

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL CASE NO. 196 of 2021**

RASHID SALEH HEMED

AND MOHAMED ALI MOHAMED

t/a TOTO COLLECTION.....PLAINTIFF

VS

RAHMA SAID MOHAMED.....1ST DEFENDANT

JUMA MOHAMED SIMAI.....2ND DEFENDANT

Date of Last Order: 31/08/2022

Date of Ruling: 24/02/2023

R U L I N G

MGONYA, J.

The Plaintiff filed a Civil Case before this Court against the Defendants for claims on claims of a Trademark. When the Defendants were served with the Plaintiff upon filed their Written Statement of Defence, they also filed a notice of preliminary objection that on the first day of hearing they will raise the following objections, to wit;

- (i) This suit is incompetent for non-joinder of necessary party; and***
- (ii) The Plaintiffs do not have cause of action against the Defendant's***

Brief facts of this case is that the Plaintiff is suing the Defendants for infringing his trademark rights that is registered within Tanzania known as **Comfrey**. The Plaintiff stated that the acts of the Defendants importing, distributing, displaying and offering for sale Comfrey Diapers from China constitutes such infringement. And that the said trademark named COMFREY is owned by him the Plaintiff and is registered under No. TZ/T/2016/2359.

The Defendants have defended themselves by denying liability and challenges both the validity and legal bases of the suit and that they have not in any way infringed the Plaintiff's trademark name.

As observed, from the suit, the Defendant then raised two points of objections as appearing above, but upon submission withdrew the second objection hence remaining with the first objection to be determined.

The Defendants' has objected that there is a misjoinder of parties that has been deliberately done as it is revealed in the records before the Court. The Plaintiff has left out the respective manufacturer and importer of the said Comfrey Diapers as necessary party to the suit so as to assist the trial Court to effectively and completely adjudicate upon the common question in the subject matter of the suit.

It is the Defendants' contention that Comfrey Brand Adult Diapers are manufactured from a China factory known as **Jiangusu Haoyue Industrial Company Limited** and the importer is a company incorporated and registered in Zanzibar known as **Barcelona Enterprises Limited**, all these were to be jointly sued so as both of them be liable in paying the specific damages pleaded. That the Manufacturer and the Distributor not being joined will cause the existence of a Decree that will not be executable.

The Plaintiff has urged the Court that the first objection raised by the Court has no legs to stand. It is so since the importer named by the Defendant is a Company registered in Zanzibar. The Defendant hiding under the umbrella of doing business under the Distributor company of Zanzibar is a misconception since the said Company is not recognised by the Companies Authorities in Tanzania.

Moreover, the Plaintiff contends the Defendants are doing business in Tanzania as sole proprietors and not even Agents, Representatives, Assignees or Attorneys to the importing Company the claim to work under. It is the Plaintiff's further assertion that, if the Defendant finds the two companies that is the Manufacturing Company and the Distributor Company ought to be joined, that is his opinion. The Plaintiff being the master of

his own case has sued the Defendants knowing them to be the ones infringing their trademark name.

Having gone through the objection raised on non-joinder of parties the same has drawn this Court's attention into the provision that regulates joinder of parties which is **Order 1 Rule 1 of the Civil Procedure Code, Cap. 33 [R. E. 2019]**.

Therefore, I am of the firm view that joinder of parties is a concept of importance when it comes to matters instituted in the Court of law. It is so since non joinder of necessary parties will result into a decision that will be inexecutable and cause retrials of which is not favourable when it comes to the need of dispensing timely justice.

The case of ***ABDULLATIF MOHAMED HAMISI VS MEHBOOB YUSUPHU OTHMAN AND ANOTHER, Civil Revision No. 6 of 2017, CAT*** established two tests for necessary party. The case stated ***there has to be a right or relief against such a party in respect of the matter involved in suit and, the Court must be in a position to pass an effective decree in the absence of such party.***

The Defendants' claim is that the Plaintiff deliberately omitted to join the two companies that is Jiangusu Haoyue Industrial Companies Limited and Barcelona Enterprises Limited as necessary party. The same would have hold both of them

liable for their actions to and caused them to pay specific damages.

From the above, it is trite law that a preliminary objection ought to be strictly on a point of law. The same shall not call for or attract the production of evidence to prove the said objection. This has been stated in a number of cases and the same was established by the case of ***MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) E. A 696.***

From the records and considering the nature of the case before the Court being claims on infringement of a trademark name, the Defendants' objection that the two Companies should be joined will require evidence to demonstrate that the said Companies actions amount to the said infringement and hence needs them to be joined.

Further, the Defendant will be required to bring evidence that the manufacturing Company is wrongfully using the trademark name, as well as to prove the fact that the Defendant is working for the Distributor Company of Zanzibar and that his actions are connected to the distributor Company. All the above disqualify the objection from having requisite qualification of a preliminary objection.

However, the Defendant claiming that there is non-joinder of a necessary party has room for applying for the two companies to be joined. In the submission the Defendants reflect for the Comfrey Adult Diapers to be manufactured in China and that there is a Distributor in Zanzibar. But the Plaintiff has identified the Defendants to be sole proprietor importing the said products bearing their trademark name and that he is a master of his case and knows who has infringed his rights. Objecting for non-joinder means the Defendants believe that the two Companies should also be joined since their acts are in on line of transaction.

Therefore, having the need of joinder of necessary party the Defendant can then apply for a third-party procedure. The law which governs the third-party procedure in Tanzania is the **Civil Procedure Code, Cap. 33 [R. E. 2019]** under **Order I Rule 14**. The main purpose of the third-party procedure is to prevent a multiplicity of actions.

In the case of **CRDB BANK CO. LTD VS UAP INSURANCE CO. LTD, 2023** Kihwelo, J. A stated that: -

"...it is incumbent upon the trial Court in terms of Order 1 Rule 10 (2) of the CPC to scrutinize the pleadings in order to determine a party or parties whose presence before the Court will be

necessary to enable the Court effectually, completely adjudicate upon and settle all the questions involved in the suit.

"Under this rule, a person may be added as a party to a suit (i) when he ought to have been joined as a Plaintiff or Defendant and is not joined so; or (ii) when, without his presence, the question in the suit cannot be completely decided."

Having said all of the above and the case above, I find the first objection raised by the Defendants has no merits and is hereby overruled. The case is to proceed on merits.

Cost to follow the event.

It is so ordered.



L. E. MGONYA

JUDGE

24/2/2023