to - (a) administer this Act, including the registration, regulation and supervision of - (i) the formation, incorporation, management, striking off and winding-up of companies, (ii) business names, management and removal of names from the register, and (iii) the formation, incorporation, management and dissolution of incorporated trustees; (b) establish and maintain a company's registry and office in each State of the Federation suitably and adequately equipped to perform its functions under this Act or any other law; (c) ... (d) ensure compliance by companies, business names and incorporated trustees with the provisions of this Act and such other regulations as may be made by the Commission; (e) perform such other functions as may be specified in this Act or any other law; and (f) undertake such other activities as are necessary or expedient to give full effect to the provisions of this Act."

42. Cf. **section 757(2)**: "A limited liability partnership shall not be registered by a name which, in the opinion of the Commission is— (a) undesirable; or (b) identical or too nearly resembles that of any other partnership, business name, limited liability partnership, body corporate, or a registered trade mark." **Section 758** makes **sections 30** and **31** on reservation or change of name applicable to LLPs. Per **section 813(1)**, "The Registrar shall cause business names to be registered in accordance with the provisions of this part of this Act."

43. See **section 41(2) CAMA**: "Any person aggrieved by the decision of the Commission under subsection (1), may give notice to the Commission requiring it to apply to the Court for directions and the Commission shall, within 21 days of the receipt of such notice, apply to the court for the directions." Quaere: Can the owner of the original name seek to be joined as an interested party when the application for directions is being heard by the Court, pursuant to **section 41(2)**?

44. There can be no doubt that the CAC owes the duty to ensure non-registration of conflicting names to both the original owner of the name and the person seeking to (innocently) register it as a proposed name. If the latter is injured by CAC's wrongful registration resulting in conflict with an existing name, there would be right to relief.

45. By **section 587(3)**, "The [prospective registrant] shall be the primary respondent to the application provided that any of its members or directors may be joined as respondents."

46. "If the ground specified in subsection (1)(a) or (b) is established, it is for the respondents to show that the (a) name was registered before the commencement of the activities on which the applicant relies to show goodwill; (b) company, limited liability partnership, limited partnership, business name or incorporated trustee (i) is operating under the name, (ii) is proposing to do so and has incurred substantial start-up costs in preparation, or (iii) was formerly operating under the name and is now dormant; (c) name was adopted in good faith; or (d) interests of the applicant are not adversely affected to any significant extent."

47. This provision which is an innovation in **CAMA 2020**, will have aided the international telecoms operator referred to in footnote 5 (at p.2), herein.



Interestingly, in *Dikko & Sons*, the Appellant (*Dikko & Sons. Ltd*) alleged that the CAC registered another company, “*A. Dikko and Sons Nigeria Limited*” and that cheques meant for the Appellant were cleared by the said company. The Appellant then sued the CAC contending that it would not have suffered the losses it did, but for CAC’s negligence. However, the CAC denied that it registered such a company. The CA and the trial Court dismissed the suit, because of the Appellant’s inability to produce the certificate of incorporation of the company.<sup>48</sup>

We submit that the CAC should be liable for losses suffered by a company as a result of the change of its ‘conflicting’ name, albeit such company would have the requisite evidential burden to discharge in order to show entitlement to damages.<sup>49</sup> This is because the losses were occasioned by the negligence of the CAC in registering the company with a name already in use by another company. For example, CAC should waive statutory fees incidental to effecting such change of name and

obtaining new certificate of incorporation pursuant thereto.<sup>50</sup> However, the aggrieved company might encounter some difficulty in instituting the action against the CAC, as **Section 2(a) Public Officers Protection Act**<sup>51</sup> states that an action against public officers shall be instituted within three months after the neglect complained of.<sup>52</sup>

Also **section 17 CAMA** stipulates that a 1 month pre-action notice must be given to the CAC prior to the institution of any suit. Thus any such action must be commenced within three months of the registration of the company with one month notice to the CAC. This would be a stumbling block to such action as non-compliance would strip the Court of jurisdiction over such a suit.

Historically, the CAC has not been very effective in its duty not to register names that are similar to already registered corporate names and trademarks. Anecdotal evidence from CAC practice has shown that the CAC does not act promptly to regularise things, where it becomes aware that it has inadvertently registered a conflicting name. Sometimes, a

name that successfully scales through the name availability check and reservation process, ends up being an issue at the time of completing the incorporation; holding up the process when CAC flags the conflict late in the day and requires a name change, prior to issuing the incorporation certificate.

#### *Welding the Big Stick*

In the case of recalcitrant companies that refuse to change their names (because they have been doing business in such names, especially if they have been so trading for quite a while), the CAC should strictly apply the relevant **CAMA** enforcement provisions.<sup>53</sup> Whilst **section 30(1)** and **(2)** can be regarded as the direct enforcement provisions, CAC has in practice also employed administrative actions like placing a *caveat* on the company’s file (suspending any filings by the company), pending compliance.<sup>54</sup> However, where such does not yield the intended result, resort may arguably be had to more drastic action, such as striking off the conflicting name from the Companies’ Register.<sup>55</sup>

48. This was in line with SC decisions (such as *The Registered Trustees of Apostolic Church v. A-G Mid-Western State* (1972) 7 NSCC 247; *JK Randle v. Kwara Breweries Ltd* (1986) 6 SC 1), that the only way to prove incorporation of a company is through production of a certificate of incorporation. Accordingly, the CA was not swayed by the Appellant’s production of evidence (print out of reservation of name application in respect of “*A. Dikko and Sons Nigeria Limited*”, that showed that the name was already in use.

49. See **Section 131(1) and (2) Evidence Act 2011; A.T.S. & Sons & 3 Ors. v. Ben Electronics Co. Nig. Ltd.** [2018] 17 NWLR (Pt. 1647), 1; *Sule v. Orisajinmi* [2006] All FWLR (Pt. 343), 1686.

50. The first part of **section 30(1) CAMA** suggests that the first option for the company whose name has been erroneously registered should lick its wounds: “If a company, through inadvertence or otherwise, on its first registration or on its registration by a new name, is registered under a name identical with that by which a company in existence is previously registered, or nearly resembling it to be likely to deceive, the first-mentioned company may, with the approval of the Commission, change its name, ...” Emphasis supplied. We believe this does not prevent such an aggrieved company from suing the CAC, because *ubi jus, ibi remedium: Promasidor (Nig) Ltd & Anor v. Asikhia* (2019) LPELR-46443(CA).

51. *Cap. P41, LFN 2004.*

52. Time begins to run irrespective of the absence of knowledge on the part of the aggrieved party at the time the cause of action arose, except in cases of unconcealed fraud: *Buac Enterprises v. Obong* (2016) LPELR-4205, *Akibu v. Azeez* (2003) All FWLR 149, 1490 at 1511.

53. See for example, the concluding parts of **section 30(1) CAMA**: “... and if the Commission directs, the company concerned shall change its name within six weeks from the date of the direction or such longer period as the Commission may allow.” By **section 30(2)**: “If a company defaults in complying with a direction under subsection (1), such company shall, without prejudice to any other lawful action which the Commission may take against it, be liable to a penalty as prescribed by the Commission, for every day during which the default continues.”

54. See CAC, ‘*Operation Checklist (Draft) March 2020*’, at pp. 79-80 (Requirements for Placing a Caveat on a Company):

<https://www.google.com/url?sa=t&rc=1&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewi8qNTPtJnxAhVKQBoKHT5gACoQFjAAegQIAhAD&url=https%3A%2F%2Fwww.cac.gov.ng%2Fwp-content%2Fuploads%2F2020%2F03%2FCAC-Operations-Checklists-March-2020.pdf&usq=AOvVawoGgG4WMTf4JEAjiJyYPh1Z> (accessed 15.06.2021). The grounds include: “i. Where the outcome of a pending matter involving the company may affect the interest of the parties; ii. Where there is an infraction of the provisions of the Companies and Allied Matters Act; iii. Where a company is under investigation; iv. Where there is a verifiable request from Federal, State and MDA of Government with evidence; v. Where there are verifiable complaints by holder(s) of at least 25% shares in a company; [and] vi. Any other reason that the commission may deem fit.”

55. See **section 8(1)(a)(i)** and **(ii) CAMA** investing CAC with wide powers in this regard. **Section 30(2)** recognises “any other lawful action which the Commission may take against” the recalcitrant company that refuses to change its name.



However, our view is that the **CAMA** does not empower the CAC to strike off the recalcitrant company's name on this basis; support for our view can be found from the community reading of **section 692 CAMA**.<sup>56</sup> Also, would there not be a moral burden in the CAC increasing the daily fine contemplated by **section 31(2) CAMA** to incentivise prompt compliance with its directive for change of name, albeit it was the CAC's error that led to the debacle in the first place?<sup>57</sup> Again, the issue of recovering compensation for CAC's error should surface in such proceedings.

It is also possible that the CAC may disagree that the subsequent name is conflicting, when same is brought to its attention by the aggrieved company with the original names. Based on such view, if the CAC refuses or is slow to act, what are the remedies available to the aggrieved company? The SC in **Amasike v. Registrar of CAC & Anor**<sup>58</sup> held in interpreting **section 30(1) CAMA 1990** which is *in pari materia* with **section 30(1) CAMA** that the by virtue of the words "In the opinion

of the Commission", contained in the section, the CAC has a very wide discretion to decide on whether or not the proposed name for the registration of any company submitted is registrable under the Act.

However, this discretion could be challenged by the aggrieved company, since the SC went further to hold that "where a party to a suit has complained that the provisions of a statute have been breached against him or that the mandatory provision of a statute was not complied with, thus making the interpretation of a statutory provision an issue it becomes the duty of the court to examine the act or acts complained of and compare it or them with the relevant statutory provision and resolve appropriately whether there was a breach, non-compliance or substantial compliance with the law in question."<sup>59</sup>

The above case confirms judicial recognition of the statutory right of companies to challenge the CAC for any wrongful registration of a name that is similar to theirs, as likely to confuse the public. An action against the CAC and the 'company

registered later in time' can be instituted for the Court to decide on whether CAC was right in registering the company with such name.

CAC registration errors resulting in conflicting corporate names does not bode well for CAC's image nor for Nigeria's as we seek to improve the perceptions and reality of the ease of doing in Nigeria. Recent significant strides in the streamlining of CAC's processes exemplified by its upgraded website and search/registration portals, we believe, will going forward, drastically reduce instances of CAC's "inadvertence or otherwise" (per **section 30(1) CAMA**) that results in wrongful registration of conflicting names. That is also in tandem with marked improvements in Nigeria's ease of doing business ratings, largely due to reforms championed by the Presidential Enabling Business Environment Council (PEBEC) established in July 2016.<sup>60</sup> PEBEC's focus on encouraging inter-agency co-operation to promote ease of doing business in Nigeria,<sup>61</sup> can underpin a more robust collaborative work-approach between the CAC and the Registrar

56. **Section 692** lists the basis of the CAC's exercise of its power to strike off company names; consequently, strict adherence to the provisions would be a prerequisite to valid exercise of such power. **Section 269(1)** recognises striking off pursuant to application by the subject company (inapplicable for our purposes here); whilst **section 269(3)** provides for onset of the striking off process for reasons of dormancy or non-compliance for 10 years: "where the Commission observes or has reasonable cause to believe that a company is not carrying on business or has not been in operation for 10 years or has not complied with provisions of this Act for a consecutive period of 10 years, the Commission may cause to be published, in at least three national daily newspapers, a notice of its intention to strike off the company from the register." Emphasis supplied. Cf. **section 819** in respect of business names, which is also limited to cessation of business, etc. See also **section 793** in respect of LLPs: there is risk of striking off if the CAC "has reasonable cause to believe that a limited liability partnership is not carrying on business or operation, in accordance with the provisions of CAMA."

57. The daily penalty ranges from ₦250 - ₦1,000 depending on the size (classification) of company: small company ₦250, public ₦1,000, other companies ₦500; partnerships ₦500; business names ₦150 and incorporated trustees ₦500. See CAC, **Companies Regulations 2021 (December 2020)**, p. 206:

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=rja&uact=8&ved=2ahUKEwiF-aH1u5nxAhXNxYUKHezxAngQFjAAegQIAxAd&url=https%3A%2F%2Fwww.cac.gov.ng%2Fwp-content%2Fuploads%2F2021%2F01%2FCOMPANIES-REGULATIONS-2021-published.pdf&usq=AOvVaw3WkH39wMqMEnZvEu-kN2fI> (accessed 15.06.2021).

58. [2010] 13 NWLR (Pt.1211), 337.

59. *Supra*, at 400C-E.

60. Ade Adefeko, 'Ease of Doing Business: PEBEC Striking the Right Chord', *The Cable*, 16.10.2019: <https://www.thecable.ng/ease-of-doing-business-pebec-striking-the-right-chords-2> (accessed 11.06.2021). According to Adefeko: "At this point, one must praise the efforts of the PEBEC. Over the last three years, it has increased its score by over 11 basis points and implemented over 140 reforms. In the same period, Nigeria moved up 24 places in the World Bank Doing Business rankings and 32 Nigerian States improved in their ease of doing business environment ... In doing these, the country has seen a 360% reduction in time for filing Corporate Income Taxes from 14 days to 72hrs (+14 places in 2019 DB rankings), 30% reduction in import documentation, and 26% reduction in cost of registering a business. These improvements have not immediately made it easy to do business in Nigeria. However, they show that improvements have been made in the last few years."

61. William Ukpe, 'PEBEC Reforms to Boost Foreign Direct Investments - Osinbajo', *Nairametrics*, 22.07.2020: <https://nairametrics.com/2020/07/22/pebec-reforms-to-boost-foreign-direct-investments-osinbajo/> (accessed 11.06.2021).



of Trade Marks to further improve the administrative framework for corporate names and thereby boost Nigeria's investment attractiveness narrative.

In order to build its reputation as an organised, efficient and proactive regulator, the CAC has to be effective in ensuring that similar names are not registered; and also in taking prompt corrective actions in strict compliance with **CAMA** when the isolated error occurs. Hopefully, with CAC's embrace of increasing automation as reflected in the revamping of both its website and its online registration portals, the days of registration of companies with similar names is

behind us.<sup>62</sup>

### Conclusion

In our analysis, we have posited that it is imperative that the respective uniqueness of 'business names' in corporate Nigeria be protected. The primary regulator, the CAC is central to achieving this objective, whilst registering company names in Nigeria. Effective discharge of such responsibility would obviate embarrassments, reputational risk and costs of instituting and defending actions for the infringement of the registered corporate names in Nigeria. We hope that the CAC's commendable announcement of 3 hour timeline

for completing name reservation process for companies and business names', will not in any way translate into outcomes that results in more instances of wrongful name registrations.<sup>63</sup>

In the United Kingdom, where a name proposed is imputed for registration, within three seconds the result of the search showed a conflicting name, the registration number and the date of incorporation.<sup>64</sup> We believe that whilst the CAC is on the right track, it must not rest on its oars, but continually challenge itself and benchmark its service delivery (as much as possible), against global standards.<sup>65</sup>

### LeLaw Disclaimer:

Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact the authors at: a.elebiju@lelawlegal.com, e.eferakeya@lelawlegal.com or email: info@lelawlegal.com

LeLaw Barristers & Solicitors, Plot 9A Olatunji Moore Street, Off TF Kuboye Road, Lekki Phase I, Lagos, NIGERIA

62. See CAC, 'Public Notice on Restoration of Service Timelines for Name Reservation and Business Registration', 16.04.2021: <https://www.cac.gov.ng/public-notice-on-restoration-of-service-timelines-for-name-reservation-and-business-registration/> (accessed 09.06.2021). The CAC registration process is now graphically classified into four (4) steps: Step 1: Public Search (Search for Existing Entities); Step 2: Reserve a Name (Submit Your Preferred Business Name); Step 3: Pre-Incorporation (Register a Company with Your Name Availability Code); and Step 4: Post Incorporation (File Changes to Your Existing Business): <https://pre.cac.gov.ng/home> (last accessed 16.06.2021). New features on the CAC website (search portal, at: <https://search.cac.gov.ng/home>) include "Company name checker" and "Alphabetical company checker".

63. One wonders whether the name reservation process can benefit from trademarks practice, with publications of accepted marks in the trademarks journal? Maybe no, given the delay in completing registration of trademarks in Nigeria. Incidentally, there appears to be nil or minimal instances of wrongful name registrations in the case of incorporated trustees. Could it be because their own start-up process include advertisements in two national newspapers unlike companies, partnerships and business names?

64. Recently one of the authors attempted to reserve a company name "Ejiro Ltd" with the UK Companies House at: <https://www.gov.uk/government/organisations/companies-house>. The results in three seconds swiftly produced a company with a conflicting name, the registration number, the date of incorporation and the type of company: <https://find-and-update.company-information.service.gov.uk/company-name-availability?q=Ejiro+Ltd>

65. Regulatory powers over the use of names conferred by **CAMA** is also exemplified by section 854: "(1) The Minister may make provision by regulations - (a) as to the letters or other characters, signs or symbols (including accents and other diacritical marks) and punctuation that may be used in the name of a company, limited liability partnership, [LP], business name or incorporated trustee registered under this Act; and (b) specifying a standard style or format for the name of a company, limited liability partnership, business name or incorporated trustee for the purposes of registration. (2) The regulations may prohibit the use of specified characters, signs or symbols when appearing in a specified position (in particular, at the beginning of a name). (3) A company, limited liability partnership, business name or incorporated trustee may not be registered under this Act by a name that consists of or includes anything that is not permitted in accordance with regulations under this section." Emphasis supplied.