

Judgment

IN THE NAME OF THE LEBANESE PEOPLE

The Court of Appeal of South Lebanon – Third Chamber – hearing cases of misdemeanors, formed of the President Majid Mouzeihem and Counselors Ali Al Barraaj and Shehrezad Nasser (commissioned), upon scrutiny and examination,

Found that on 17/3/2014, Hussein Abou Eid, his attorney Maya Majzoub against Société des Produits Nestlé S.A. and the prosecutor general, filed an appeal against Judgment no. 852 issued by the single criminal judge in Sidon on 21/12/2013, which contained the following:

- Convicting the Defendant Hussein Hassan Abou Eid of the offences set forth in Articles 702/and/714/ of the Penal Code, Articles /105/ and /106/ of Law no. 2385/24 and Article /85/ of Law no. 75/299, and therefore imposing the harshest penalty as per Article /181/ of the Penal Code, imprisoning him for a period of three months and sentencing him to a fine amounting to LBP 7 million; and for mitigation, only imposing the fine as prescribed in Article 254 of the Penal Code, provided that he is imprisoned for one day for each LBP 10 thousand that he fails to pay.
- Imposing upon the Defendant to withdraw all the products, distributed in the market, if any, that bear the brand name “City Creamer” which imitate the brand “Coffee-mate” that is produced and distributed by the Plaintiff’s establishment, at his own expenses and preventing him from distributing such product imitating the product of the Plaintiff in the future, unless based a permission by the latter.
- Imposing upon the Defendant to pay an amount of LBP 25 million as damages to the Plaintiff.
- Rejecting any augmenting or contradicting requests.
- Imposing all legal costs and fees on the Defendant.

The Appellant stated that the appealed judgment has been served on him on 3/3/2014 and that it rules the acceptance of the Appeal for having been filed within the legal deadline after having fulfilled its formal conditions. The Appellant cited the facts of the case and stated that he distributes products of the Syrian Company Al Hamwi Trading in Lebanon, that these products and those of the Plaintiff Company are neither identical nor similar, that the elements of the crimes charged are not fulfilled, and that the Appellant does not have any relation with the producing company (Al Hamwi) anymore since the beginning of 2010. The Appellant added that the appealed judgment has distorted some of the basic facts of the dispute and omitted some of them as well as some of the defense reasons mentioned in the complaint. Moreover, he stated that the elements of the crime provided for in Article/85/of the Law on the Protection of Literary and Artistic Property are non-fulfilled in the present case, and the elements of the crimes set forth in Articles /702/ and /714/ of the Penal Code, Articles /105/ and /106/ of law No. 2385/24 are non-fulfilled too, whether in terms of the failure of the Plaintiff Company to register its trademark or in terms of lack of the material and moral elements. Finally, the Appellant requested acceptance of the Appeal in form and in substance, rejection of the lawsuit on the ground that it is invalid and illegal, withdrawal of charges brought against him for lack of elements of the crimes attributed to him, keeping his right to

produce some documents, present the grounds of the pleas and the defense and the imposition of fees, costs and damages on the Respondent.

On 8/1/2014, the Appellant Public Prosecution in South Lebanon heard the appealed judgment.

On 18/11/2014, the Respondent Société des Produits Nestlé S.A. represented by its attorney Rany Sader submitted a memorandum wherein it cited the facts of this case and explained that the great resemblance and similarity between the original packaging belonging to it and the imitated packaging appear to the naked eye after simple comparison between them, and that the expert assigned by the single criminal judge in Sidon has established that similarity in his report. The Respondent added that the Appeal shall be rejected in form for having violated Article /217/ of the Criminal Procedure Code as it failed to cite the grounds of appeal and to mention the request for nullification of the appealed judgment in the requests paragraph. Moreover, the Respondent stated that the appeal shall be rejected since the elements of the crimes of which the Appellant is accused are fulfilled.

The Respondent ended up with requesting the rejection of the Appeal in form if it appears that it was not filed within the legal time limit and that it violates the provisions of Article /217/ of the Criminal Procedure Code. Further, the Respondent requested the rejection of the Appeal in substance, the confirmation of the appealed judgment since the element of the claimed crimes are fulfilled and the imposition of the expenses, costs and fees on the Appellant.

On 24/5/2015, the attorney of the Appellant submitted a memorandum with a document, wherein she reiterated her previous statements and requests and added the request of rejection of the content of the Respondent's memorandum for lack of legal validity, significance and accuracy.

On 7/7/2015, no one duly appeared on behalf of the Appellant who was represented in the preceding session; and the legal hour elapsed, thus the court ruled to duly try him. Public trial was conducted in the presence of the Appellant after public reading of the documents, and each of the attorney of the Respondent and the representative of the Appellate Public Prosecution in South Lebanon requested the rejection of the Appeal and the confirmation of the appealed judgment, thus the trial was closed pending the announcement of the judgment.

First: On the Facts

It appeared that the appealed judgment has sufficiently cited the facts of the present case and each of the Appellant and the Respondent has recited said facts, thus the court is of the view that the already cited facts are sufficient to avoid repetition, especially since the significant ones will be presented in the Law section.

Second: On the Law

1- In Form

Whereas this Appeal, bearing the signature of an attorney at the Court of Appeal, was presented to the court on 17/3/2014 against the judgment issued in absentia against the Appellant after having been served on him on 3/2/2014, thus it shall be deemed as having been presented within the legal time limit after having fulfilled its formal conditions; therefore it shall be accepted in form

especially since the Appellant has specified in his Appeal the errors with which he considered the judgment was flawed.

2- In Substance

Whereas the Appellant requested accepting the Appeal in substance, rejecting the lawsuit for its invalidity and withdrawing the charges brought against him since the elements of the crimes attributed to him were not fulfilled;

Whereas the Respondent requested the rejection of the Appeal in substance for its invalidity and since the elements of the claimed crimes were fulfilled;

Whereas Articles /702/ and /714/ of the Penal Code stipulate that whoever sells or offer for sale a product bearing a counterfeit trademark and such act is intended to deceive the buyer or cause deviation of customers of a third party to him shall be punished;

Whereas Articles /105/ and /106/ of Law no. 2385/24 stipulate that whoever knowingly sells or offers for sale a product bearing a counterfeit trademark or a trademark similar to the original one with intent to deceive shall be punished;

Whereas Article /85/ of Law no. 75/99 stipulates that whoever sells or offers for sale a counterfeit work shall be punished;

Whereas Article /720/ of the Penal Code stipulates that the courts estimate imitation and similarity in the eye of the consumer or the buyer, taking into account the similarity in general rather than the differences from a criminal point of view.

Whereas it appeared from the details of the present case that the Defendant has sold and offered for sale the coffee creamer in a container that is similar, to a great extent, to the container previously used by the Respondent on the markets to sell a similar product.

Whereas the court is of the view that such similarity is intended to deceive the buyer or cause deviation of the Respondent's customers to the Defendant or to the producing company and that the difference in the name would not eliminate such deception since the buyer usually considers the type of the product rather than its name when willing to buy it.

Whereas the Defendant's defense whereby he stated that he is only the producer of the container does not acquit him from the criminal act, since the above provisions punish the sale of the product and not its production; and whereas the Defendant's defense whereby he stated that such act is not punishable in other countries would not restrict the conclusions of the court;

Moreover, the registration or the failure to register the product would neither decriminalize the committed act nor deprive the original trademark from protection as long it is proven that it was previously used before the commission of the act complained of;

Whereas based on the aforementioned, the Appellant's act mentioned above shall be deemed to constitute one of the crimes specified in the abovementioned articles; and the appealed judgment shall be deemed valid, thus it shall be confirmed, the Appeal shall be rejected for its invalidity in terms of conviction and punishment, it shall be imposed upon the Appellant to withdraw the

products from the market, he shall be prohibited from selling them in the future and the adjudged fine shall be reduced.

Whereas there is no more need to look into the augmenting or contradicting grounds or requests for insignificance, the personal compensations were reduced since the damage was not proven to be equal to the adjudged amount,

Therefore,

After having heard the statement of the representative of the Appellate Public Prosecution in South Lebanon:

The court rules unanimously the following:

- 1- Accepting the Appeal in form for having been presented within the legal time limit after having fulfilled its formal conditions.
- 2- Rejecting the Appeal in substance, confirming the appealed judgment as to the ruling of conviction, punishment and imposition of withdrawal of the products and the prohibition of their sale in the future as well as the reduction of the adjudged fine to LBP 5 million.
- 3- Accepting the appeal in part in substance, nullifying the appealed judgment as to the ruling related to the personal compensations adjudged, reducing the adjudged compensations to LBP 15 million and imposing upon the Appellant to pay said amount to the Respondent.
- 4- Rejecting any augmenting or contradicting requests.
- 5- Imposing the costs and fees upon the Appellant.

A judgment promulgated and made public in Sidon in the presence of the representative of the Appellate Public Prosecution in South Lebanon on 18/2/2016.