

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

COMMERCIAL CASE NO. 2 OF 2007

KABUSHIKI KAISHA HITACHI SEISAKUSHO
(d/b/a Hitachi, Ltd).....PLAINTIFF
VERSUS
AISHA MOHAMED DAUD
t/a NURU STORE.....DEFENDANT

R U L I N G

Date of Final submission March 9, 2007.
Date of Ruling March 26, 2007.

MJASIRI, J.

This is an application under Order XXXVII Rule 2(1) and section 68 (b) and (c) and section 95 of the Civil Procedure Act Cap.33 R.E 2002. The applicant is applying for the following orders:

“ 1.1 Pending determination of the suit an injunction to restrain the Defendant/Respondent by its officers, servants or agents or any of them, from infringing the Plaintiff/applicant's registered trademarks HITACHI and/or HITACHI

DEVICE by ceasing forthwith from importing selling and or distributing counterfeit HITACHI and/or HITACHI DEVICE television sets or any other products not being products of the Plaintiff/applicant's manufacture or merchandise but bearing the mark HITACHI and/or HITACHI DEVICE and /or any other mark or marks by which the product of the Plaintiff/ Applicant is known and identified.

- 1.2. Delivery up by the Defendant/Respondent immediately to an officer of the Honourable Court all counterfeit HITACHI and or HITACHI DEVICE television sets, or any other products, boxes, cartons or containers together with labels of advertising material bearing the mark HITACHI and/or HITACHI DEVICE and or any representation or logo similar to those of the product of the Plaintiff/ Applicant with further orders of the court.*
- 1.3. Defendant/Respondent to allow the advocate for the Plaintiff/ Applicant together with an officer of the court and the police officers to enter the premises of the Defendant/Respondent so that they can search for, inspect, photograph and deliver into the safekeeping of the*

Plaintiff/Applicant's Advocates any counterfeit or all counterfeit HITACHI and/or HITACHI DEVICE television sets. And that the Defendant/Respondent must allow these persons to remain on the premises until the search is complete and re-enter the premises on the same or the following day in order to complete the search."

The application arises from the suit filed by the Applicant/Plaintiff against the Respondent/Defendant for the infringement of the Plaintiff's registered trade mark HITACHI and HITACHI DEVICE and for passing off the Defendant's products as HITACHI and/or HITACHI DEVICE products.

The Application was argued by way of written submission. The Applicant/Plaintiff was represented by Ms Paulina Kasonda of Abenry and Co. Advocates and the Respondent/Defendant was represented by Mr. Edward Chuwa.

The learned Counsel for the Applicant strongly argued in support of the application. Counsel cited various authorities in favour of granting temporary injunctions. The said authorities included *E.A Industries Limited V TRUFOOD Limited* [1972]

E.A 420; Giella V Cassman Brown & Co Ltd [1973] EA 358; Colgate Palmolive Co. V Zakaria Provisions Stores and 3 others, Civil Case No.1 of 1997 (unreported) and CPC International Inc V Zainabu Grain Millers Ltd, Civil Appeal No.49 of 1999 Court of Appeal of Tanzania (unreported).

The learned Counsel for the Applicant also submitted that the Applicant is the registered proprietor of the trade mark HITACHI and/or HITACHI DEVICE and the proprietor is therefore accorded protection under the law in view of registration. Attention was also brought to the court on the number of years the Plaintiff has taken in developing, marketing and registering its trade mark.

Counsel for the Applicant also referred to commercial Case No.38 of 2005, N.V. Philips Gloeilampenf Abrieken V Aloyce Ngowi t/a N.M.Hardware and A.C General Traders and Commercial Case No. 6 of 1999, Kibo Match Group Limited V Mohamed Enterprises (T) Limited where both Massati J and Kalegeya J granted orders for temporary injunction to prevent infringement of the Plaintiff's trademark.

Counsel for the Respondent, Mr. Chuwa in his submission stated that the submissions made by the Applicant in respect of the temporary injunction are matters of evidence and that if the prayers sought by the Applicant are granted it would mean that it has been proved that the items in the Respondent's shop are counterfeit products. Counsel cited the case of Wenslaus R. Mramba (as Receiver and Manager) of Tanzania Cordage versus Tanzania Sisal Authority. Counsel further stated that the affidavit and receipt produced by the applicant on the counterfeit television set alleged to have been sold by the Respondent is a matter to be considered at the hearing of the case and to be proved by evidence.

The Respondent has denied selling counterfeit products, but has made no serious or specific denial that the Respondent is selling television sets with a HITACHI and/or HITACHI DEVICE trademark. The Respondent did not dispute that the Applicant is the registered proprietor of the trade mark HITACHI and/or HITACHI DEVICE. According to the Counsel for the Respondent, on the balance of convenience it is the Respondent who would suffer more in particular if prayers 1.2 and 1.3 are granted. The burden is therefore on the

applicant to show that his convenience or hardship exceeds that of the Respondent.

The principles governing the issuance of the temporary injunction are well established in Atilio V Mbowe [1969] HCD 28 and in the other authorities of the Court of Appeal of Tanzania and East Africa:

1. *That the applicant must show a prima-facie case with a probability of success.*
2. *That the interference is necessary to protect the applicant from suffering irreparable loss and.*
3. *That on a balance of convenience there would be greater mischief and hardship on the applicant than on the Respondent, if the injunction is not granted.*

On the strength of the affidavits filed in court and on the strength of the arguments raised by the parties, the following factors are taken into consideration:

1. *The applicant is the registered proprietor of the trade mark which has been so registered since 1976 and 1977.*

2. The applicant has spent considerable amount of time and funds in registering and marketing the trade mark.

3. Under section 50 of The Trade and Services Marks Act 1986 Cap.326 [R.e.2002] registration is a prima-facie evidence of the validity of the original registration. Section 31 gives exclusive rights to the registered proprietor and section 32 governs infringement of the said right.

The Counsel for the Respondent does not seriously contest the application for injunction but is concerned on the orders sought under 1.2 and 1.3 in the application. The Respondent did not clearly come out and state that it is not dealing with products under the HITACHI trade mark.

A prima-facie case has been established and looking at the balance of convenience there would be greater mischief and hardship on the part of the Applicant than on the Respondent if injunction is not granted.

With regards to the orders prayed for under 1.2 and 1.3, I would agree with the submissions of the Counsel for the

Respondent that evidence need to be established. Under the present circumstances there are no basis to grant the said orders despite the attractive arguments raised by the learned Counsel for the Applicant.

In view of that, it is hereby ordered as follows:

(i) *An injunction under 1.1 to restrain the Defendant/Respondent by its officers, servants or agents or any of them from infringing the Plaintiff/Applicant's registered trade marks HITACHI and/or (HITACHI DEVICE) by ceasing forthwith from importing, selling and/or distributing counterfeit HITACHI and/or HITACHI DEVICE television sets or any other products not being products of the Plaintiff/Applicant's manufacture or merchandise but bearing the mark HITACHI and/or HITACHI DEVICE and or any other mark or marks by which the product of the Plaintiff/Applicant is known and identified is hereby granted.*

(ii) *Costs to be costs in the cause.*

SAUDA MJASIRI

JUDGE

MARCH 23, 2007

Delivered in Chambers this 26th day of March 2007 in the presence of Mr. Mrema Advocate, holding brief for both Counsels for Applicant and Respondent Ms Paulina Kasonda and Mr. Edward Chuwa.

SAUDA MJASIRI

JUDGE

MARCH 26, 2007



I have read and correct
and signed the Judgment Ruling
Sign Subuse
Registrar Commercial Court Dsm.
Date 30/3/2007