



Strathmore University
Law School

**GREEN FRONTIERS IN KENYA'S *TRADE MARKS ACT* (No.51 of 1955): ASSESSING
THE REGISTRATION AND CERTIFICATION OF GREEN MARKS**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School

By

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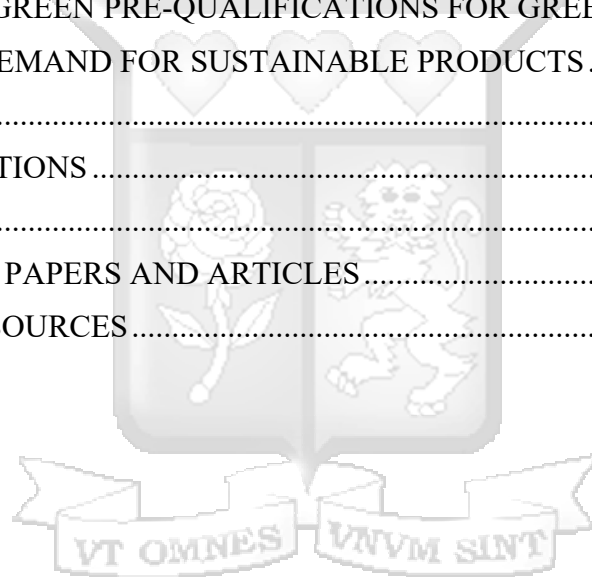
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DECLARATION

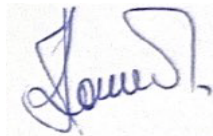
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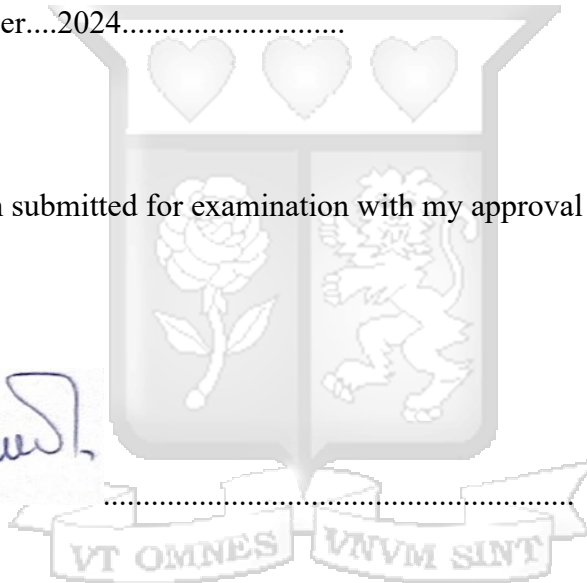
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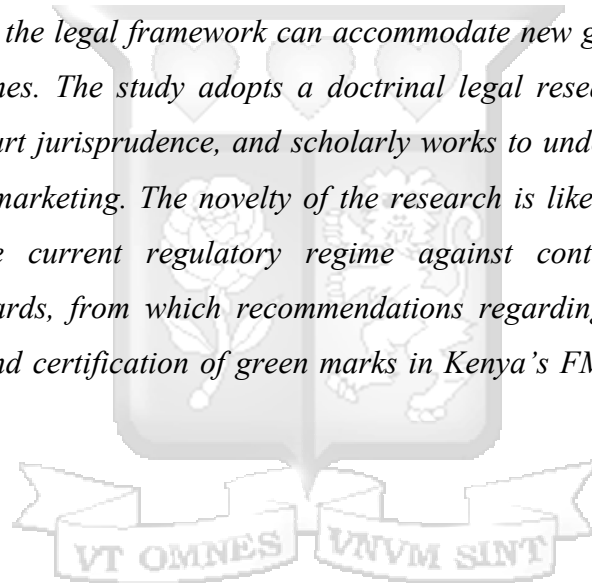
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ABSTRACT

The age of corporate sustainability has motivated organisations to adopt green marketing techniques to appeal to their pro-green consumers. An example of these techniques is using green trademarks and certification marks, which denote a product's sustainability and ecological friendliness. The main problem outlined is that existing regulations appear not to have adapted to the novelties presented by the registration and use of green trademarks and certification marks. This has exposed consumers to unsubstantiated sustainability claims in Kenya's Fast-Moving Consumer Goods (FMCG) market segment. The proposed research will examine the problem by employing theoretical underpinnings from the quality theory of trademarks, as propounded by Frank Schechter, to establish whether the legal framework can accommodate new green marketing tools in contemporary times. The study adopts a doctrinal legal research methodology to analyse statutes, court jurisprudence, and scholarly works to understand the aims and the scope of green marketing. The novelty of the research is likely to be found in the examination of the current regulatory regime against contemporary corporate sustainability standards, from which recommendations regarding the registration of green trademarks and certification of green marks in Kenya's FMCG industry will be made.



LIST OF ABBREVIATIONS

IP – Intellectual Property

WTP - willingness to pay

FMCG – Fast-Moving Consumer Goods

PCE – Perceived Consumer Effectiveness

SGLS - The Singapore Green Labelling Scheme

KEBS - Kenya Bureau of Standards

NEMA - National Environment Management Authority

SEC - Singapore Environment Council

GEN - Global Eco-Labelling Network

DEFINITION OF TECHNICAL TERMS

Corporate Sustainability - This refers to the outlook of an organisation's long-term value in financial, environmental, and social-ethical terms, commonly referred to as Environmental, Social, and Governance (ESG) principles.

Greenwashing - Greenwashing is the misrepresentation of a product's environmental impact, where such a product is presented as being more environmentally conscious than it actually is

Green marks - The term refers to either trademarks or certification marks that have a dual effect of helping consumers select products that reflect their environmental values and incentivising corporations to uptake product differentiation and premium pricing.

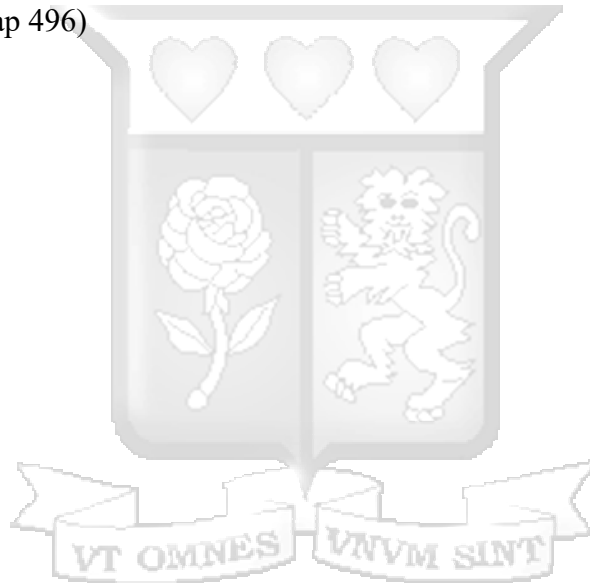
Passing off - The term entails representing one's business or products as being that of another person, usually a competitor.

LIST OF CASES

1. *Brooke Bond Kenya Ltd vs Chai Ltd* (1971) EA 10
2. *Premier Food Industries Limited v Triclover Industries (K) Limited* (2021) eKLR
3. *British United Provident Association Limited v Bupa Kenya Limited* (2020) eKLR

LIST OF LEGAL INSTRUMENTS

1. *Constitution of Kenya* (2010)
2. *Trade Marks Act* (No. 51 of 1955)
3. *The Consumer Protection Act* (No. 46 of 2012)
4. *The Competition Act* (No. 12 of 2010)
5. *Standards Act* (Cap 496)



CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND TO THE STUDY

The dynamic contours of the modern marketplace invite a keener inspection of the interwoven relationship between eco-conscious organisational approaches to marketing and consumer engagement.¹ It means that marketing tools must appeal to consumers' ecosystem concerns and health awareness. That is why corporate sustainability in the market has catalysed the adoption of green dimensions in corporate branding through green marketing campaigns.² Before delving into any further analysis, this section introduces the two main concepts to argue a case for the prevalence of green marketing techniques. These terms, corporate sustainability, and green marketing, will each be defined in turn.

Corporate sustainability refers to the outlook of an organisation's long-term value in financial, environmental, and social-ethical terms, commonly referred to as Environmental, Social, and Governance (ESG) principles.³ This study takes a keen interest in the environmental ambit of corporate sustainability to understand the impact of corporations to this end. Broadly defined, green marketing refers to the advertising efforts and methods employed to appeal to pro-green consumers,⁴ about the sustainability of a corporate entity's products or services as being environmentally conscious.⁵ Some methods used include employing conventional trademarks and certification marks.⁶ Green trademarks are trademarks such as symbols, logos, or phrases used by an organisation to denote their environmental responsibility, as well as the sustainability of their

¹ Gong Y, Xiao J, Tang X and Li J, 'How does sustainable marketing influence customer engagement and sustainable purchase intention? The moderating role of corporate social responsibility' *Frontiers in Psychology*, 15 March 2023, 1-12.

² Khan H, Gupta S, Kumar V and Kumar B 'Managing climate change risks and creating stakeholders' value via sustainability-focused B2B brand strategies' 115 (1) *Industrial Marketing Management*, 2023, 198–213.

³ Yang K, Zhang T and Ye C, 'The Sustainability of Corporate ESG Performance: An Empirical Study' 16 (6) *Sustainability Journal*, 2024, 1-3. See also Ashrafi M, Magnan G, Adams M and Walker T, 'Understanding the Conceptual Evolutionary Path and Theoretical Underpinnings of Corporate Social Responsibility and Corporate Sustainability' 12 (3) *Sustainability*, 2020, 12.

⁴ Alkhatib S, Kecskes and Keller V, 'Green Marketing in the Digital Age: A Systematic Literature Review' 15 (16) *Sustainability*, 2023, 1-2. See also Fernando J, Battle A and Perez Y, 'What is Green Marketing? Definition, Examples and How it Works' Investopedia, 2023-<<https://www.investopedia.com/terms/g/green-marketing.asp#:~:text=Green%20marketing%20refers%20to%20the,real%20or%20perceived%20environmental%20sustainability>> on 22 December 2023.

⁵ These activities include the sustainability of production and manufacturing processes, the environmental impacts of commercial operation, and the safety of material in the end-products. See Adelman D and Austin G, 'Trademarks and private environmental governance' 93 (1) *Note Dame Law Review*, 2017, 710.

⁶ Kirchner-Freis I and Kirchner A, 'Legal Aspects of Green Trademarks' in Kirchner-Freis I and Kirchner A (eds) *Green Innovations and IPR Management*, 1ed, Kluwer Law International, The Netherlands, 2013, 74-76.

products and services.⁷ With green certification marks, a particular product is marketed by denoting its adherence to or compliance with defined metrics by a regulatory authority.⁸ As a marketing technique, it has gained increased attention with the corresponding consumer awareness of sustainability reflected in their purchases in the Fast-Moving Consumer Goods (FMCG) industry.⁹

The FMCG industry in Africa is termed the most competitive market segment due to its low cost and huge frequency of consumption and use.¹⁰ It is competitive because it entails essential household products. The products, such as toiletries, detergents, and stationery in this industry are often in high demand, sold quickly, and are majorly affordable to the general populace.¹¹ To better understand the scale of this study's industry, the global net sales of the top 50 leading FMCG companies (in 2021) accounted for 1.441 Trillion US Dollars with Nestle AG, the leading corporation, managing a sales volume valued at 95.7 US Billion dollars.¹² Pertinent to the research, green marketing spending is estimated to increase globally to 60.81 Billion USD by 2027 with the uptake of green consumption.¹³

In Kenya, the need for environmentally friendly packaging remains a key criterion in food purchases, standing at 33% of interviewed consumers.¹⁴ While this research study appreciates that

⁷ Eikel C, 'Going Green: The Dos and Don'ts of green trade marks' The TradeMarks Group at Bird and Bird, 25 April 2024 <<https://brandwrites.law/going-green-green-trade-marks-dos-and-donts/>> on 21 July 2024.

⁸ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?' 18 (5) *Journal of Intellectual Property Law & Practice*, 2023, 368.

⁹ Crispell D, 'Going green(ish)' Public perspective, 2001, 28–30. See also Park K, 'Green trademarks and the risk of greenwashing' WIPO Magazine, December 2022- <https://www.wipo.int/wipo_magazine/en/2022/04/article_0006.html> on 29 February 2024.

¹⁰ Elliott R, 'The Fast Moving Consumer Goods Market in Africa' GeoPoll <<https://www.geopoll.com/blog/fmccg-market-africa/>> on May 2019. See also Thompson AA and Strickland AJ, *Strategic management*, 12th ed, McGraw-Hill Foundation, 2001, 412.

¹¹ See CFI Team, 'Fast-moving consumer goods (FMCG)' Corporate Finance Institute, 2023 - <https://corporatefinanceinstitute.com/resources/valuation/fast-moving-consumer-goods-fmccg/> on 22 December 2023.

¹² Statista, 'Leading 50 FMCG companies worldwide in 2021, based on net sales' Statista, 2023 - <<https://www.statista.com/statistics/260963/leading-fmccg-companies-worldwide-based-on-sales/>> on 22 December 2023.

¹³ Social Gamma, 'The Great Green Shift: How Eco-conscious Marketing is Winning Hearts' LinkedIn, 20 September 2023- <<https://www.linkedin.com/pulse/great-green-shift-how-eco-conscious-marketing-winning-hearts#:~:text=As%20it%20stands%2C%20the%20global,annually%20from%202021%20to%202027>> on 22 December 2023.

¹⁴ Statista 'Purchase criteria for food in Kenya as of June 2023' Statista, June 2023- <<https://www.statista.com/forecasts/1191052/purchase-criteria-for-food-in-kenya>> on 7 March 2024.

this statistic may not be a prima facie case for the prevalence of pro-green consumption, it is prudent to note that it is neither of the greater populace in Kenya. Nonetheless, the study relies on it to note the uptake of ecologically conscious consumer choices in Kenya. All the preceding quantitative materials point to the scale of the FMCG industry globally, in Africa, and in Kenya, as well as the extent of financial steps taken by corporations to market their products to woe consumers in the FMCG industry.

Green marks, trademarks, and certification marks have a dual effect of helping consumers select products that reflect their environmental values and incentivising corporations to uptake product differentiation and premium pricing.¹⁵ Be that as it may, some corporations have wrongly capitalised on this shift in consumer purchasing habits with the growth of greenwashing in their representations to the market.¹⁶ Greenwashing is the misrepresentation of a product's environmental impact, where such a product is presented as being more environmentally conscious than it actually is.¹⁷

Greenwashing manifests itself in numerous instances of non-disclosure, including falsely reporting an organisation's progress to net zero emissions and regulatory compliance, making vague statements to avoid accountability and using misleading labels in marketing.¹⁸ Common labels used to capitalise on pro-green purchasing trends include 'sustainably sourced', 'environmentally friendly' and 'low greenhouse emissions'.¹⁹ Companies targeting pro-sustainability consumers have opted for these labels based on consumers' willingness-to-pay (WTP) premium for such products.²⁰ A Densu International and Microsoft Advertising research study noted that close to

¹⁵ Adelman D and Austin G, 'Trademarks and private environmental governance' 93 (1) *Note Dame Law Review*, 2017, 710.

¹⁶ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?' 18 (5) *Journal of Intellectual Property & Practice*, 2023, 370.

¹⁷ Borochoff-Porte A and Cooper J, 'Applying Consumer Protection Basics to Greenwashing "Recyclability" Cases' *Harvard Environmental Law Review*, 2023, 2-3-<https://journals.law.harvard.edu/elr/wp-content/uploads/sites/79/2023/04/HELR-Vol.-47-Recyclability.pdf> > on 2 March 2024.

¹⁸ United Nations, 'Greenwashing-the deceptive tactics behind environmental claims' United Nations, 2023-<https://www.un.org/en/climatechange/science/climate-issues/greenwashing> > on 22 December 2023.

¹⁹ Duckworth J, Randle M, McGale L, Jones A, Doherty B, Halford J and Christiansen P, 'Do front-of-pack 'green labels' increase sustainable food choice and willingness-to-pay in UK Consumers?' 371 (1) *Journal of Cleaner Production*, 2022, 4.

²⁰ Costanigro M, McFadden D, Kroll S and Nurse G, 'An in-store valuation of local and organic apples: the role of social desirability' 27 (4) *Agribusiness*, 2011, 465-477. See also Park K, 'Green trademarks and the risk of greenwashing' *WIPO Magazine*, December 2022-https://www.wipo.int/wipo_magazine/en/2022/04/article_0006.html > on 29 February 2024

90% of consumers globally are inclined to side with firms that prioritise corporate sustainability in their value chains.²¹

In Kenya, a 2019 research study by the SUSTALDE Foundation sought to determine the prevalence of green consumerism.²² Resultantly, 64.9% of the respondents acknowledged their responsibility to conserve the environment, while only 41% of the respondents had little or no insights into their preferred products' environmental impact.²³ The preceding statistic points towards the need for increased scrutiny into using green marks to protect consumers who support green consumerism but fail to accurately note the key factors that make a product environmentally friendly. This research study delves deeper into developing a standard to ascertain an FMCG product's environmental friendliness and sustainability.

As such, green marketing raises several legal concerns that cut across fundamental understandings of intellectual property (IP), environmental law, and consumer protection. This study investigates Kenya's legal regime and appraises its sufficiency in addressing the novelties presented by the registration and use of green trademarks and certification marks in Kenya's FMCG industry.

1.2 STATEMENT OF THE PROBLEM

Unlike traditional trademarks, green marks generally lack the need for prior registration and can easily be affixed to products in the market. As such, their use or misuse often passes off without any legal injury, given that they do not prima facie infringe on any IP rights. Green marks, just like conventional trademarks, influence consumer decisions not only through product identification but also by presenting a particular product as having met a particular quality threshold. It is unclear whether Kenya's legal-regulatory framework provides a system for registering green trademarks and certification marks. Resultantly, organisations can make deceptive green claims, cutting across falsely reporting organisational compliance and using misleading product labels, thus affecting consumer trust and fair competition among enterprises.

²¹ Dentsu and Microsoft Advertising, 'The rise of sustainable media' March 2022, 8-
<<https://about.ads.microsoft.com/en-us/microsoft-advertising-the-rise-of-sustainable-media-global-study-en-march-2022.pdf>> on 29 February 2024.

²² Omayio D, Abong'o O, Elmah G and Marion S, 'Consumer awareness, practices and purchasing behavior towards green consumerism in Kenya' 2 (1) *East Africa Journal of Science, Technology and Innovation*, May 2021, 3.

²³ Omayio D, Abong'o O, Elmah G and Marion S, 'Consumer awareness, practices and purchasing behavior towards green consumerism in Kenya', 3.

Consequently, Kenya's regime of green market needs to be examined in order to assess how its system of registration and certification could protect consumer interests, increase transparency, and establish a level playing field for local and international green enterprises operating in the country.

1.3 RESEARCH OBJECTIVES

The main aim of the research is to establish whether Kenya's legal-regulatory framework promotes green consumption, protects green consumers, and aligns with green marketing techniques at the dawn of corporate sustainability. To realise this objective, this study aims to:

1. To investigate Kenya's legal-regulatory framework for the registration and certification of green marks.
2. To study court jurisprudence with regard to Kenya's legal-regulatory framework around the registration and certification of green marks.
3. To present lessons and proposals to Kenya's legal-regulatory framework with regard to global green marketing techniques.

1.4 HYPOTHESIS

The proposed research proceeds from the assumption that Kenya's legal-regulatory framework inadequately governs the registration and certification of green marks in Kenya's FMCG industry, exposing consumers to greenwashing.

1.5 RESEARCH QUESTIONS

1. How does Kenya's legal-regulatory framework govern the registration and certification of green marks in the FMCG sector?
2. What is the prevailing court jurisprudence with regard to Kenya's legal-regulatory framework around the registration and certification of green marks?

1.6 SIGNIFICANCE OF THE STUDY

This study's novel contribution is likely to be found in the need for proper standards for registering and certifying green marks in Kenya's *Trademarks Act*. Proper standards, as alluded to in the preceding claim, are hinged on a new understanding of trademark law as not only connoting a

product's source or origin but also its quality. The inclusion of the quality aspect as a function of trademarks is key to appreciating the prevalence of green marks used to appeal to pro-green consumers in Kenya's FMCG sector.

1.7 LIMITATIONS

The Intellectual Property (IP) industry in Kenya has long existed with arguably sufficient literature on the same. Nonetheless, new developments in this industry, such as the use of green marks, fail to be adequately addressed by both scholarly works and judicial determinations. The research study is likely to encounter several limitations ranging from scarce scholarship on green marks and limited quantitative data in Kenya's FMCG sector. As a statute, the Kenyan *Trade Marks Act* (No.51 of 1955), is interpreted by the Kenyan Judicial system. Be that as it may, the limited judicial determinations on trademarks and consumer behaviour only capture the conventional understanding of trademarks based on the source theory and not the quality theory, which this paper primarily advances. Since this study's timelines are narrow, there exists challenges around providing new quantitative material arising from its research methodology.

1.8 THEORETICAL FRAMEWORK: THE QUALITY THEORY

For purposes of analysing the problem stated this research adopts theoretical understandings from the Quality Theory of trademarks, given that it discusses the expanded role of trademarks as conveying a product's adherence to certain quality standards and argues for recognition and registration of such trademarks.

The quality theory, as propounded by Frank I. Schechter, posits that a trademark, as an intellectual property, should promote the goodwill that the specific mark harnesses for a business entity's brand and promote consumer protection.²⁴ Goodwill, in this instance, arises from the continued performance of a brand in a market to the point that consumers associate that brand as being up to a specific standard of quality.²⁵ Harry D. Nims also agrees with the quality assurance nature of trademarks, noting that they serve not only as source indicators but also as symbols of uniform

²⁴ Nichols C, 'Trouble in trademark law: How applying different theories leaves door open for abuse' 17 (1) *SMU Science and Technology Law Review*, January 2014, 20.

²⁵ This has also been termed as customer Loyalty. This study captured the ingredients of competitive market advantage. See Lafley A and Martin R, 'Customer loyalty Is overrated' *Harvard Business Review* (HBR), February 2017-<<https://hbr.org/2017/01/customer-loyalty-is-overrated>> on 6 March 2024.

quality.²⁶ Callmann argues that a trademark on a given good assures a consumer that all other goods bearing that mark are of the same quality.²⁷

Besides trademarks indicating the identity of a product and its source, their role is expanded to include consumer decision-making, especially where quality levels dictate their purchasing trends. To effectively realise the expanded role of trademarks, especially for eco-friendly products, the problem of their registration and certification must be solved to prevent the possibility of substandard and counterfeit products in the FMCG sector. The research study will use the theory to appraise Kenya's legal-regulatory framework in relation to the registration and certification of green marks in the FMCG sector.

1.9 LITERATURE REVIEW ON GREEN MARKS

In this section, the study explores the relevant literature detailing the historical foundations of green marks and how they came about as well as the IP issues that arise from them. The literature surveyed includes studies on judicial precedents and academic material from experts in this field and their perspectives. All of this is to identify the gaps in the existing literature with regard to green marks.

As captured in the preceding discussions above, being a fast-emerging field, green marks as a mode of appealing to pro-green consumers is fast coming to the fore of most campaigns by corporate organisations in a given market.²⁸ Adelman and Austin opine that ecolabels, such as green trademarks, have a dual remedying effect with regards to two types of market failure that is first, information asymmetry on green attributes of a given product or service and second, collective action problems caused by corporates mimicking those with advanced environmental practices.²⁹

Ecolabels remedy this problem by targeting pro-green consumers, nudging them to select these advertised products or services and positioning environmentally compliant corporations separate

²⁶ Harry D. Nims, *The Law of Unfair Competition and Trade-marks*, 4th ed, Baker Voorhis, New York, 1947, 517.

²⁷ Callmann R, *Unfair Competition, Trademarks, and Monopolies*, 2024-1 ed, Clark Boardman Callaghan, New York, 2024, 640.

²⁸ Maggiore M, 'Can Trademarks ever be green? Between green-branding and greenwashing' International Trademark Association, 10 March 2021-<<https://www.inta.org/perspectives/features/can-trademarks-ever-be-green-the-line-between-green-branding-and-greenwashing/>> on 29 February 2024.

²⁹ Adelman D and Austin G, 'Trademarks and private environmental governance', 720.

from their environmentally unsustainable competitors in the market.³⁰ Their understanding of green trademarks through the lens of private environmental governance stresses the need for a uniform communicative function of green trademarks to aid the formulation of environmentally responsible choices by consumers.³¹

In their work on IP and climate change, Christine Farley explored using green marks, including trademarks and certification marks, in green marketing. Similar to Adelman and Austin above, they also noted the prevalence of green marks and how companies have leveraged trademark law to convey their eco-consciousness.³² Trademark law allows for the registration of non-descriptive marks, a common shortfall of green marks.³³ For registration to happen for a green trademark, unlike certification marks, there ought to be evidence of that specific industry being associated with environmentally conscious practices. For instance, in the context of the banking system, a bank applying for a green branch will be denied a green mark since the term ‘green branch’ does not connote ecologically efficient characteristics.³⁴ All these point to the prevailing understanding of the refusal of registration of green marks on grounds of descriptiveness.

Alexandra Mogyoros also writes on the suitability of certification marks and traditional trademarks, as eco-labels, to demonstrate a product’s environmental preferability or conformity to a set environmental standard.³⁵ They express their preference of green certification marks over trademarks, given that they are bound by more restrictive ownership and usage rules, and that there is increased governance on their registration.³⁶ It means that the difference between green trademarks and green certification marks is that the former are issued by the organisations themselves while the latter is issued by a regulatory authority, which independently verifies a given

³⁰ Prakash A and Potoski M, 'Collective action through voluntary environmental programs: A club theory perspective', 35 (4) *The Policy Studies Journal*, 2007, 777. Notably, their scholarship focused on the use of eco-labels and green certification in the Coffee industry, an FMCG, and the negative marketplace interactions that accrue from conventional trademarks and certification marks. See Adelman D and Austin G, 'Trademarks and private environmental governance', 720-724.

³¹ Adelman D and Austin G, 'Trademarks and private environmental governance', 709-756.

³² Farley C, 'Green Marks' in Sarnoff J (ed), *Research Handbook on Intellectual Property and Climate Change*, 1st ed, Edward Elgar, Massachusetts, 2016, 400.

³³ Farley C, 'Green Marks', 401. Green marks are often termed as merely descriptive due to the use of the term 'green' which necessitates a further inspection of the secondary meaning of the work in a given industry for it to meet the threshold for registration on the principal register.

³⁴ Farley C, 'Green Marks', 401.

³⁵ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?', 367-374.

³⁶ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?', 369.

product's green claims. All these points to a two-pronged benefit of green certification marks touching on the independence of the owners of certification marks and the finite nature of the information such marks convey.³⁷ Be that as it may, owners of certification marks are not allowed to trade in the provision of goods in a market, hence maintaining objectivity in their regulatory mandate. The practice in Kenya aligns with Mogyoro's position in that issuing such certification falls within the mandate of the Kenya Bureau of Standards (KEBS),³⁸ which is to maintain quality standards and crackdown on counterfeit and misleading products.³⁹ Furthermore, Kenya's National Environment Management Authority (NEMA) sets and enforces environmentally friendly standards such as those likely to be disregarded through greenwashing.⁴⁰ NEMA's thought leadership and policies are thus a useful source of information with regard to the eco-friendly standards that a green mark tries to convey.

Touching on consumer behavioural economics, James Roberts tried to categorise consumers' propensity to make ethical purchases based on five demographic variables, which include Age, sex, level of education, income, and the nature of employment.⁴¹ They contend that consumers' willingness to engage in socially responsible behaviour, such as pro-green consumption, was predicted by four underlying attitudes i.e. environmental concern, liberalism, Perceived Consumer Effectiveness (PCE) and alienation.⁴² To them, there existed a substantial relationship between making deliberate pro-green purchases and following the advice of influential people out of curiosity about new products.⁴³ There are two important caveats to their work i.) It fails to show the impact of green marketing and instead focuses on a consumer's pro-green inclinations and ii.) It focuses on the USA consumers, which may not accurately depict green consumerism in the Global South and more specifically Kenya's FMCG industry. The foregoing evidences the need for comprehensive quality checks with regard to registering and certifying green marks, given their strong bearing in informing consumer's decision-making.

³⁷ Mogyoro A, 'Improving eco-labels: Are green certification marks up to the task?', 369.

³⁸ Part II, *Standards Act* (Cap 496).

³⁹ Kenya Bureau of Standards (KEBS), *Strategic Plan 2022-2027*, KEBS, 2022, 25.

⁴⁰ Section 7 and 9, *Environment Management and Coordination Act* (1999).

⁴¹ Roberts J, 'Profiling levels of socially responsible consumer behaviour: A cluster analytic approach and its implications for marketing' 3(4) *Journal of Marketing Theory and Practice*, 1995, 97-117.

⁴² Roberts J, 'Profiling levels of socially responsible consumer behaviour', 109-110.

⁴³ Roberts J, 'Profiling levels of socially responsible consumer behaviour', 112.

In summary, the existing knowledge captured above informs this research study's investigation of the relationship between green marketing and IP, focusing on green trademarks and certification marks in addressing eco-conscious consumers. The literature surveyed, mainly from the United States, where scholars have researched on the registration and use of green marks while still noting pro-environmental consumption. So far, as green marks stand in Kenya, there is no scholarly literature on the registration and certification of green marks thus noting the need for the present study.

1.10 RESEARCH DESIGN AND METHODOLOGY

This research study employs a doctrinal legal research methodology. The study will advance the arguments herein through a comprehensive inspection of the works of luminaries in this field including dissertations and theses, journal articles, research papers, opinion pieces and other literary works. These sources will supplement the Constitution of Kenya, relevant statutes, international instruments and jurisprudence from both the Kenyan and foreign jurisdictions such as the USA approach to green marks to draw learning points on the interpretation of the use of green trademarks.

1.11 ASSUMPTIONS

The research study posited that pro-green consumerism concerns a significant amount of consumers in the Kenyan FMCG market. This has been evidenced by consumer trends to opt for ecologically conscious packaging, pointing towards the existence of this groups of consumers who may then be ensnared by green marks.

1.12 CHAPTER BREAKDOWN

Chapter One will form the introduction and background of the study. This chapter captures the relevant guiding questions and objectives, including the key terms that will be advanced throughout the research. These will be presented alongside the theoretical underpinning and literature review.

Chapter two examines the origins and understandings of trademark law with a special consideration to the quality theory. This theory will advance the need to recognise trademarks as advancing a product's quality standards and thus appreciate the legal issues arising from the registration and certification of green marks.

Chapter three builds upon this background and appraises Kenya's legal-regulatory landscape concerning green marks. It will cover a review of relevant statutes and delegated legislation, rules and policies. Overall, the chapter aims at comprehensively discussing Kenya's legal-regulatory framework that governs the registration and certification of green marks in Kenya's *Trademark Act*.

Chapter four entails a study of the prevailing court jurisprudence with regard to Kenya's legal-regulatory framework around the registration and certification of green marks. While the preliminary research indicates no green marks-related cases having been laid before the Kenyan courts with regards to green marks, the study will draw from the jurisprudence from countries where these foreign courts have rendered decisions on the registration and certification of green marks.

The findings captured in all the preceding parts will be advanced against proposed solutions in Chapter five. This part will form the main recommendations section and will provide informed and workable solutions for the Kenyan FMCG market. Chapter five will also conclude the research with a summary of the core thesis and the key findings.

1.13 CHAPTER SUMMARY

As this chapter draws to a close, it is prudent to recall some key facts that form the basis of subsequent discussion. Chapter one introduces the evolving relationship between corporate sustainability and green marketing in the contemporary marketplace, particularly focusing on Kenya's Fast-Moving Consumer Goods (FMCG) industry.

Corporate sustainability, as a company's long-term value based on Environmental, Social, and Governance (ESG) principles, has led to enterprises presenting their good as being ecologically friendly to appeal to pro-green consumers. This often involves using green marks, trademarks and certification marks, to demonstrate a company's environmental responsibility through an avenue called green marketing.

Africa's highly competitive FMCG industry is driven by the affordability and high demand for household essentials. Globally, the rising trend of green consumerism is reflected in increasing green marketing expenditures, projected to reach \$60.81 billion by 2027. In Kenya, 33% of

consumers consider eco-friendly packaging an important factor in their purchases, indicating a growing shift toward sustainable choices. Research suggests that while many Kenyans recognize the need for environmental conservation, there is still a lack of awareness about the actual environmental impact of the products they buy.

Finally, the chapter raises key legal concerns around the registration and certification of green trademarks in Kenya's FMCG sector. It argues that Kenya's legal-regulatory framework is not equipped to promote the registration and certification of green marks let alone regulate green marketing practices, and protect consumers from false claims, laying the groundwork for the research objectives and theoretical approach of the study.



CHAPTER TWO: THEORETICAL FRAMEWORK - THE QUALITY THEORY

2.0 INTRODUCTION

In the modern day, trademarks serve two primary purposes: demonstrating the source or origin of a good and connoting that good's quality. The quality theory conceptualises the latter function. This chapter presents the theory and elaborates on how it will be used to analyse the objectives of the study and demonstrate the overall claim for the registration and certification of green marks used in Kenya's FMCG Industry. In the realm of trademark law, the quality theory is an evolution from the source theory and conceptualises the quality purpose of trademarks beyond merely presenting the source or origin of a product.

2.1 THE QUALITY THEORY

The quality assurance function of trademarks is best presented through the quality theory of trademarks attributed to Frank I. Schechter.⁴⁴ It propounds that trademarks cannot be limited to conveying the source of the goods; they most importantly also show its quality. Traditionally, trademarks indicated the origin or source of a given market good or service.⁴⁵ This position flowed from the source theory of trademarks, and it argued that trademark law's duo-pronged objective was to enable consumers to locate a product's source and guard it against negative market externalities such as competitor fraud.⁴⁶ In Kenya, section 2 of the *Trademarks Act* outlines the function of trademarks, including drawing connections between a person and their goods to demonstrate ownership of that mark, making no mention of the quality aspect of trademarks.⁴⁷ Kenya's present approach to trademark registration ties to the theory, thus negating its application to green marks, given that green marks particularly speak to a product's quality.

At the turn of the 20th Century, the increased use of psychological advertising affected consumer attitudes, entrenching a deeper understanding of a trademark's quality aspect.⁴⁸ For Schechter, the quality angle of trademarks builds up on the source theory by indicating a product's origin and

⁴⁴ Schechter F, *The historical foundations of the law relating to trademarks*, 1st ed, Columbia University Press, New York, 1925, 211. Nichols C, 'Trouble in Trademark Law', 8-11

⁴⁵ Hanak E, 'The quality assurance function of trademarks' 43 (3) *Fordham Law Review*, 1974, 363.

⁴⁶ Nichols C, 'Trouble in Trademark Law', 11.

⁴⁷ Section 2, *Trademarks Act* (No 51 of 1955).

⁴⁸ Alfaouri M and Wahdani F, 'The theoretical grounds for the provision of trademark's protection' 8 (22) *Practical Application of Science Journal*, 2020, 78.

quality.⁴⁹ Harry D. Nims also agrees with the quality assurance nature of trademarks, noting that they serve not only as source indicators but also as symbols of uniform quality.⁵⁰ This means that all products bearing a given trademark, or in this case, a green mark, have met the quality threshold of ecological friendliness.

Nichols further argues that both the source and quality functions of trademarks coexist, as consumers must first recognise the origin of a product before assessing its quality by applying their preferential inclinations.⁵¹ Schechter's, Nims' and Nichols' perspectives strengthen the argument that trademarks, including green marks, should serve as a tool for both differentiation and quality assurance in the marketplace, thus pertinent to this study's overarching goal.

Further building up on the aspects of source and quality, Callmann argues that a trademark on a given good assures consumers that all other goods bearing that mark are of the same quality.⁵² The use of green marks to denote a particular product's ecological friendliness, demonstrates that other products having the same green mark equally adhere to the same ecological standards.

Their discussion thus points to this study's main goal of green marks where consumers rely on them to signal that a product meets specific environmental criteria.⁵³ Quality assurance is vital for consumers who prioritise sustainability in their purchasing decisions, as it enables them to trust that products, marked as environmentally friendly, have indeed met established ecological standards. With these points in mind, the research proceeds to argue for the inclusion of quality as a metric under section 2 of Kenya's *Trademarks Act*.⁵⁴

⁴⁹ Hanak E, 'The quality assurance function of trademarks', 363.

⁵⁰ Harry D. Nims, *The Law of Unfair Competition and Trade-marks*, 4th ed, Baker Voorhis, New York, 1947, 517. See also Bermudez S and Sarmiento F, 'South-South Trade and voluntary sustainability standards: Challenges and opportunities', International Institute for Sustainable Development, September 2023 - <<https://www.iisd.org/system/files/2023-09/voluntary-sustainability-standards-south-south-trade.pdf>> on 10 September 2024.

⁵¹ Nichols C, 'Trouble in Trademark Law', 22.

⁵² Callmann R, *Unfair Competition, Trademarks, and Monopolies*, 2024-1 ed, Clark Boardman Callaghan, New York, 2024, 640.

⁵³ Bermudez S and Sarmiento F, 'South-South Trade and voluntary sustainability standards: Challenges and opportunities', International Institute for Sustainable Development, September 2023 - <<https://www.iisd.org/system/files/2023-09/voluntary-sustainability-standards-south-south-trade.pdf>> on 10 September 2024.

⁵⁴ Section 2, *Trademarks Act* (No 51 of 1955).

The current focus, captured above, on the source function of trademarks, is inadequate in addressing the complexities introduced by green marks. From the foregoing analysis of the theory's proponents, green marks are, by definition, both source indicators and quality indicators, particularly in terms of ecological sustainability.⁵⁵ It then follows that registering and certifying these marks would provide pro-green consumers with a reliable means of identifying environmentally friendly products. Consequently, registering and certifying green marks will help reduce search costs and minimise the risk of misleading claims.⁵⁶

Moreover, the registration of green marks would facilitate transparency in the FMCG sector, ensuring that companies cannot falsely claim environmental benefits without meeting the required standards. The global trend towards sustainability, coupled with the increasing demand for green products in Kenya's FMCG sector, underscores the necessity of expanding the scope of trademark law to include the registration and certification of green marks. The expanded scope would not only protect consumers from greenwashing, but also promote fair competition by creating a level playing field for businesses that genuinely adhere to sustainable practices.

In appraising Kenya's legal-regulatory framework, the study will use the quality theory of trademarks to discuss the shortfalls of Kenya's principal trademark statute, the *Trademarks Act*, in relation to the quality function of trademarks. Moreover, the study will use the quality theory of trademarks to analyse select court jurisprudence to assess the existing approach by Kenyan courts in relation to the registration and certification of green marks.

⁵⁵ European Innovation Council and SMEs Executive Agency, 'Green trade marks' European Union HelpDesk, 7 July 2023 < https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/green-trade-marks-2023-07-07_en > On 10 September 2024.

⁵⁶ Calboli I, 'The sunset of "quality control" in modern trademark licensing' 57 (2) *American University Law Review*, 2007, 343

CHAPTER THREE: KENYA’S LEGAL-REGULATORY FRAMEWORK GOVERNING THE REGISTRATION AND CERTIFICATION OF GREEN MARKS

3.0: INTRODUCTION

Green marks in Kenya are best studied by noting two important points. Firstly, these marks are an Intellectual Property (IP) tool and can either be trademarks or certification marks. This means that to cover the legal regime governing green marks in this sense, the study needs to appraise the relevant IP laws that govern their registration, certification, and consequent use. Secondly, green marks have a bearing on consumer decision-making as a marketing tool. The reason is that trademarks and certification marks present a product based on its quality, as canvassed through the quality theory of trademarks. Informed by corporate sustainability perspectives, the study investigates the Constitution of Kenya, The Trade Marks Act, The Consumer Protection Act, The Competition Act and Standards Act and how they regulate consumer protection of pro-green consumers in Kenya’s FMCG market segment.

3.1: CONSTITUTION OF KENYA (2010)

Kenya’s Constitution conceptualises the enhanced role of trademarks and the quality function through different provisions that cut across Chapter 4 of the Bill of Rights,⁵⁷ to Chapter 5 on Land.⁵⁸ Before any further analysis, the study appreciates the need to recall the fact that sustainability has led to the promotion of eco-friendly practices, the performance of which has motivated organisations to amplify their pro-green status.⁵⁹ Sustainability is a land use principle in Kenya, and it is captured in Article 60 of the Constitution.⁶⁰

Recalling Christine Farley’s scholarship on corporations’ use of green marks as an indicator of a product’s eco-friendliness, green marks promote the attainment of the right to a clean and healthy environment as provided for in Article 42.⁶¹ Article 42 of the Kenyan constitution further

⁵⁷ Chapter 4, *Constitution of Kenya* (2010)

⁵⁸ Chapter 5, *Constitution of Kenya* (2010)

⁵⁹ Chapter 4, *Constitution of Kenya* (2010)

⁶⁰ Article 60, *Constitution of Kenya* (2010)

⁶¹ Farley C, ‘Green Marks’, 400. See Article 42, *Constitution of Kenya* (2010)

mandates that the state shall undertake the measures covered in Article 69 and the obligations in Article 70 to realise the right to a clean and healthy environment.⁶²

Article 69 provides that the state shall, *inter alia*, ensure the sustainable exploitation, utilisation, management, and conservation of the environment and natural resources.⁶³ The duty shall also extend to establishing systems of environmental impact assessment, environmental audit, and monitoring and to the general elimination of environmentally harmful activities.⁶⁴ Concerning the registration and certification of green marks, Article 69's provisions act as an avenue for compliant organisations to demonstrate their sustainable utilisation and management of the environment and natural resources.

Failure to meet the conditions necessary to attain a green mark will serve as a criteria for pro-green consumers to distinguish environmentally unsustainable products from sustainable ones. Callman acknowledges the role of trademarks in distinguishing a quality compliant product from a non-compliant one.⁶⁵ Where an organisation makes greenwashing claims, such claims can point to the fact that there is actual or possible infringement of the right to a clean and healthy environment.⁶⁶ Enforcing these rights is best captured in Article 70 of the constitution, and it further stipulates that a court of competent jurisdiction can order victim compensation for any harm borne as a result of breaches of environmental obligations.⁶⁷

From a consumer rights protection standpoint, Article 46 protects pro-green consumers by mandating that they shall have access to goods and services of reasonable quality and the information necessary for them to gain full benefit from goods and services.⁶⁸ For green marks, quality indicates the adherence to eco-friendly standards and informs the reader of the same to pro-green consumers. As such, the registration and certification of green marks will help to realise adequate consumer protection for the nuanced consumer segment by availing the necessary information about a product's ecofriendliness.

⁶² Article 70, *Constitution of Kenya* (2010)

⁶³ Article 69, *Constitution of Kenya* (2010)

⁶⁴ Article 42, *Constitution of Kenya* (2010)

⁶⁵ Callmann R, *Unfair Competition, Trademarks, and Monopolies*, 640.

⁶⁶ Article 42, *Constitution of Kenya* (2010) See Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?' 18 (5) *Journal of Intellectual Property & Practice*, 2023, 370.

⁶⁷ Article 70, *Constitution of Kenya* (2010)

⁶⁸ Article 46, *Constitution of Kenya* (2010)

The Constitution sets the compliance standards for green marks to adhere to citizen's rights. It does so by promoting proper environmental management and the conditions for refraining from making deceptive claims.

3.2: TRADE MARKS ACT (No. 51 of 1955)

The Trade Marks Act distinguishes trademarks from certification marks. For the purposes of the study, the statute's provisions are relevant in realising the registration of green trademarks and green certification marks respectively. Section 2 states that, by way of function, a trademark indicates a connection between a person and some good or service.⁶⁹ For the former, a trademark distinguishes a person's good from another in the same course of trade, while in the latter scenario, a trademark distinguishes between 2 or more service providers and their service offerings.⁷⁰ The expanded role of trademarks, not only shows a product's source but also its quality, as illustrated by Harry D Nims.⁷¹

In relation to green trademarks, Section 2 of the Act fails to accommodate the quality assurance role of a trademark.⁷² As presented by Schechter, Nims and Nichols, the quality assurance function means that green trademarks, as indicators of a product's ecofriendliness, fail to meet the understanding of what amounts to a trademark under the Act, thus limiting its possible registration.⁷³ Their views indicate that the provisions of Kenya's *Trade Marks Act* appear to not consider the registration of green trademarks.

Section 40 defines green certification marks as marks that, *inter alia*, distinguish trade goods with respect to their origin, mode of manufacture and quality.⁷⁴ According to the definition, it is discernible that green certification marks perform a source-indicator role, as per the source theory of trademarks, and a quality assurance role, from the quality theory of trademarks.⁷⁵ A pro-green consumer is first able to know a product's origin and then apply their consumer inclination while resonating with that product's eco-friendliness quality.

⁶⁹ Section 2, *Trade Marks Act* (No. 51 of 1955)

⁷⁰ Section 2, *Trade Marks Act* (No. 51 of 1955)

⁷¹ Harry D. Nims, *The Law of Unfair Competition and Trade-marks*, 517.

⁷² Section 2, *Trade Marks Act* (No. 51 of 1955)

⁷³ Schechter F, *The historical foundations of the law relating to trademarks*, 211; Harry D. Nims, 'The Law of Unfair Competition and Trade-marks', 517; Nichols C, 'Trouble in trademark law', 20.

⁷⁴ Section 40, *Trade Marks Act* (No. 51 of 1955)

⁷⁵ Adelman D and Austin G, 'Trademarks and private environmental governance', 710.

3.3: THE CONSUMER PROTECTION ACT (No. 46 of 2012)

As a consumer-focused trade regime, the Consumer Protection Act shields consumers from unfair trade practices. An example of unfair trade practices include misrepresentation through the use of deceptive claims, such as the use of green marks on products that do not meet the ecologically friendly criteria.⁷⁶

Section 2 of the Consumer Protection Act defines a consumer as any person who uses a particular product, or enters into a contract with a supplier in the ordinary course of business.⁷⁷ Part III of the Act delves further into unfair practices and extends the meaning of this term to cover any representation that the goods, or services, are of a particular standard or quality when they are not.⁷⁸ Aligning with Alexandra Mogyoro's views, legal elements on unfair competition bar the representation of deceptive green claims by using green marks on unsustainable products, a common practice among corporations in the age of green marketing.⁷⁹ In terms of the scope of liability, the Act provides that any person engaging in unfair practices is liable, jointly and severally, for any amount to which the consumer is entitled under the Act⁸⁰, as well as a general penalty not exceeding one million shillings, or to imprisonment for a term not exceeding three years, or to both.⁸¹

The Act provides adequate protection against deceptive representation that aims to sway a consumer's purchase decisions on the basis of using a green mark that speaks to that product's ecological friendliness when, in reality, it does not satisfy the ecological standards.

3.4: THE COMPETITION ACT (No. 12 of 2010)

The Act builds up on the understanding of unfair trade practices, from a market competition perspective, to protect consumers from unfair and misleading market conduct. Section 55 prescribes what constitutes false representations as those that fail to accurately represent a particular good's standard or quality.⁸² For ecologically friendly products, green marks represent

⁷⁶ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?', 370.

⁷⁷ Section 2 *The Consumer Protection Act* (No. 46 of 2012)

⁷⁸ Part III, *The Consumer Protection Act* (No. 46 of 2012)

⁷⁹ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?' 18 (5) *Journal of Intellectual Property & Practice*, 2023, 370

⁸⁰ Section 92, *The Consumer Protection Act* (No. 46 of 2012)

⁸¹ Section 16 (10), *The Consumer Protection Act* (No. 46 of 2012)

⁸² Section 55, *The Competition Act* (No. 12 of 2010)

their attainment of such standards of quality that position them strategically for the pro-green consumer, who tends to make their purchasing decisions on this metric. Eikel and Mogyoros agree with this view, as green marks have an influence on consumer decision-making and gaining a competitive market edge over other products.⁸³

Importantly, section 67 provides consultations with the Kenya Bureau of Standards (KEBS) regarding the setting of quality standards to be adhered to.⁸⁴ KEBS's mandate is best captured in the succeeding section on the Standards Act. Overall, the Competition Act maintains a fair market space where organisations make accurate representations to their consumers to avoid undercutting each other through misleading assertions.

3.5: STANDARDS ACT (Cap 496)

The standards of quality of goods sold within Kenya originate from this Act. Section 3 of the Standards Act establishes the Kenya Bureau of Standards (KEBS).⁸⁵ Section 4 stipulates KEBS's functions, which include controlling the use of standardisation marks and distinctive marks, as well as testing locally manufactured and imported commodities to assess their compliance with set quality standards.⁸⁶ The standardisation mark is one given to manufacturers, who have expressed their willingness to comply with the approved specifications in their manufacturing process.⁸⁷

The need for regulatory involvement in the registration and certification of green marks ensures that only ecologically friendly products are presented to pro-green consumers. Mogyoros' views support the quality checks presented by green certification marks, given that independent authorities issue certification marks.⁸⁸ Understanding the provisions of the Standards Act is important to the overall need for creating a consumer protection standard to gauge a product's ecological friendliness in Kenya's FMCG sector. Such standards will help pro-green consumers make more informed purchasing decisions and comply with local regulations.

⁸³ Eikel C, 'Going Green: The Dos and Don'ts of green trade marks' The TradeMarks Group at Bird and Bird, 25 April 2024 < <https://brandwrites.law/going-green-green-trade-marks-dos-and-donts/> > on 4 October 2024; See also Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?', 368.

⁸⁴ Section 67, *The Competition Act* (No. 12 of 2010)

⁸⁵ Section 3, *The Standards Act* (Cap 496)

⁸⁶ Section 4, *The Standards Act* (Cap 496)

⁸⁷ Section 10, *The Standards Act* (Cap 496)

⁸⁸ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?' 18 (5) *Journal of Intellectual Property Law & Practice*, 2023, 368.

3.6: CONCLUSION

The main findings flowing from this chapter can be categorised into two main points cutting across consumer protection and the registration and certification of green marks. With regard to the former, Kenya's *Consumer Protection Act* (2012) prohibits the use of false misrepresentations to consumers, thus shielding them from the deceptive nature arising from greenwashing. On the other hand, Kenya's *Trade Marks Act* (1955) primarily focuses on the source function of trademarks and not their quality assurance function, thus failing to promote the use of green trademarks in denoting a product's ecological friendliness.

The different pieces of legislation listed above are pertinent to the discussion on the registration and certification of green marks in Kenya. These marks are rooted in the quality assurance function of trademarks and convey a product's ecological friendliness. From the above analysis, Kenya's Constitution and statutes each paint a vivid image of the need to enhance consumer protection by shielding them from deceptive green claims. Nonetheless, Kenya's Trade Marks Act seems to lag behind in relation to the registration and certification of green marks used in Kenya's FMCG sector.

Preliminarily, the Act is rooted in the source theory of trademarks, which views these marks as only distinguishing one good from another without any indication of its quality standards. Failing to recognise this important function means that green marks, as indicators of a product's ecological friendliness, are not supported within Kenya's Trade Marks Act. Importantly, the critique of the Trade Marks Act alone flows from the fact that it is the research study's overarching subject matter legislation and that the statute is the primary law of Trademark protection in Kenya.

Additionally, the present study addresses the resultant gap by arguing for the recognition of the quality assurance function of trademarks to allow the registration and certification of green marks to best realise the provisions of Kenya's constitution and supporting legislation. This will encourage organisations to focus on sustainable environmental uses, promote fair market practices and help pro-green consumers make more informed purchasing decisions.

CHAPTER FOUR: COURT JURISPRUDENCE ON KENYA'S LEGAL-REGULATORY FRAMEWORK GOVERNING THE REGISTRATION AND CERTIFICATION OF GREEN MARKS

4.0: INTRODUCTION

Kenyan courts' jurisprudence on the registration and certification of green marks raises two key points: the prevailing understanding of the role of trademarks and the criteria for registration under section 2 of the *Trade Marks Act* (No. 51 of 1955). While there is no reported case law on the registration and certification of green marks in Kenya, this study will examine the judicial decisions regarding applying the provisions of section 2 of the Act. Such determinations are relevant to the problem of registration and certification of green marks; they illustrate the set threshold towards the role of trademarks in Kenya in demonstrating a product's origins and distinguishing it from other goods and services. This means that the study will, at each point, offer preliminary thoughts on the possible role and registration criteria of green trademarks and green certification marks, as an indicator of a product's ecological friendliness.

4.1: INTERPRETATION OF SECTION 2 OF THE *TRADE MARKS ACT* BY KENYAN COURTS

Section 2 of the Trade Marks Act provides that a trademark's principal function is to indicate a connection between a good or service to one person and distinguish it from that of another person.⁸⁹ In interpreting section 2, the study relies on three cases namely; *Premier Food Industries Limited v Triclover Industries (K) Limited*,⁹⁰ *British United Provident Association Limited v Bupa Kenya Limited*, and *Brooke Bond Kenya Ltd vs Chai Ltd*.⁹¹

In the first case, the plaintiff, Premier Foods Industries Limited, claimed that the defendant's product, Clovers Lime Juice Cordial, was too similar in appearance and packaging to their products, PEP Lime Juice Cordial. The similarity was argued to potentially confuse consumers and suggest an association between the two brands.

⁸⁹ Section 2, *Trade Marks Act* (No. 51 of 1955)

⁹⁰ *Premier Food Industries Limited v Triclover Industries (K) Limited* [2021] eKLR.

⁹¹ *Brooke Bond Kenya Ltd vs Chai Ltd* (1971) EA 10.

The argument points to the source function of trademarks as illustrated by Harry Nims, according to which trademarks indicate a product's origins and differentiate it from another manufacturer's products.⁹² The defendant argued that the names were distinct enough to avoid confusion since "lime juice cordial" was a generic term, not subject to trademark protection. While the facts do not immediately point to the existence of green claims, the study adopts this case to demonstrate the common grounds for challenging trademarks under section 2 of the Trade Marks Act.

A mark, including a label or signature, distinguishes one item from another and does not connote a product's ecological friendliness,⁹³ thus tying to the source function of trademarks, a position shared by Adelman and Austin.⁹⁴ The main takeaway is that the courts have yet to be asked to decide on the quality assurance function of trademarks in the definition under section 2, and resorted to restating the source function instead.

With regard to a green label, the court in the case of *Brooke Bond Kenya Ltd vs Chai Ltd* approached this term in the context of the offence of passing off.⁹⁵ Passing off entails representing one's business or products as being that of another person, usually a competitor.⁹⁶ The court held that imitations of the words 'green label', as a term protectable under trademark law, amounted to passing off. While this case concerns the legal question(s) raised with regard to the tort of passing off, it is relevant to the study because of the use of the term 'green label'. The descriptive nature of the words associated with green trademarks makes it difficult to register them, given that they lack distinctiveness and are descriptive, as further captured by Christine Farley.⁹⁷ A green trademark's non-distinctive and descriptive characteristics is important to consider when making a case for their registration. This is because a trademark, as a source indicator, ought to be a distinctive mark and not merely describe a product's quality or purpose.⁹⁸

⁹² Harry D. Nims, 'The Law of Unfair Competition and Trade-marks', 517

⁹³ *Premier Food Industries Limited v Triclover Industries (K) Limited* [2021] eKLR.

⁹⁴ Adelman D and Austin G, 'Trademarks and private environmental governance', 710.

⁹⁵ *Brooke Bond Kenya Ltd vs Chai Ltd* (1971) EA 10.

⁹⁶ Kameja E, 'Passing off - COMMERCIAL CASE NO. 132 OF 2018: Kenafric Industries Limited (Plaintiff) vs. Lakairo Industries Group Co. Ltd. (1st Defendant) & Others', *Bowmans*, 2018 -<<https://www.bowmanslaw.com/wp-content/uploads/2022/08/IP-EA-Article-Passing-off-COMMERCIAL-CASE-NO-132-OF-2018-TZ.pdf>> on 15 October 2024

⁹⁷ Farley C, 'Green Marks', 401.

⁹⁸ CLG Attorneys, 'The Two Objectives of every trademark registration', CLG Attorneys, 2024 -<<https://www.cohnlg.com/descriptive-trademarks-everything-you-need-to->

The examination of *Brooke Bond Kenya Ltd vs Chai Ltd* suggests that the Kenyan courts' holding on the role of trademarks is pegged on the source function of trademarks. However, this case may serve as a precedent if and when legal conflicts involving the registration and certification of green trademarks could be brought for adjudication by the courts.

In the case of *British United Provident Association Limited v Bupa Kenya Limited*, the court briefly canvassed a trademark's quality assurance role.⁹⁹ The Plaintiff argued that they owned the trademark, BUPA, and had established a great reputation and was known for the great quality of its healthcare services. Furthermore, they argued that the defendant's use of the BUPA trademark amounted to the offence of passing off and thus infringed on their intellectual property. On the other hand, the Defendant argued that it legally acquired their name, BUPA, through registration as a company under the Companies Act. The court ultimately found that the defendant's use of the BUPA name was likely to cause confusion among consumers, as it closely resembled the plaintiff's registered trademarks, thus mirroring the source function of trademarks. Furthermore, the court's holding is pertinent to the study in that the decision noted the plaintiff's trademark, emphasising the quality assurance function of trademarks in Kenya. In terms of registration and certification of green marks, while a green trademark can convey a product's eco-friendliness, it cannot be registered if it interferes with or misrepresents the established character or quality of another person's products. This is particularly due to the fact that the resultant confusion would lead to unfair competition or mislead consumers about the authenticity of the environmental claims.¹⁰⁰

4.3: FINDINGS AND CONCLUSION

In summary, while the current Kenyan law, as interpreted in *Premier Food* and *Brooke Bond cases*, remains focused on the source function of trademarks, the growing importance of green marketing demands an expanded interpretation. The focus should shift from merely identifying the source of goods or services to embracing the broader social and economic functions of trademarks, including

[know/#:~:text=A%20mark%20is%20merely%20descriptive,applicant's%20goods%20and%20for%20services](#) > on 15 October 2024.

⁹⁹ *British United Provident Association Limited v Bupa Kenya Limited* (2020) eKLR.

¹⁰⁰ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?' 18 (5) *Journal of Intellectual Property & Practice*, 2023, 370

their role in fostering sustainable practices.¹⁰¹ For instance, while the bench in *Premier Food Industries Limited v Triclover Industries (K) Limited, Brooke Bond Kenya Ltd vs Chai Ltd* and *British United Provident Association Limited v Bupa Kenya Limited* cases addressed the issue of passing off in relation to the term "green label," it is notable that the court did not address the ecological implications of the term. The distinction between source identification and environmental quality representation needs to be better understood. As environmental consciousness increases among consumers, trademarks that signal eco-friendly or sustainable practices become essential for the commercial success of green brands.¹⁰² Legislators need to consider how green trademarks can protect consumers from misleading claims, encourage sustainable practices, and provide legal clarity in a market increasingly driven by environmental concerns.



¹⁰¹ Nichols C, 'Trouble in Trademark Law', 22.

¹⁰² Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?', 368.

CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0: INTRODUCTION

Green marketing presents an array of challenges and opportunities in Kenya, particularly in the realm of consumer protection and advertising. The preceding sections have each outlined support for this argument, cutting across the present scale of green marks in the FMCG sector, the legal-regulatory framework as well as court jurisprudence on this topic. The discussion in this chapter presents the findings, recalling the hypothesis and research objectives set out in Chapter I.

5.1: FINDINGS OF THE RESEARCH

5.1.1: LIMITED FUNCTIONS OF TRADEMARKS

As discussed earlier, green marks can either be categorised into trademarks or certification marks. The registration of these tools are governed by the Trademarks Act, thus the limited function of trademarks in the present market space is inextricably linked to a limitation of the relevant law. Section 2 of the Trademarks Act, in its definition of a trademark, narrowly extends the role of trademarks to illustrate a connection between a person and their goods to demonstrate ownership of that mark.¹⁰³ This ties to the source theory of trademarks, which as presented by Frank I. Schechter, argues in support of a trademark's distinguishing function between goods and services on account of their origin or source and not the quality of the goods bearing a trademark.¹⁰⁴

The research noted that the Act also anticipates the quality function role of distinguishing marks, namely certification marks.¹⁰⁵ Tied to the earlier argument on trademarks, green certification marks have a duo-pronged role in that they both indicate a product's source and its quality.¹⁰⁶ Their dual function concurs with Mogyoros's viewpoints.¹⁰⁷ The study's view is that the adoption of green certification marks over green trademarks offers a more informed position in governing the

¹⁰³ Section 2, *Trademarks Act* (No 51 of 1955).

¹⁰⁴ Schechter F, *The historical foundations of the law relating to trademarks*, 211. See also Nichols C, 'Trouble in Trademark Law', 8-11

¹⁰⁵ Section 40, *Trademarks Act* (No 51 of 1955).

¹⁰⁶ Adelman D and Austin G, 'Trademarks and private environmental governance', 710.

¹⁰⁷ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?' 18 (5) *Journal of intellectual Property Law & Practice*, 2023, 368.

registration and certification of green marks in Kenya.¹⁰⁸ Hence, the findings disprove the hypothesis, which assumed that the Kenyan *Trade Marks Act* inadequately provides for the registration and certification of green marks in Kenya's FMCG industry.

While the *Trade Marks Act* provides for the source function of trademarks, it also outlines the quality function role of certification marks. The latter are an important talking point given the research's overarching goal of providing a second protective layer, third party view, to protect pro-green consumers from greenwashing. Green certification marks, like all certification marks, are issued by an independent authority upon the satisfaction of a defined list of requirements, in this case, eco-friendly standards.¹⁰⁹ The limited function of trademarks, bars the registration of green trademarks, but allows for the registration of green certification marks.

5.1.2: ABSENCE OF GREEN PRE-QUALIFICATIONS FOR GREEN MARKS

The registration and certification of green marks in Kenya align with the need to promote consumer protection, thus protecting pro-green consumers from greenwashing by enterprises in the FMCG sector. Greenwashing occurs when companies make exaggerated or unsubstantiated claims about the environmental benefits of their products, which undermines consumer trust and the integrity of sustainable markets.

To ensure sufficient consumer protection, it is important to establish robust systems for registering and certifying green trademarks as they provide verifiable assurances of a product's eco-friendliness. The relevant state agencies such as KEBS ought to establish and strictly enforce the prequalification standards on green marketing to ensure adequate consumer protection. These standards should clearly define what constitutes an ecologically friendly product thus ensuring transparency and accountability throughout the certification process. For instance, the certifications should require evidence of reduced carbon footprints, sustainable sourcing, or compliance with specific environmental benchmarks. Consumers are thus not only protected but also businesses are encouraged to meet higher sustainability standards in the Kenyan landscape to qualify for these marks.

¹⁰⁸ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?' 18 (5) *Journal of Intellectual Property Law & Practice*, 2023, 368.

¹⁰⁹ Mogyoros A, 'Improving eco-labels: Are green certification marks up to the task?', 368.

Presently, KEBS oversees consumer protection prioritising the enforcement of quality standards and addressing counterfeit and misleading products.¹¹⁰ While KEBS primarily addresses the quality and safety of goods, its mandate could be expanded to include specialised certification processes for green products.¹¹¹ As an eco-certification framework, KEBS could work with environmental experts, industry stakeholders NEMA, and consumer organisations to create a transparent system for identifying and labelling environmentally friendly goods. The synergy between the two organisations, KEBS and NEMA, could be more impactful given the former's experience with consumer protection and the latter's involvement with environmental management. Overall, this aspect supports the research's hypothesis being that Kenya's legal-regulatory framework fails to adequately support the registration and certification of green marks in Kenya.

5.1.3: CONSUMER DEMAND FOR SUSTAINABLE PRODUCTS

With the increased uptake of ecologically friendly products, Kenya can leverage the existing legal and institutional framework to shield pro-green consumers from greenwashing. Strengthening Kenya's legal-regulatory framework for the registration and certification of green marks could lead to integrating aspects of the Singapore Green Labelling Scheme (SGLS).¹¹² The SGLS has been managed by the Singapore Environment Council (SEC) since 1999, which is the only eco-labelling body in Singapore and is part of the Global Eco-Labelling Network (GEN).¹¹³ Since then, the SGLS has gone on to become Singapore's foremost environmental compliance standard and certification mark, applying to green certification marks, thus promoting environmentally friendly practices through rigorous certification processes that ensure products meet strict environmental standards.¹¹⁴

¹¹⁰ Kenya Bureau of Standards (KEBS), *Strategic Plan 2022-2027*, KEBS, 2022, 25.

¹¹¹ Part II, *Standards Act* (Cap 496).

¹¹² Singapore Environmental Council, 'About Singapore Green Labelling Scheme' Singapore Environmental Council <https://www.sgls.sec.org.sg/cms.php?cms_id=3> Accessed 15 November 2024

¹¹³ Global Ecolabelling Network (GEN), 'Singapore Green Labelling Scheme (Singapore Environment Council)', Global Ecolabelling Network (GEN), 2024-<<https://globalecolabelling.net/organisation/singapore-green-labelling-scheme/>> on 25 November 2024.

¹¹⁴ Competition and Consumer Commission of Singapore (CCCS), 'Environmental Sustainability: The role of competition and consumer protection laws and policies', Competition and Consumer Commission of Singapore (CCCS), 17 August 2022, 16-18, <<https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/ccs-campaigns/cccs-essay-competition-2022/merit-sch-aydaasta.ashx>> on 25 November 2024

As a Type 1 Ecolabel, the SGLS is independently verified by a third party program which authorizes the use of green certification marks to demonstrate a product's ecofriendliness.¹¹⁵ The standards encompass resource conservation, energy efficiency, waste reduction, and the use of sustainable materials, all evaluated through a life cycle assessment.¹¹⁶ By implementing such measures, the SGLS guarantees that certified products genuinely contribute to sustainability goals, providing consumers with reliable information and strengthening market trust.

In Kenya, adopting similar standards could significantly enhance the credibility of green certifications by integrating stringent prequalification criteria and independent verifications. The SGLS's comprehensive product evaluation approach highlights the importance of transparency and accountability, effectively protecting consumers from greenwashing, which is a major concern in Kenya's fast-moving consumer goods (FMCG) sector.¹¹⁷

Conforming with global practices by adopting Type 1 Ecolabels will bring Kenya's eco-certification program a step closer to becoming a globally recognised environmental certification programme under the GEN. The foregoing not only supports local sustainability objectives but also positions Kenya as a leader in green marketing within the region. By incentivizing businesses to innovate and embrace sustainable practices, a Kenya-specific adaptation of the SGLS framework could yield substantial environmental and economic benefits, fostering both market competitiveness and sustainable consumer protection.

5.2: CONCLUSION

The research study elucidates the critical need for the registration and certification of green trademarks in Kenya, highlighting their pivotal role in promoting sustainable marketing practices and protecting consumers against the adverse effects of greenwashing. Greenwashing not only undermines consumer trust but also poses a significant threat to the credibility of environmental claims within the burgeoning fast-moving consumer goods (FMCG) sector in Kenya. This erosion

¹¹⁵ Swedish Confederation of Professional Employees (TCO), 'ISO 14024: Rules for a third party certification', TCO, 2024-<https://tcocertified.com/iso-14024/> > on 25 November 2024

¹¹⁶ Dr Lai S, Lim D, Shi L and Tay J, 'Beyond the Green Façade: "Greenwashing" Risks and Strategies for Authentic Sustainability', Allen & Gledhill LLP, October 2023-<https://law.nus.edu.sg/trail/beyond-the-green-facade/#:~:text=A%20sustainable%20product%20may%20be,origin%2C%20material%20and%20mode%20of> Accessed 15 November 2024

¹¹⁷ Wu P, Xia B, Pienaar J and Xianbo Z, 'The past, present and future of carbon labelling for construction materials – A review', 77 (1) *Building and Environment*, July 2014, 160-168.

of trust has far-reaching implications, compromising market integrity and hindering broader sustainability initiatives.

While the existing *Trade Marks Act* establishes a foundational legal framework for trademark registration, its singular focus on the source theory significantly limits its capacity to address the nuanced requirements specific to green trademarks. Comparative analyses, particularly insights from the Singapore Green Labelling Scheme (SGLS), reveal the necessity of robust certification standards that encompass comprehensive criteria such as resource conservation, energy efficiency, waste reduction, and life-cycle assessments. These criteria are essential to ensure the authenticity of environmental claims and to promote sustainable business practices.

The current regulatory framework in Kenya, as overseen by the Kenya Bureau of Standards (KEBS), lacks the structural capacity and requisite resources to facilitate effective green product certification. This regulatory inadequacy creates a significant gap that jeopardizes the provision of reliable and verifiable environmental claims, thereby rendering consumers susceptible to deceptive marketing practices. Furthermore, as the demand for sustainable products continues to escalate in the Kenyan market, it becomes increasingly imperative to establish a legal and regulatory environment that not only safeguards consumer interests but also incentivizes businesses to embed sustainable practices within their operations.

In conclusion, the absence of a dedicated green certification framework in Kenya significantly undermines the nation's ability to combat the rising challenge of greenwashing. This deficiency compromises consumer protection and diminishes the integrity of sustainable marketing practices. To emerge as a leader in sustainable development, Kenya must enact a comprehensive green trademark framework that aligns with international best practices. Such a framework would reinforce its commitment to environmental stewardship and cultivate a culture of sustainable consumption and production, ultimately benefiting both consumers and businesses alike.

5.3: RECOMMENDATIONS

In order to enhance environmental sustainability within the framework of trademark regulation in Kenya, several important proposals are advanced.

- 1) *Amendments to Section 2 of the Trade Marks Act* - There should be legislative amendments to Section 2 of the Trade Marks Act geared towards expanding the definition of trademarks. The expanded role will highlight the quality assurance function of trademarks and thus incorporate eco-friendly attributes, thereby facilitating the registration of green trademarks. Furthermore, it is essential to establish prequalification criteria that define what constitutes a green product, ensuring alignment with global best practices.

- 2) *Creation of a dedicated green certification framework* - This move will signal the establishment of Kenyan green standards towards the issuance of a green certification mark by KEBS and NEMA. This framework scheme, modeled after international standards such as the Sustainable Green Labeling Scheme (SGLS), would rigorously evaluate environmental claims through comprehensive multi-criteria assessments. To uphold transparency and credibility in this certification process, it is crucial to implement third-party audits and conduct life-cycle analyses. This ties to the enhanced role of the Kenya Bureau of Standards (KEBS) which together with NEMA, can develop and enforce ecologically friendly standards for certification.

All the foregoing are without prejudice to the need for continued sensitisation of the public on pro-green consumption and incentivising sustainable business practices. By implementing these comprehensive measures, Kenya has the opportunity to establish a robust framework for green trademarks. Such a framework would not only protect consumers but also encourage sustainable practices and position the country as a regional leader in environmental sustainability.

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