IS KENYA'S COFFEE CERTIFICATION MARK DESTINED TO FAIL? A LEGAL DISCUSSION

Written by ***Yvonne Wamuca Kimani***

4th Year PhD Student, Xiamen University, Xiamen, China

DOI: doi.org/10.55662/CLRJ.2023.903

ABSTRACT

Poor coffee prices, constant delays in payment, lack of government support and poor management of cooperatives have been the major challenges that have faced Kenya's coffee sector for a while. Many Kenyan coffee farmers that had once reaped immense profits from the crop are no longer singing this tune. Although Kenyan coffee is considered among the best in the world, its farmers have been neglected despite it being Kenya's major export. It was therefore a great feat when on 14th February, 2015 the Coffee Board of Kenya unveiled a certification mark of origin, *'Coffee Kenya So Rich, So Kenyan'*, aimed at promoting consumer loyalty in the importing countries all while proving the distinctiveneness of Kenyan coffee in the international market. The move follows the use of intellectual property rights to be able to create a niche market for the possibility of raising profits for the communities that grow the crop especially seeing how European markets have successfully used intellectual property to create such niche markets with their agricultural products. African markets are slowly but surely catching up, especially with the use of geographical indications for *Penja pepper, Oku Honey, Rooibos tea* amongst others. However, such initiatives do not come without downfalls. This paper examines the legal state of Kenya's coffee sector from the introduction of the *Coffee Kenya* certification mark. The aim of this research is to open a legal discussion around the already known problems plaguing the sector namely, the lack of transparency of the supply chain, failing cooperatives and the exclusion of smallholder farmers. It seeks to raise questions of whether the certification mark was a step too soon and whether these issues have been addressed since the introduction of the mark.

Key words: Coffee, Kenya, certification mark, intellectual property rights

THE EXTENT OF THE *'Coffee Kenya'* CERTIFICATION MARK

Coffee consumers have developed a better understanding of their consumption habits, including but not limited to the people producing the coffee and the envoronment that the coffee is produced. European wines and cheeses have proven that there is an increase in awareness and recognition of the high potential that agricultural produce has on its consumers by providing niche agricultural products. The coffee industry in Kenya can therefore begin to learn from western jurisdictions about the positive effects of using intellectual property to market its niche produce and in turn impact not only the economy[i] as well as promote rural development. In Kenya, certification programs on agricultural produce were initiated in the horticulture industry and they then trickled down to the tea and coffee industries. Thereafter, certification programs were introduced to advocate for good practices in an endeavour to protect the consumers, the environment and the producers.

A certification mark is used to help identify goods or services that meet a defined standard. It serves as an indication that the goods or services in connection with which it is used are certified by the proprietor of the mark with respect to certain characteristics such as geographical origin, material, mode of manufacture of goods or perfomance of services, quality or accuracy. According to the Trademark Act, a certification trademark is *'a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin material, mode of manufacture, quality, acccuracy or other characteristic from goods not so certified.....Provided that a mark shall not be so registrable in the name of a person who carries on trade in goods of the kind certified.'*[ii]

Through the Ministry of Agriculture, the Kenyan government successfully applied for registration of a mark of origin for Kenyan coffee at the Kenya Industrial Property Institute (KIPI).[iii] An application was also made at the World Intellectual Property Organization (WIPO) through its Madrid System.[iv] The mark has been registered as a geographical certification trademark in an attempt to indicate that the coffee has particular characteristics. However, the registration of the *Coffee Kenya* mark through a certification trade only protects the name as far as the product may be confused by the consumer.

ISSN 2581 3382

Since international registration was sort in WIPO, it also included the jurisdictions of countries that are party to the Madrid Agreement. Consequently, this option is open to any national of a country member of the Madrid Agreement meaning that the African Regional Intellectual Property Organization (ARIPO) and the Organisation Africaine de la Propriété Intellectuelle (OAPI) have access to the mark as they have access to the agreement. The *Coffee Kenya* mark holder is currently the Coffee Directorate under the Agriculture, Food and Fisheries Authority(AFFA) (previously the Coffee Board of Kenya) and to date only four companies have met the requirements to use the mark namely, C. Dormans, Kenya Nut Company, Kimathi University of Technology and Super Gibs Limited.[v]

Figure 1. Coffee Kenya Certification Mark (Source: WIPO, 2020)

COFFEE KENYA
SO RICH SO KENYAN

OBSERVATIONS SO FAR

a. Lack of Transparency of The Supply Chain

The Nairobi Coffee Exchange (NCE) auctions all Kenyan produced coffee and is managed by the country's Exchange Management Committee.[vi] Therefore, unless the volume of coffee brough to auction is relatively low the auction takes place every Tuesday. After the coffee cherries are harvested and sorted from the respective factories, they are sent to a dry mill where they are assigned a unique tracking number also known as a 'out-turn number'. The coffee

ISSN 2581 3382

marketing agent is then handed the coffee beans that have already been milled, grilled, graded and packaged in jute bags[vii] and is responsible for preparing a catalogue of the beans that will be passed down to the NCE traders prior to the auction. On the auction date, buyers bid on the coffee available on the floor and the highest bidder wins. In 2006, another marketing strategy commonly referred to as the "Second Window" was introduced and enables marketing agents to directly negotiate with international buyers, execute a sales contract and register with the Board after inspection and analysis is carried out for quality and value as per the contract.

Once the farmers drop off their crop, they are no longer privy to the aforementioned process nor are they given the figures of how much their coffee fetches at these auctions. Many have been very critical of the NCE system since the marketing agents are responsible for paying farmers but these payments are often delayed for extended periods. Moreover, the number of players in the supply chain ends up reducing the amount that the producers receive as final payment since each player receives a percentage.

The Coffee Board of Kenya (now the Coffee Directorate) was established in 1934 pre-colonial Kenya after the enactment of the coffee industry ordinance in 1933. It is tasked with carrying out registration and licensing of coffee nurseries, growers, pulping stations, millers, marketing agents, management agents, buyers, roasters, packers, warehousemen and auctioneers to ensure they adhere to standards. This has locked out farmers who would wish to grow, market and sell their coffee but find such rules to be a hinderance. Supported and protected by the Kenyan Coffee Act that safeguards the licensing and registration provisions for all those that are part of the coffee business.[viii] Low coffee yields have been the plague that hit the Kenyan market seems to be the major reason for the certification to give it an edge

Having the coffee board of Kenya unveil and oversee a certification mark was definitely initiated with the best intentions behind it. However, having the Coffee Directorate, which has been plagued with the same problems for years, to be tasked with additional authority to oversee another strategy seems to be farfetched. The certification mark was unveiled to be geared towards giving it a niche market with a higher price point but not many of the farmers are aware of this mark and how they can directly benefit.

b. Failing Cooperatives

ISSN 2581 3382

Cooperative societies in Kenya are championed as having mass potential to deliver goods and services in areas where both the public and private sector have not ventured. They are local institutions that address local needs, employ local talent and are led by local leaders either directly or through branches. Kenyan cooperatives are organized into service and producer entities and cut across various sectors.

However, coffee farmers have been in conflict with the management and coffee millers of the cooperative societies they are registered to and this has affected the production of coffee beans. Complaints over low prices, financial indiscipline amongst society officials as well as climate change have been among the main factors behind the reduction in productivity and profits in the coffee sector. The long marketing chain has also been a contributing factor to the monetary deductions by the cooperative societies and the marketing agents who act as middlemen at the coffee auction and the international market. Many cooperative societies have been accused by its members to be havens of corruption at the hands of the officials. With time, farmers have become enraged and weary of unscrupulous cooperative society managers who over borrow from financial institutions without informing its members, further continuing the debt cycle.

For example, the Tetu Coffee Growers Cooperative Society, amid growing frustrations of its members, took control of 28 factories and raised red flags atop the gates.[ix] There was a violent takeover by the members since their harvests had been neglected by officials. The riots resulted in the destruction of their coffee beans, one person killed, scores injured and the factory burned to the ground. Thereafter, it was revealed that the riot was triggered by managers who were out of touch with its members.

The cooperative movement in Kenya traces back to pre-independence and has played an important role in wealth creation, food security and employment generation. This consequently became a big factor in poverty alleviation. The policy objective of cooperative sosieties in Kenya is to spur sustainable economic growth by focusing on achievements of desired outcomes through strengthening of the movement, improving cooperative extension service delivery, corporate governance, access to markets and marketing efficiency.

Kenya's Cooperative Societies Act[x] was enacted in 2005 and has been revised a number of times with the latest and current version being in 2012. The law has not been able to evolve with the changes in cooperative movements in Kenya, such as devolving cooperatives to the county government once the country adopted a new constitution in 2012. With regards to the

ISSN 2581 3382

role of a cooperative society in managing certification marks, the law is silent. The rights and obligations of cooperative societies under Part IX of the act only mentions its financial obligations over the farmers' property, for example, provision for having a charge over the members' produce, and imposing fines on members that violate its bylaws.

The same sad story is replicated at the National level where the State Department for Cooperatives continues to suffer severe budget cuts and therefore, cannot discharge such functions as capacity building to the cooperative enterprises and cooperative technical officers. This makes it difficult to see a future for the mark if these cooperatives have no understanding of it. Only when the Kenyan Cooperatives Act is reviewed or repealed and more friendly laws and financial and capacity building efforts to support cooperatives within the Counties is addressed, can cooperatives begin to look into and understand the benefits of the *Coffee Kenya* mark. The absence of a robust regulatory framework opens an avenue for officials who steal and run down cooperative societies to escape prosecution.

c. Exclusion of Small-Holder Farmers Through Overlegislation

Currently, there are four companies that have authority to use the mark namely, C. Dormans, Kenya Nut Company, Kimathi University of Technology and Super Gibs Limited. Each company works with local farmers from a few farms to purchase the crop and they are left to sell and market the final product. C. Dormans is in the business of exporting Kenyan coffee to markets in Europe, Asia, North America and Australia. Additionally, they run a number of coffee houses, export warehouses as well as a roasting plant. On the other hand, Super Gibs Limited works with 4 farms namely, Kirimara, Mbiri, Kathunguri Farm and Kegwa Farm.[xi] Currently, for these farmers to be able to export their crop they have to take into consideration over twenty (20) local licensing and legislations for example;

i. The (Nairobi) Coffee (Exchange) Trading Rules, 2012,
ii. The Capital Markets Authority
iii. The Nairobi Coffee Exchange Rules, 2018,
iv. Agriculture Act Cap 318,
v. Agricultural Fisheries & Food Authority Act (No. 13 of 2013),
vi. The Crops Act, 2013 (No 16 of 2013),
vii. The Coffee Directorate Certificates and permits,

ISSN 2581 3382

viii. The Labour Act Cap 229 (Employment Act 2007),

ix. County Government Business Permits,

x. County Government Health Certificates,

xi. Kenya Plant health Inspectorate Services including Phytosanitary Certificates, Weights and Measures – Inspection, Calibration, verification and stamping of scales,

xii. Kenya Maritime Certificate – Certificate in place,

xiii. Kenya Revenue Authority Tax Compliance Certificates,

xiv. Kenya Revenue Authority GSP & EURO 1 Certificates,

xv. International Coffee Organization (ICO) Coffee Export Certificates,

xvi. Kenya Trade Network Agency (KenTrade) Coffee export documents facilitation,

xvii. Chain of Custody certifications to facilitate trade (Fairtrade Labelling Organization and the Rainforest Alliance),

xviii. Kenya Bureau of Standards (KEBS) approval,

xix. Coffee Directorate Mark of origin,

xx. GS1 Barcodes,

xxi. Kenya Chamber of Commerce Membership,

xxii. The Kenya Association of Manufacturers Membership

xxiii. The Co-operatives Act CAP 490,

xxiv. The Coffee Act Cap 430, The Coffee Act (No. 9 of 2001),

Out of the four companies that have access to the mark, three are private companies while one is a state-owned entity. It is therefore safe to conclude that these companies are in a better position to afford the costs skilled manpower that is required to go over these regulations and licenses for compliance purposes to maintain the mark. For smallholder farmers who may want to utilize this opportunity, the same may not be the case. Many cooperatives are experiencing financial difficulties especially with lack of on-time payments therefore the use of the certification mark may not be possible without intervention from private entities that have the capability to utilize the mark.

Furthermore, outside the financial aspect, many of the smallholder farmers are not privy to the legal aspects behind the crop. The lack of representation of the coffee producers in the legislation is clear as there is no provision for them to provide advice to the Coffee Directorate and National Government. Smallholder farmers are still required to own 5 acres of coffee to be

ISSN 2581 3382

able to have a pulping station license,[xii] only marketing agents are licensed to sell coffee at the NCE[xiii] and washing station owners are allowed to receive money on behalf of farmers. It is such roadblocks that have made a contribution to such over legislation of the crop.

However, there have been the Coffee Bill 2020 and 2021 that are still undergoing public participation and law makers claiming that they have the potential to improve outcomes for Kenyan coffee farmers.

CONCLUSION

The *Coffee Kenya* certification mark seems to be an initiative that was paved with good intentions. The coffee sector had and has been failing, farmers in a state of despair over not being able to make any profits from the once lucrative crop and a government seemed to have neglected to implement any policies in light of these problems. It showed a positive trend towards creating a niche market for the crop similar to what Europe has been able to do with niche agricultural produce. However, the thrill of coffee growing is gone. Farmers have lost hope in ever being able to live off of the crop and many have gone ahead and uprooted the crop to introduce other local cash crops or erecting infrastructure for rental income.

Additionally, there is still no data available to the public concerning the effects that have been experienced from having the coffee Kenya certification mark. The four companies that have authority to use the mark have yet to release any products with the mark, indicating that they may still be in the implementation phases before they can launch the mark. However, with the success of the coffee products already in the market, there is hope for the success of this mark and the communities that produce it. Having a proper legal system is not always what would determine the improvement of Kenya's ailing coffee sector and having the sector address the growing disinterest amongst coffee growers would be the best place to start since the certification carries no weight if there is no crop to market.

ENDNOTES

ISSN 2581 3382

[i] Mercy W. K, Lawrence M., Ricardo F., Ruerd R. (2010), *The Impact of Certification on Smallholder Coffee Farmers in Kenya: The case of 'UTZ' certification program'*, Joint 3rd African Association of Agricultural Economists (AAE) and 48th Agricultural Economists Association of South Africa, South Africa

[ii] Trade Marks Act 2007, S.40 (Ken.)

[iii] Nzomo V (2015, Januar 15) Registration of the "COFFEE KENYA" Certification Mark by the Government. Retrieved from https://ipkenya.wordpress.com/2015/01/15/registration-of-the-coffee-kenya-certification-mark-by-the-government/

[iv] WIPO IP Portal (2022) Retrieved from https://www3.wipo.int/madrid/monitor/en/

[v] Nzomo V (2015, Januar 15) Registration of the "COFFEE KENYA" Certification Mark by the Government. Retrieved from https://ipkenya.wordpress.com/2015/01/15/registration-of-the-coffee-kenya-certification-mark-by-the-government/

[vi] Gakuo P., (2021), 'what is the Nairobi Coffee Exchange?', Retrieved on 10th January https://perfectdailygrind.com/2021/02/what-is-the-nairobi-coffee-exchange/

[vii] IBID

[viii] Coffee Act, Cap 333 Part III (Ken.)

[ix] Mabala R.(2021, June 14) Kenya: Inside New Plans to Rescue Coffee Sector, Making Growing It Profitable. Retrieved from https://allafrica.com/stories/202106141185.html

[x] Cooperatives Societies Act (2012) Cap 490 (Ken.)

[xi] Supergibs Coffee Limited (2023) Retrieved from supergibs.com/farms.php

[xii] Coffee Act, (2012) Part III, CAP 333 (Ken.)

[xiii] ibid

ISSN 2581 3382