

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT ARUSHA

COMMERCIAL CASE NO. 2 OF 2007

KABUSHIKI KAISHA HITACHI SEISAKUSHO
(d/b/a Hitachi, Ltd).....PLAINTIFF
VERSUS

ASHA MOHAMED DAUD
t/a NURU STORE..... DEFEENDANT

R U L I N G

Date of Final Submission 14.2.2007

Date of Ruling 20.2.2007

MJASIRI, J.

This application has been brought under a certificate of urgency. The Applicant/Defendant 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 trade marks HITACHI and/or (hereinafter 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 is made under Order XXXV11 Rule 2(1) of the Civil Procedure Act Cap 33 R.E.2002, Section 68(b) and (c), and section 95 of the said act. The Applicant/Plaintiff is represented by Ms Paulina Kasonda of Abenry and Company Advocates and the Respondent/Defendant is represented by Mr. Edward Chuwa.

The Respondent has filed a preliminary objection that the application is bad in law for being accompanied by a defective affidavit:

- (i) The deponent of the affidavit has no locus standi and is not conversant with the facts of the affidavit.*
- (ii) The affidavit has not been signed by the deponent.*
- (iii) The deponent has not disclosed sources of information in some paragraphs.*

In reviewing the affidavits and counter affidavits filed in court. I am of the view that the first and third objections raised by the applicant do not qualify as a preliminary points of law. The court has to search for evidence so as to be satisfied with

compliance. For a matter to qualify to be raised as a preliminary objection it must consist of pure points of law. A point which needs evidence to be proved cannot be argued as a preliminary objection. **Mukisa Biscuits Manufacturing Company V West End Distributors Limited** [1969] EA 696.

With regards to objection No. (iii) the affidavit does not disclose source of information, the deponent has stated that the information provided is of his own knowledge true. The Defendant is challenging that which is a matter of evidence.

With regards to objection No.(i) on the locus standi, it is also a matter of evidence. The deponent has stated that his company is the authorized agent, and he is authorised to swear the affidavit for the plaintiff.

With regards to objection No.(ii) i.e the affidavit not being signed by the deponent, I would like to make the following observations: The pre-requisite of an affidavit is governed by Order X1X Rule 3(1) of the Civil Procedure Act [R.E 2002]. Under this rule what is required in the affidavit is for the deponent to give facts which he is able of his non knowledge to prove. This was the case and the deponent duly signed the affidavit. The basic essentials of the affidavit were not lacking.

This court and the Court of Appeal of Tanzania has stated over and over again that the concern of the court is substance rather than form.

Samatta J (as he then was) in **Mwalimu Paul John Mhozya V the Attorney General** (No.1) 1996 TLR 130 (HC) stated as under:

“ the concern of the court is substance rather than form and its function is to get to the bottom of the dispute and determine the real issues in it and; for that purposes the court may allow steps to be taken to cure any defects in a pleading or an affidavit provided that the party is not prejudiced thereby.”

The affidavit has been duly signed by the deponent before a notary public.

It is my finding that failure to sign the verification clause does not render the affidavit defective.

In view of what has been stated herein above the preliminary objections raised by the Respondent/defendant are hereby dismissed with costs.

Sauda Mjasiri
Judge
February 20, 2007

DELIVERED in Chambers this 20th day of February 2007 in
the presence of Ms Pauline Kasonda Advocate for the
Applicant/Plaintiff and Mr. Chuwa, Advocate for the
Respondent/Defendant.

Sauda Mjasiri
Judge
February 20, 2007

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I Certify that this is a true and correct
of the original order Judgment Ruling
Sign [Signature]
Registrar Commercial Court Dsm.
Date 27/2/07