

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 07 OF 2004

IN THE MATTER OF THE TRADE AND SERVICE MARKS ACT NO.12 OF 1986

AND

IN THE MATTER OF TRADE MARK NO.21488 SUPERMATCH (WORD & DEVICE)
IN CLASS 34 REGISTERED IN THE NAME OF MASTERMIND TOBACCO
(TANZANIA) LIMITED

BETWEEN

TANZANIA CIGARETTE COMPANY LIMITED.....APPLICANT

VERSUS

BURUNDI TOBACCO COMPANY LIMITED.....RESPONDENT

AND

MASTERMIND TOBACCO (TANZANIA) LIMITED...INTERESTED PARTY

R U L I N G

KIMARO, J.

Burundi Tobacco Company Ltd and Mastermind Tobacco (Tanzania) Limited who are the Respondent and an Interested Party respectively in these proceedings, raised several points of objections to an application for removal of Trade Mark No. TM 21488 "Supermatch" (word and device) in class 34 from Register of Trade as well as rectification of the register. The application was made under Sections 35 and

36 of the Trade and Service Marks Act, 1986. The application was filed by Tanzania Cigarettes Company Limited.

Among the points of objection raised is that the application is incompetent because it has been instituted without the authority of the Applicant Company. The authority of the Counsel for the Applicant has also been challenged. The allegation put forward is that he is not dully authorized to institute the Application on behalf of the Applicant Company. The notice of objection was filed in court on 30th April 2004.

Mr. Marando, Learned Advocate is appearing for the Applicant and Ms Kasonda, Learned Advocate is appearing for the Respondent and the Interested Party.

The application was called for a mention on 17/05/2004. On that day the court ordered the hearing of the preliminary objection to proceed by written submissions. A time line for filing of the submissions and the delivery of the ruling was set as follows: Mr. Joseph who had appeared for the Respondent and the Interested Party was ordered to file his submission by 5th June, Reply by Capt. Sanze who appeared for the Applicant had to file his submissions by 18th June and rejoinder if any had to be filed by 28th June. The ruling was scheduled for 27th July, 2004.

On 18th June, 2004 when the Applicant filed a reply to the written submissions to the preliminary objection, it also filed a chamber application praying for leave to amend the application for rectification of the Register and Removal of the mark from the Registrar so as to include some of the documents which formed the subject of the objection.

The Advocates for the Respondent and the Interested Party raised another point of preliminary objection;

“ That the purported application is misconceived and is an abuse of the court process because it has been taken out in an attempt to circumvent and pre-empt the preliminary objections filed earlier by the Respondent and the Interested Party on 30th April 2004 and had already been argued and was awaiting for a ruling of the court. ”

The Advocates were also directed to argue the preliminary objection by written submissions. That objection is what forms the subject matter of this ruling.

The argument raised by the Advocates for the Respondent and the Interested Party is that the Court of Appeal has through precedent laid down the following principle:

“ It is improper for a party to the proceedings to make an application in order to cure a defect in the said proceedings after the opposing party has filed an objection based on the defect. ”

The court was referred to the cases of **D.P.Valambia V Transport Equipment Ltd**, Court of Appeal Civil Application No.13 of 1991 (Unreported), **Arusha International Conference Centre V Damas Augustine Ndemasi Kavishe** Court of Appeal Civil Appeal No.34 of 1988 (unreported) and the **Minister for Labour and Youths Development and Shirika la Usafiri Dar-Es-Salaam Vs Gaspar Swai and 67 Others** Court of Appeal Civil Appeal No. 101 of 1998 (unreported) and **Alhaj Talib Vs Kiweni Mushi** [1990] TLR 108.

The Advocates for the Respondent argued that since the application was filed subsequent to the objections they were intended to circumvent or pre-empt the preliminary objections. They prayed that the application be dismissed with costs.

Mr. Marando in reply submitted that in the authorities cited, the Court of Appeal dealt with occasions where proper objections of law were raised as a result of non-compliance with the provisions of the Court of Appeal Rules but they can not be applicable under the present circumstances because the court is being asked to strike out the application because there is no evidence that the applicant had made a resolution that the matter be taken to court.

I agree that Mr. Marando's reasoning could be sound but the argument here is why should the application by Mr. Marando come after the Advocates for the Respondent raised the preliminary objection. What is the purpose of the application? How should the application be perceived?

My careful consideration of the nature of the application shows that, the purpose is to circumvent or pre-empt the preliminary points of objection raised by the Advocates for the Respondent and the Interested Party. The authorities of the Court of Appeal cited prohibits such a move from being taken by a party to the proceedings.

After all, if Mr. Marando is certain that the points raised are matters of evidence why pre-empt the application. He had to argue his case and leave the court to say whether he is right or wrong but not to pre-empt the objection.

I uphold the preliminary objection and dismiss the application for amendment with costs.

N.P.KIMARO,
JUDGE
27/08/2004

Date 15/10/2004

Coram: Hon. N.P.Kimaro, J.

For the applicant – Mr. Mnyele.

For the Respondent – Mr. Mrema.

CC: R. Mtey.

Court: Ruling delivered today.

Order: The objection is upheld. The application for amendment is dismissed with costs.

N.P.KIMARO,
JUDGE
15/10/2004

1,162-words

jd.

I Certify that this is a true and correct
of the original order Judgement Rulling
Sign Mnyele
Registrar Commercial Court, Dsm.
Date 18/10/04