Decision for dispute CAC-UDRP-101063

Case number	CAC-UDRP-101063
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Domain names	dafabetkenya.com

Case administrator

Name	Aneta Jelenová (Case admin)

Complainant

Organization	Emphasis Services Limited

Respondent

Name	Oliver Ndegwa

OTHER LEGAL PROCEEDINGS

A company which claims to use the disputed domain name (Dafabet Kenya Limited) has filed a civil suit against the Complainant's licensee in Kenya alleging the exclusive rights to use the name "Dafabet Kenya".

The disclosed proceeding, however, is related to the use of the name Dafabet Kenya and has not been initiated in respect of the domain-name dispute that is the subject of the complaint (as stated in paragraph 18 (a) of the Rules for Uniform Domain Name Dispute Resolution Policy, hereinafter the “Rules”).

The Panel finds that such dispute in Kenya shall not affect this administrative proceeding.
The Panel will therefore proceed to a decision.

IDENTIFICATION OF RIGHTS

In this proceeding, the Complainant relies on the following trademarks:

- Dafabet (word) trademark registered in the Philippines, Registration No. 505037, registered on 09.07.2015.
- DAFABET (word) European Union Registration No. 012067088, registered on 17.02.2014.

FACTUAL BACKGROUND

The Complainant states that it through its subsidiaries and licensees, operates websites offering online gaming and betting with licenses issued in the Philippines, Curacao, UK, the Isle of Man and Kenya. The Complainant owns and operates several gaming sites under the brand dafabet (i.e. dafabet.com and dafabet.co.ke) and had been using the names “Dafa” and “Dafabet” for many years.

The Complainant owns a number of trademark registrations either directly or through its subsidiaries or licensees.
The Respondent registered the disputed domain name on March 23, 2017.

The Respondent did not provide any explanations apart from his response where he disclosed the information about the proceeding currently going on in Kenya in respect of Dafabet Kenya name and attached some documents related to the court proceeding in Kenya.

The Complainant sent a cease and desist letter to the Respondent on March 30, 2017 and the Respondent confirmed the receipt of the letter and said that the letter was forwarded to Dafabet Kenya Ltd while the Respondent stated that he was just a domain name registrant and provider of hosting services. Reference is made to annexes to the complaint.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS:

COMPLAINANT:

The Complainant claims that it owns “Dafabet” registered trademarks either directly or through its subsidiaries and had filed an application for a trademark in Kenya through its licensee and that “Dafabet” is a well-known mark through its various sponsorships of commercial clubs: a) Official Main Club Sponsor of Sunderland FC; b) Official Main Club Sponsor of Celtic FC; c) Official Main Club Sponsor of Burnley FC; d) Official Main Club Sponsor of Blackburn Rovers FC; e) Official Betting Partner Wales; f) Official Title Sponsor Masters-Snooker.

The Complainant also states that Dafabet was also named by eGaming Review as 21st most influential e-gaming operator in the world.

According to the Complainant the disputed domain name is identical and confusingly similar to the trademarks owned by the Complainant as it uses "dafabet" as a prefix with the geographical term "Kenya" attached to the domain.

As to the second UDRP criterion, the Complainant denies any direct connection with the Respondent and claims that Respondent’s use of the “Dafabet” trademark in the disputed domain name and website are unauthorized and illegal.
In particular, the Complainant states that that the Respondent is not commonly known by the disputed domain name.
The website under the disputed domain name was created on March 23, 2017 and the company that alleges use of the disputed domain name was registered on March 13, 2017.
The Complainant notes that this was after the Complainant had announced that it was launching its "dafabet" brand and services in Kenya.

The Complainant adds that the Respondent will not be able to show prior usage of the mark “Dafabet” for the website and will be unable to show any logical reason for the use of the word "dafabet" in the business or the disputed domain name. The Complainant also doubts whether the Respondent can demonstrate any actual business.

As to the third UDRP criterion of bad faith, the Complainant contends that the Respondent does not have any reason as to why he decided to choose the brand "dafabet" in the disputed domain name.
The Complainant states that the only conceivable reason for using the mark "dafabet" in the disputed domain name is to exploit the goodwill and notoriety of Complainant's marks.
The Complainant notes that registration of the disputed domain name coincided with the extensive Complainant’s marketing campaign in Kenya on the launch of Complainant’s services and that various marketing materials had been released in Kenya announcing the launch of Complainant’s services before March 23, 2017, date of registration of the disputed domain name.

The Complainant also addresses the issue of the company Dafabet Kenya Ltd that allegedly uses the disputed domain name for its business.
The Complainant claims that the company address published on the web site under the disputed domain name and in the company registration data is false, no actual business is conducted by this company and this had been confirmed by the report of a private investigator attached to the complaint (annex to the complaint).

Therefore, the Complainant states that the bad faith criterion is satisfied.

RESPONDENT:

The Respondent chose not to address the UDRP criteria and Complainant's claims in his response and merely stated that there is a pending case before the High Court of Kenya regarding the use of the Dafabet name filed by Dafabet Kenya Ltd against Complainant's licensee Asian Betting & Gaming Enterprises Africa Ltd and attached some documents related to that court case to the response.

The attached documents indicate that Dafabet Kenya Ltd initiated a court proceeding in Kenya against Asian Betting & Gaming Enterprises Africa Ltd with the goal to prohibit the use of Dafabet Kenya.

The Respondent decided not to make further representation in the response.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights (within the meaning of paragraph 4(a)(i)of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the disputed domain name (within the meaning of paragraph 4(a)(ii)of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the disputed domain name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii)of the Policy).

PROCEDURAL FACTORS

The Panel is satisfied that all procedural requirements under UDRP were met and there is no other reason why it would be inappropriate to provide a decision.

The Panel notes that the registrant of the disputed domain name and the Respondent is Oliver Ndegwa. The Rules define the respondent (par. 1 of the Rules) as the holder of a domain-name registration against which a complaint is initiated.

The Respondent in his response and the attached documents referred to the court proceeding in Kenya initiated by Dafabet Kenya Ltd. The web site under the disputed domain name suggests that it is used by Dafabet Kenya Ltd.

The Respondent did not clarify his relations with this company and it does not appear from the documents submitted by the Respondent along with the response that he is somehow connected to Dafabet Kenya Ltd (i.e. as a shareholder, company officer or an employee).
The only possible connection appears from one of the annexes to the complaint (Cease and Desist Letter communication) where the Respondent states that he is a just a domain name registrant and hosting provider for Dafabet Kenya Ltd.

However, the response was submitted by Oliver Ndegwa and not by Dafabet Kenya Ltd and there were no submissions made by Dafabet Kenya Ltd in this proceeding.

The Respondent had the opportunity to address his relations with Dafabet Kenya Ltd in his response and Dafabet Kenya Ltd had the opportunity to provide some explanations but both chose not to do so.

Therefore, any reference to "the Respondent" in this decision shall be intended as referring to Oliver Ndegwa.

However, for the sake of clarity and completeness, the Panel will also deal with the alleged use of the disputed domain name by Dafabet Kenya Ltd as this is relevant for the outcome of this proceeding.

The Panel also needs to address the issue of the arguments filed by the Complainant after the complaint and the response had been filed.
As the Rules stipulate under par. 10:

(a) The Panel shall conduct the administrative proceeding in such manner as it considers appropriate in accordance with the Policy and these Rules.

(d) The Panel shall determine the admissibility, relevance, materiality and weight of the evidence.

The Panel considered that the Complainant's additional submission did not contain any point of substance that could not reasonably have been included in the complaint. The Complainant simply repeated the information about the ongoing dispute in Kenya over the Dafabet Kenya name that was already disclosed.

Accordingly, the Panel did not admit the Complainant's additional submission.

PRINCIPAL REASONS FOR THE DECISION

A. Identical or confusingly similar with Complainant's trademark

The Panel finds that the Complainant has proven trademark rights on a basis of its registered "Dafabet" trademarks.

As confirmed by WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition
("WIPO Overview 3.0"), see paragraph 1.2.1: "Where the complainant holds a nationally or regionally registered trademark or service mark, this prima facie satisfies the threshold requirement of having trademark rights for purposes of standing to file a UDRP case".

The disputed domain name consists of the mark "dafabet" and a country name "Kenya".
As generally accepted and confirmed by previous panels where the trademark itself is clearly recognizable the addition of a geographic term does not prevent a finding of confusing similarity between the disputed domain name and the trademark (see par. 1.8 of WIPO Overview 3.0 and Playboy Enterprises International, Inc. v. Zeynel Demirtas, WIPO Case No. D2007-0768; Allianz SE v. IP Legal, Allianz Bank Limited, WIPO Case No. D2017-0287).

In this case the "Dafabet" trademark is clearly recognizable in the disputed domain name and the addition of Kenya does not change the overall impression.

Therefore, the Panel finds that the first requirement of the Policy has been satisfied.

B. Rights or Legitimate Interests

The general rule is the following:

(i) a complainant is required to make out a prima facie case that the respondent lacks rights or legitimate interests; and
(ii) once such prima facie case is made, the burden shifts to the respondent who has to demonstrate his rights or legitimate interests in respect of the domain name under paragraph 4 (c) of the Policy.

If the respondent fails to do so, the second element of the Policy is satisfied, see Julian Barnes v. Old Barn Studios, WIPO Case No. D2001-0121; Belupo d.d. v. WACHEM d.o.o., WIPO Case No. D2004-0110 and CAC Case No. 101284.

The Complainant stated that there is no any connection between the Complainant and the Respondent, the Respondent is not commonly known by the disputed domain name and the disputed domain name was registered on March 23, 2017 after

the Complainant had announced its launch of “Dafabet” betting services in Kenya.

There is no information provided by the Respondent that would somehow support his rights or legitimate interests in respect of the disputed domain name.

However, the Panel believes it is necessary to address potential rights and legitimate interests of Dafabet Kenya Ltd that appears to be the actual user of the disputed domain name.

The Panel notes that generally a business name that is identical or similar to a disputed domain name should be sufficient to establish rights and legitimate interests in respect of the domain name as this would normally demonstrate the use in connection with bona fide offering of goods or services or prove that the respondent is commonly known by a name.

Besides, UDRP is not intended to solve complex disputes between owners of competing businesses or between persons having competing rights and interests.

However, this is not the case where the overall circumstances demonstrate that a competing right was obtained primarily to circumvent the application of the UDRP or otherwise prevent the complainant’s exercise of its rights.

In particular, a “commonly known” by a name corresponding to the disputed domain name claim should be supported by some evidence of actual business activity conducted under a disputed name.

A mere fact of company registration alone is not sufficient if circumstances of the case indicate that such registration was made not for real business purposes but with the intent to harm the complainant or unfairly obtain any benefits from the complainant or its reputation.

Circumstances of the present case indicate that Dafabet Kenya Ltd was registered on March 13, 2017 and the disputed domain name was registered on March 20, 2017.

This coincides with the numerous publications about the Complainant and its business launch in Kenya.

Under paragraph 10(a) of the Rules the Panel shall conduct the administrative proceeding in such manner as it considers appropriate in accordance with the Policy and the Rules and the Panel shall be able to independently visit the Internet in order to obtain additional information (see Société des Produits Nestlé SA v. Telmex Management Services, WIPO Case No. D2002-0070; InfoSpace.com, Inc. v. Hari Prakash, WIPO Case No. D2000-0076).

The Panel notes that the web site under the disputed domain name on the date of the decision (September 26th, 2017) contains very limited information about Dafabet Kenya Ltd suggesting only that the company is in the business of “house sports design”. The email address and the physical address are provided and there is no further contact information.

No additional information about Dafabet Kenya Ltd has been provided either by the Respondent (including in the case documents attached by the Respondent to his response) or is available on the web site under the disputed domain name.

In particular, it is unclear why the name Dafabet was chosen for a home sports design company.

No information has been made available on Dafabet Kenya Ltd actual business activities in Kenya and there is no proof that any goods or services are offered by Dafabet Kenya Ltd (i.e. copies of any agreements, invoices, marketing materials, etc.) and it would be far-fetched in these circumstances to conclude that either the Respondent or this company is commonly known by the name Dafabet.

As stated in Compagnie Gervais Danone v. Duxpoint and Alejandro Gomez, WIPO Case No. D2008-1799 “the Policy requires that proof of being commonly known by a disputed domain name must be substantial, and that to sustain such a defense without substantial proof would seriously undermine the Policy”.

The Panel finds that the Complainant has established its prima facie case and without any evidence from the Respondent to the contrary, the Complainant satisfied the second requirement of the Policy.

C. Registered and Used in Bad Faith

Paragraph 4(b) of the Policy lists non-exhaustive circumstances indicating registration and use in bad faith.
These circumstances are non-exhaustive and other factors can also be considered in deciding whether the disputed domain name is registered and used in bad faith.
In particular, the Panel may take into account the following:
- The nature of the disputed domain name;
- the timing and circumstances of the registration (particularly following a product launch);
- other indicia generally suggesting that the respondent had somehow targeted the complainant (see WIPO Overview 3.0, par. 3.2.1.).

While the content of the web site under the disputed domain name is not related to sports betting (albeit "sports" connection is present as the web site under the disputed domain name is allegedly used by a "house sports designer"), it is apparent from the evidence available before the Panel that the Complainant was intentionally targeted and the Respondent knew about the Complainant and Complainant's marks.

The Respondent's knowledge of the complainant and/or the complainant's trademark rights at the time of registration can evidence bad faith (See e.g. BellSouth Intellectual Property Corporation v. Serena, Axel, WIPO Case No. D2006-0007 and CAC Case No. 101140).

As stated in par. 3.1 of WIPO Overview 3.0 "the scenarios described in UDRP paragraph 4(b) are non-exclusive and merely illustrative, even where a complainant may not be able to demonstrate the literal or verbatim application of one of the above scenarios, evidence demonstrating that a respondent seeks to take unfair advantage of, abuse, or otherwise engage in behavior detrimental to the complainant's trademark would also satisfy the complainant's burden."

This conclusion is supported by some panels (see e.g. CAC Case No. 101153 "it must be remembered that paragraph 4(b) of the Policy lists only examples and not an exclusive list of circumstances giving rise to bad faith. Consequently complainants may and frequently do, rely on conduct showing bad faith registration and use within the generally accepted meaning of that expression".)

In the opinion of the Panel circumstances indicating bad faith in the present case are:

1) Timing of the disputed domain name registration (immediately after the start of Complainant's marketing campaign in Kenya) and extensive information about the Complainant and its planned activities in Kenya made available prior to the date of the disputed domain name registration. The Complainant also provided a confirmation that a national trademark application in Kenya for "Dafabet" was filed by its licensee on February 8th, 2017;
2) Complainant's "Dafabet" marks had been already known in Kenya due to sponsorship of various popular sporting clubs prior to registration of the disputed domain name and the fact that the Complainant is one of the market leaders;
3) Failure by the Respondent to address the complaint substantially;
4) Absence of any information about Dafabet Kenya Ltd, the alleged actual user of the disputed domain name, including any information about the company, its business, reasons behind the business name choice and its real commercial activity;
5) Timing of registration of Dafabet Kenya Ltd (shortly after the start of Complainant's marketing campaign in Kenya);
6) Evidence furnished by the Complainant that false contact addresses provided by Dafabet Kenya Ltd both on the web site under the disputed domain name and in the company registration data;
7) From the facts and evidence available it is likely that Dafabet Kenya Ltd company registration was made solely to justify the disputed domain name registration by the Respondent and create a more or less plausible explanation for the disputed domain name registration and use.

The previous panels have also found that in certain cases action on media coverage (i.e. shortly after media announcement of some events or business opening) constitutes an example of bad faith registration and use (see e.g. Pharmacia & Upjohn AB v. Sol Meyer, WIPO Case No. D2000-0785 and Pro Confort SRL v. P-IER56, Ion Robu, WIPO Case No. D2008-0801).

Circumstances of the case indicate that the Respondent intended to profit from registration and use of the domain name and public confusion.

In fact, even from the Respondent's attached submissions it is admitted that the users indeed confused about Dafabet Kenya Ltd and "are making enquiries on games to bet through email accounts" of Dafabet Kenya Ltd.

The Panel notes that in UDRP disputes the standard of proof is balance of probabilities ("more likely than not") and in the present case the Complainant succeeds on the balance of probabilities.

Taken into account all of the above, the Panel holds that the third requirement of the Policy has been satisfied.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

1. **DAFABETKENYA.COM**: Transferred

PANELLISTS

Name	**Igor Motsnyi**

DATE OF PANEL DECISION 2017-09-26

Publish the Decision