IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 46 OF 1997

BETWEEN

INTERTEC EAST AFRICA AS ..... APPELLANT

AND

B & S INTERNATIONAL ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kaji, J.)

dated the 14th day of January, 1997

in

Civil Case No. 235 of 1992

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The appellant claimed to be a limited liability company incorporated in Denmark and having a place of business in Tanzania. It also claimed to be the beneficial and registered owner of a parcel of land comprised in Certificate of Title No. 21724 and known as Plot No. 29C, Block "A", Makuburi, Dar es Salaam City. The respondent is undisputedly a limited liability company incorporated in Denmark and having a place of business in Tanzania. The appellant commenced action in the High Court at Dar es Salaam alleging that the respondent had trespassed on the property aforesaid, committing waste by installing machinery and equipment thereon, and prayed for the respondent's eviction, a permanent injunction restraining further trespass, mesne profits, general damages, costs and any other reliefs. The action failed in its entirety hence this appeal.

We will attempt to highlight the salient features in the dispute. On August 13, 1985, the Danish Commerce and Companies Agency in the

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Ministry of Industry registered a private limited company of the name ApS KBUS 8 nr.1135. At an extraordinary general meeting held on April 17, 1986, the shareholders resolved, among other things, to convert the company from a private limited company (ApS) into a public limited company (AS) and to change its name to Intertec East Africa AS. A board of directors was also elected which included Mr. Bjarne Alling and his wife Mrs. Hasina Jivraj Alling, the latter being a substantial shareholder in the proposed company. Mr. Alling was also elected Managing Director of the company. In order for these changes to take effect they had to be approved and registered by the Danish Commerce and Companies Agency. But towards the end of May 1986, before such approval and registration was obtained, Mr. Alling was despatched to Dar es Salaam to establish a branch of the company. At Dar es Salaam he delivered to the Registrar of Companies the documents required under section 321 of the Companies Ordinance (Cap. 212) and was on August 30, 1986, issued with a Certificate of Compliance in the name of Intertec East Africa AS, the appellant. Less than three months later, on November 14, 1986, to be exact, the Danish Commerce and Companies Agency refused to effect registration of the conversion and change of name of ApS KBUS 8 nr.1135. In view of the setback the company held a general meeting on June 29, 1987 at which it was resolved merely to change the name to Intertec East Africa ApS. The change was approved and registered by the Commerce and Companies Agency on June 13, 1988.

Meanwhile the appellant was proceeding with operations in Dar es Salaam as if nothing was happening in Denmark. In October 1989, it acquired the suit property by a transfer of the right of occupancy from one Purshottam Gokal Solanki. It was common ground that the respondent moved onto the premises in July-August 1992.

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The suit was filed on September 11, 1992 and was apparently triggered by the dismissal of Mr. Alling as Managing Director and the restructuring of the shareholding which had resulted in the erosion of Mrs. Alling's commanding position. Since the dismissal came from the board of Intertec East Africa ApS and restructured shareholding obtained in that company, these and related matters are the subject of another suit still pending before the High Court. In its statement of defence, the respondent raised two preliminary issues, namely, that the appellant was not incorporated in Denmark and that it filed the suit without leave of the board of directors; alternatively, it averred that the appellant was a sister company, both of them being owned or substantially owned by Intertec Contracting AS, a company incorporated in Denmark, and that it entered the suit premises pursuant to a lease agreement concluded with the appellant. In an amended statement of defence the respondent added another preliminary issue to the effect that the suit was res judicata on account of a decision of the Court of Aarhus, Denmark, in a dispute between Intertec East Africa ApS and Mr. Alling delivered on March 29, 1994. In November 1995, while the suit was pending trial in the High Court, the Registrar of Companies upon representations by Intertec East Africa ApS, cancelled the appellant's registration and Certificate of Compliance. He then issued a Certificate of Compliance in the name of ApS KBUS 8 nr.1135 retrospectively from August 30, 1986 and at the same time issued a Certificate of Change of Name in the name of Intertec East Africa ApS.

At the first hearing of the suit, the then counsel for the respondent, Mrs. Kasonda, informed the trial judge (Kaji, J.) that she had agreed with Mr. Maira, who appeared for the appellant at the trial and before us, to withdraw the preliminary issues and include them in the main suit, "because most of them will need witnesses

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to be proved," (except for the issue of res judicata which she withdrew completely. The learned judge agreed and proceeded to frame the following issues for determination.

1. Whether the plaintiff company has a place of business in Tanzania.

2. If the answer is in the negative, does the plaintiff company have a locus standi in these proceedings?

3. Was the authority of the Board necessary before the institution of these proceedings?

4. Who is the lawful owner of the suit property/premises?

5. Is the defendant a lawful tenant or a trespasser on the suit property/premises?

6. What reliefs are the parties entitled to?

We are surprised that the trial had to take this course. Our surprise derives not only from the fact that the decision to postpone the trial of the preliminary issues entailed a longer trial, but also because the decision disregarded the express provisions of the law. It is provided as follows in O. 14, r. 2 of the Civil Procedure Code, 1966:

> "When issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

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This provision is evidently mandatory. Once the court forms the opinion that an issue of law may dispose of the case or any part thereof, it has no discretion but to try that issue first: see, for instance, Partab Singh v. Gurmji Singh 1959 Punj. 1776. If the answer to the issue disposes of the whole case, that would be freed from any obligation to inquire into the remaining questions for they might no longer be valid questions or the answers thereto might be academic. That would be the position where, for instance, it is found on a preliminary issue, that the court has no jurisdiction or the suit is incompetent. The position in India has slightly changed since 1976 and their new rule 2 provides for the pronouncement of judgment on all issues notwithstanding that a case may be disposed of on a preliminary issue, except where the issue relates to the jurisdiction of the court or a bar to the suit created by any law. Our rule 2, however, remains what India's was up to 1976 and the change is not relevant to us. The question, therefore is whether in the instant case there was an issue of law the answer to which could have disposed of the whole or part of the case. The learned trial judge does not appear to have given this matter any consideration but we have no hesitation in giving an affirmative answer. The charge that the appellant was never incorporated in Denmark, meaning that it had never come into existence, implied that it could not maintain a suit in a court of law. That was a fundamental issue which went to the root of the entire case, and which therefore called for immediate settlement. The reason assigned for withdrawing the preliminary issues into the main suit, namely, to avoid calling witnesses, cannot be justified under the rule. The rule itself provides for a trial and this, in our view, includes adduction of evidence. In the case of Nanu Ram v. Vardichand, 1978 A. Raj. 138, the Rajasthan High Court in India decided to the effect that the only question of law which could be dealt with as a preliminary issue

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> What was purportedly registered on 30th August, 1986 as INTERTEC EAST AFRICA A/S was actually APS KBUS 8 NR 1135 which by then was incorporated in the country of origin (Denmark) bearing Registration No. 102,895. Therefore in law from 30th August, 1986 when Intertec East Africa A/S was purportedly registered till on 10th June 1988 when APS KBUS NR 1135 changed to INTERTEC EAST AFRICA APS, APS KBUS 8 NR 1135 was operating its business in this country under a mistaken name of INTERTEC EAST AFRICA A/S. And from 13th June 1988 when APS KBUS 8 NR 1135 was changed to Intertec East Africa APS to 17th November 1995 when rectification was made in the office of the Registrar of Companies, Intertec East Africa APS had been operating its business in this country under a mistaken name of Intertec East Africa A/S.

In the same vein, and in reference to the fourth issue, he held that Intertec East Africa ApS was the lawful owner of the suit property, "although the certificate of occupancy Exh. P8 was mistakenly written in the name of INTERTEC EAST AFRICA A/S ..." As regards the fifth issue, he found the respondent a lawful tenant of Intertec East Africa ApS which was, again according to him, "mistakenly operating under the name of Intertec East Africa A/S." He did not find it necessary to answer the third issue. He concluded with these significant remarks:

> ... that company (i.e. Intertec East Africa A/S) has no legal personality and it is incapable of suing and therefore cannot have locus standi in these proceedings. However the fate of that company will probably be dealt with better in

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was not only one which went to the root of the case but also which was capable of being decided without recording evidence. We have not read and therefore cannot criticise that decision but we wish to observe that it does not appear to represent the predominant view among the High Courts in India. There is no doubt, in the final analysis, that the trial judge proceeded with material irregularity when there was evidently a preliminary issue capable of disposing of the whole case; but since the irregularity did not affect the merits of the judgment as a whole, we say no more on the subject but to look at the consequences.

In his judgment the trial judge held with reference to the first and second of the framed issues that the appellant had not established a place of business in Tanzania, after finding that it was not incorporated in Denmark, and that it had no standing in these proceedings. We agree and we think that even at that late hour the learned judge could still have spared himself considerable trouble by stopping there and striking out the suit. As correctly found, the conversion of ApS KBUS 8 nr.1135 into a public limited company of the name Intertec East Africa AS, and of which the appellant purports to be, never went through. The appellant hence never came into existence under Danish law and was not in existence when it purported to apply for and to obtain a Certificate of Compliance at the companies' registry in Dar es Salaam or when it instituted this suit. A foreign company which is not incorporated in its home country cannot validly take out a Certificate of Compliance under the Companies Ordinance nor can it institute valid proceedings in the courts of this country. The learned judge should therefore have struck out the suit even at that stage without having to enquire into the remaining issues because it was incompetent. But because this never occured to him, he went further and made these interesting remarks:

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Civil Case No. 244 of 1992 where the existence or legality of Intertec East Africa APS is being challenged by the plaintiffs Hasina Alling, Bjarne Alling and Intertec East Africa A/S.

The memorandum of appeal consisted of four grounds couched in these terms:

1. The learned trial judge erred in fact and in law in accepting the changes made by the Registrar of Companies in November 1995 when the dispute was already in court and hence sub judice.

2. The learned trial judge erred in holding that the suit property does not belong to the Appellant company despite the Certificate of Title.

3. The learned trial judge misdirected himself in holding that the Respondent was a lawful tenant of the Appellant (sic) when the purported lease is not witnessed by the Chief Executive of the Appellant company.

4. The learned judge erred in law in not holding that the registering of the Appellant company and the issuance of certificate under section 321 of the Companies Ordinance was proper.

At the hearing of the appeal Mr. Maira conceded that the appellant company was never incorporated in Denmark. We think that disposes of the fourth ground. As stated earlier, since the appellant was not incorporated in Denmark, it could not validly take out a Certificate of Compliance under the Tanzanian Companies Ordinance. To put it differently, the acquisition of the Certificate of Compliance did not bring the appellant into existence in Tanzania in the absence of incorporation in Denmark, but the exercise at the companies' registry

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was a nulity. As regards the third ground, the trial judge actually held that the respondent was a lawful tenant of Intertec East Africa ApS, after holding that the latter company was the lawful owner of the suit property, "although the certificate of occupancy Exh. P8 was mistakenly written in the name of Intertec East Africa A/S."

Apart from that correction we do not feel called upon to go into the merits of the first, second and third grounds of appeal because they arise from an adventure that had no basis in law. After it was found that the appellant never came into existence, the trial judge should have realised that there was no valid suit before him since the appellant had no capacity to institute one. As Dr. Mwaikusa learned Counsel for the respondent put it, once it was determined that the appellant never existed, everything else fell into place. The problem in this case was the trial judge's perception of the issue as one of the appellant's standing or locus standi in the proceedings. This inevitably tended to dissociate the proceedings from the appellant while not necessarily impugning the legitimacy of the former. What was at the issue was not standing, which means no more than the right to be heard, but the capacity, as the learned judge realised at the end of his judgment, the appellant did not have. The suit was therefore a nullity from the start. It was like bringing a suit against a person who is found to have died before its institution; it is a nullity from start though it may have been filed in ignorance of his death: see Mohum Chunder v. Azeen, (1968) 2 Punj. 309 and Screedhar Pani v. State 1979 Ori.55. In the light of the foregoing, we are of the view that the pronouncements of the learned judge subsequent to the determination that the appellant did not exist were a nullity, and we declare them so. It is to be observed also that the issues involved in those pronouncements are more directly in issue in Civil Case No.244

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of 1992 which is still pending. This, we think, was additional reason for him to have refrained from expressing any position on the matter.

The appeal is otherwise without merit and it is accordingly dismissed. In view of the peculiar circumstances of this case, we make no order as to costs.

DATED at DAR ES SALAAM this 3rd day of December, 1998.

D. Z. LUBUVA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(A.G. MWARIJA)
DEPUTY REGISTRAR