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

COMMERCIAL CASE NO. 3 OF 2007

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

VERSUS

DICK ALEX SHAYO.....DEFENDANT/RESPONDENT

RULING

Date of Submission – 11/4/2007

Date of Ruling – 31/5/2007

MASSATI, J:

The Plaintiff in this case has filed a suit in this court for infringement of a trade mark. He has also filed an application for temporary injunction. Spearheading the Plaintiff's cause is Ms. Pauline Kasonda, learned Counsel.

The Defendant resists both the suit and the application for interim orders. As if that is not enough, he has raised preliminary objections against both the suit and the application for temporary injunction. Mr. Chuwa, learned Counsel represents the Defendant. On 20/3/2007 I ordered that as the application depends on the competency of the suit, both sets of preliminary objections be argued together, so as to

expedite the matter. Counsel have filed their written submissions.

I intend to consider the preliminary objections relating to the suit first.

In his written statement of defence, the Defendant has assailed the competency of the suit on the following grounds.

(1) The suit is bad in law having been filed without the Board Resolution.

(2) The plaint has been improperly signed.

(3) The advocate for the Plaintiff has not been authorized to sign the pleadings.

(4) The Plaintiff has no cause of action against the Defendant.

Arguing on the first preliminary objection, Mr. Chuwa submitted that to be able to institute the suit, the Plaintiff Company ought to have passed a resolution to that effect. In the present case there is no board resolution to commence the present suit. Therefore the suit must be dismissed. He relied

on the decision of **BUGERERE COFFEE GROWERS LTD VS SEBADUKA AND ANOTHER** [1970] EA. 147.

On the other hand, Ms. Kasonda submitted that there is no provision either in the Companies Act or the Civil Procedure Code which requires that when a Company institutes a suit there must be a board resolution. She distinguished **BUGERERE'S** case. In the alternative, I think, the learned Counsel has cited the decision of Kimaro J (as she then was) in Misc. Civil Case No. 7 of 2004 – **TANZANIA CIGARETTE COMPANY LTD VS BURUNDI TOBACCO COMPANY AND ANOTHER** to the effect that such argument invites an examination of evidence, and therefore not fit to be disposed of as a preliminary objection. So she prayed for the dismissal of this objection.

In observing that Companies must pass resolutions authorizing commencement of legal proceedings, **YOUDS J in BUGERERE'S** case was faced with an argument that the point could have been raised at the initial stages of the suit as a preliminary point so as to save the Plaintiff from being condemned to pay costs. He remarked at p. 154:

> *"I very much doubt whether in the particular circumstances of this case the defendants would have been successful in having the action struck out or stayed*

at its inception when the main point of the action involves a determination of the issue as to what group of directors was clothed with authority to make decisions on behalf of the Company. I doubt whether any costs could or would have been saved by an early application on the defendant's part to have the action struck out or stayed on the ground of lack of authority to bring the proceedings."

This passage illustrates the difficulty of tackling the issue of authority to bring the legal proceedings by the Company, as a preliminary point. This is because the matter involves a detailed analysis of evidence to see if proper authority was granted. In fact in **BUGERERE'S** case this point was not determined as a preliminary point, but after hearing the parties. So I agree with Ms. Kasonda, that this point cannot be determined as a preliminarypoint as it does not meet the criterion of a preliminary objection set out in **MUKISA BISCUIT MANUFACTURING CO VS WEST END DISTRIBUTORS LTD** [1969] E.A. 796, I would therefore dismiss the first preliminary objection.

Mr. Chuwa then chose to argue the next two objections together. Ac cording to him these were predicated upon the finding on the first issue. He submitted that even if O. VI rule 14 permits an advocate to sign on behalf of his client, and even in view of the decision of the Court of Appeal in **NIMROD**

MKONO VS STATE TRAVEL SERVICES LTD & ANOTHER [1992] TLR. 24, it did not assist the Plaintiff here since there is no authority to commence proceedings anyway.

On the other hand, Ms. Kasonda submitted that on the strength of O. VI rule 14 of the Civil Procedure Code 1966 the plaint was properly signed. Besides, she repeated her argument that this issue also required evidence to determine.

Since I have held that the Defendant's first preliminary objection is not a preliminary objection par excellence and since Mr. Chuwa's next two preliminary objections are predicated upon my holding the first one in the affirmative, it follows that these two objections must also fail. I think, the issue of authority to sign or to commence proceedings is a question of fact and requires evidence to determine it in either direction. But this is not that stage. I again, agree with Ms. Kasonda, that these two objections must also fail.

The last objection raised by the Plaintiff is that the Plaintiff had no cause of action against the Defendant. Mr. Chuwa, learned Counsel referred to the provisions of O. VII (1) (e) of the Civil Procedure Code 1966, commentaries from **SARKAR The Law of Civil Procedure** 8th Ed. Vol. 1 and **MOGHA'S LAW OF PLEADINGS IN INDIA** 6th Ed. He also referred to **JERAJ SHARIFF & CO, VS CHOTAL FANCY**

STORE [1960] EA. 374 and **CASTELINO VS RODRIQUES** [1972] EA. 223 and forcefully argued that the basis of the claim that one ELIUD purchased the infringed item from the Plaintiff was not sufficient to constitute a cause of action. So the suit should be dismissed for failure to disclose a cause of action.

On her part, Ms. Kasonda, submitted that in terms of s. 31 of the Trade and Service Marks Act No. 12 of 1986 the plaint does disclose a cause of action as the Plaintiff has annexed a receipt bearing the Defendant's name as evidence of purchase of the counter feit television. Whether EIUD or ELWOOD were the same person, was a matter of evidence. She then referred the court to the unreported decision of **KIWI EUROPEAN HOLDINGS B VS SAUD ALI LTD** (Commercial Case No. 267/2001, whose copy of the judgment was annexed to her submission. So she prayed for the dismissal of this preliminary objection too.

I have no doubt in my mind that Counsel have no dispute as to what constitutes a cause of action, and the mandatory wording of O. VII rule 1 (e) of the Civil Procedure Code Act 1966. The only issue is whether in its wording, the plaint discloses a cause of action against the Defendant?

The essential/material facts that a Plaintiff has to plead in an action for infringement of a trade mark, are that, there is a trade mark registered in the country, that the Plaintiff is the registered owner of that trade mark, and that the Defendant has, in any way, infringed on that mark. In doing so, the Plaintiff has only to plead the facts and not the evidence. In the present case, I have closely examined the plaint in detail, but I need not reproduce these details in a ruling of this nature. Suffice it to note that in my view paragraphs 3, 4, 5 and 9 of the plaint, sufficiently disclose a cause of action against the Defendant. But even if the plaint was not to disclose a cause of action, the prayer for dismissal of the plaint is not supported by the law, because O. VII rule 11 (a) and the proviso thereto allows plaints which do not disclose a cause of action to be amended. So that means such a defect is curable by amendment.

The above analysis, is sufficient to dispose of the preliminary objections. I do not see the need to examine Ms. Kasonda's remaining arguments which in effect are only a summary of what she had already submitted. For the above reasons, I conclude that all the Defendant's preliminary objections on the suit lack merit and are accordingly dismissed.

Having so held, I now go to consider the rival arguments of Counsel on the Defendant's preliminary objections on the application for temporary injunction. Mr. Chuwa, learned Counsel has raised and argued three preliminary objections.

The first is that the deponent of the affidavit has no locus standi and is not conversant with the facts of the case. Mr. Chuwa's point on this score is that, in paragraph 1 of the affidavit, the deponent lied on oath, as there is no connection between the Applicant and EROS GROUP. Besides, the deponent had not been authorized by the Plaintiff's Board of Directors to take such affidavit. Ms. Kasonda, submitted that a deponent of an affidavit need not be the Applicant himself or his agent. It could be any person having knowledge of the facts in question. Besides, by definition of the term *"locus standi"* a deponent of an affidavit does not need a locus standi to do so, because he does not seek the right to bring an action.

Furthermore the issue whether the Applicant was authorized was a matter of evidence, and cannot be decided as a preliminary point of law.

I would agree with Ms. Kasonda that the issue of authority to take out the affidavit is a matter of evidence. So is the proposition that the deponent was lying on oath. These are matters of facts which could only be controverted in the

counter affidavit and if need be by cross examination. It is the court and not the parties which determines where the truth lies. But this cannot be done without that evidence being tested in court. I think Mr. Chuwa, is working on a misconception of what a preliminary objection really is. As I held in my ruling on the objections to the suit disputed matters of evidence cannot constitute the basis of preliminary objections. They have to await the proper stage. For that reason, I would again dismiss the first preliminary objection on the affidavit.

The second preliminary objection is that the affidavit has not been signed by the deponent. Mr. Chuwa submitted that what has been signed is only the jurat before the Commissioner for Oaths. It was his view therefore that the affidavit was defective and should not be acted upon. On the other hand, Ms. Kasonda has submitted that the signing of a verification clause is not a legal requirement. She specifically relied on O. XIX rule 3 (1) and s. 8 of the Notaries Public and Commissioners for Oaths Act. It was her submission that the affidavit fully complied with the law, and therefore not defective. For inspiration, Ms. Kasonda cited a decision of the Court of Appeal of Tanzania in **SENI SILANGA VS THE UNIT MANAGER OLAM LTD** (Unreported) to the effect that the requirements of the affidavit are provided in O. IX rule 3. As the deponent in the present case has deponed to matters

which are of his own knowledge and information, it is enough. The signing of a verification clause is not one of the essential elements of affidavits.

I have examined the affidavit of **DAVID KIMEY**, filed in support of the affidavit. It is true that the verification clause is not signed. According to Ms. Kasonda, that did not render the affidavit defective and has relied on the decision of **SENI SILANGA.** With respect I do not think the facts in the two cases are similar. In **SILANGA'S** case, the issue of an unsigned verification clause did not arise. There, the issue was that the affidavit was neither sworn nor signed and dated by the deponent. There, the Court of Appeal held that provided it complied with the essentials of O. XIX rule 3 (1) it was valid in law. The court, did not, however say that verification was not necessary.

I think it is a rule of practice and law, that every affidavit must contain a separate verification clause. It is in this clause that a deponent can say whether the facts are from his own knowledge or not. This requirement is, I think implicit in Rule 3 (1) of O. XIX of the Civil Procedure Code Act 1966. It is the defective **verification clause** which led to the criticism and eventual striking out of the affidavit in **SALIMA VUAI FOUM VS REGISTRAR OF COOPERATIVES AND THREE OTHERS.**

Even the Court of Appeal in **SILANGA'S** case acknowledges that: -

> *"In the verification clause, the deponent states that what is deposed in the document is true to his knowledge."*

So, in my view, the requirement of a verification clause is implied in O. XIX rule 3 (1) of the Civil Procedure Code, whereas the jurat is a requirement of the Notaries Public and Commissioner for Oaths Act. As these are statutory requirements, I think both are sacrosanct and must be complied with for an affidavit to be valid in law. And the sacrocancy of the verification clause is in the signature of the deponent. With due respect an unsigned verification clause, is as good as there is no verification. To that extent, I agree with Mr. Chuwa that the affidavit in support of the application, was, to that extent, defective and bad in law. However, according to MOGHA ON PLEADINGS, a defective verification does not invalidate the whole affidavit, and that part can be cured by amendment.

For the above reasons, it is my finding that although the verification clause is unsigned the affidavit can still be amended by returning it for the deponent to sign. So that objection succeeds only in part and to that extent.

The last preliminary objection that I have to consider is that the affidavit is further defective for not disclosing the source of information. It is contended by Mr. Chuwa, learned Counsel that almost all the averments in the affidavit are based on information, whose sources have not been disclosed. As to the effect of that defect, Mr. Chuwa referred to O. XIX rule 3 (1) of the Civil Procedure Code Act 1966, **SINAI UMBA VS NATIONAL INSURANCE CORPORATION (T) LTD AND ANOTHER** Civil Appeal No. 50 of 2003 **UGANDA VS COMMISSIONER OF PRISONS EX PARTE MATOVU** [1966] EA. 514 and **RUBYA SAW MILL TINDER VS CONSOLIDATED HOLDING CORPORATION** (Commercial Case No. 297 of 2002 (Unreported). Before, I take on to examine the arguments of Ms. Kasonda on this point, I must hastily note that Mr. Chuwa, must have confused in the paging of his submission on preliminary objections to the application with those in the main suit. After the last but one paragraph in his submission filed on 23/2/2007, pages 6 to 8 are then devoted to arguments on the cause of action which are repeated on pages 4 to 5 of the submission on the suit filed on 27/4/2007. I think this must have been a slip of the memory.

Turning to Ms. Kasonda's submission on whether the affidavit discloses the sources of information, the learned Counsel submitted that all the sources of information have

been disclosed in the respective paragraphs and so the objection should be overruled.

I think, on the authorities, the law is clear that an affidavit which does not disclose the source of information, (except in interlocutory applications, (O. XIX rule 3 (1) of the Civil Procedure Code 1966), should not be acted upon by the court. Counsel are not on dispute on this point. The only issue here is whether, the deponent has disclosed sources of information contained in his all the paragraphs of his affidavit?

I have examined the affidavit of **DAVID KIMEY** very closely. Assuming, for the sake of argument that the verification clause was valid, the deponent states in that clause, that with the exception of pa agraph 15 which is based on the advice of Counsel, ***"what is stated in all paragraphs herein are correct and true of my own knowledge"***. According to Mr. Chuwa, the source of information contained in paragraphs 8, 9, 10, 11 and 14 of the affidavit are not disclosed, except by way of a reply filed by ELIUD MWANYIKA. In return Ms. Kasonda, submitted that the information carried in paragraphs 3 and 4 are public information, paragraph 5 is within the deponent's knowledge and so are the contents of paragraphs 6, 7, 8, 10, 11, 12 and 13, whereas the source of information contained in paragraph 9 has been disclosed.

I have looked at paragraphs 8, 9, 10, 11 and 14 of the affidavit which are at the centre of the controversy. I accept the proposition that the information contained in some of the paragraphs may have been derived from the deponent's personal knowledge as the Applicant's Sales and Marketing Representative in Tanzania, but I think the contents of paragraphs 11, 12, 13 and 14 are generally argumentative and presumptious and cannot be sourced from the deponent's knowledge. As such and on the authority of **UGANDA VS COMMISSIONER OF PRISONS EXPARTE MATOVU** (Supra) such paragraphs render the affidavit defective. So, I uphold Mr. Chuwa's proposition that these paragraphs (11,12,13 and 14) of the affidavit are defective. However, in my view, this does not render the whole of the affidavit defective. It has been suggested by some authorities and which I believe is a sound approach, that the defective paragraphs may be expunged, and if the remaining paragraphs would still make any sense, the court could act on them.

But in view of my finding on the defective verification clause, it is obvious that the two amendments must now be done together.

That said, I will now conclude that since the verification clause is not signed and since some of the paragraphs in the

affidavit are argumentative and therefore defective, I will, to that extent, uphold Mr. Chuwa's objections and order that the affidavit be returned to the Applicant for amendment if the Applicant so opts and this is to be done within 7 days from the date of this ruling or else the affidavit shall stand struck out and so will the application. Since both parties have succeeded midway there shall be no order as to costs.

Order accordingly.

SGD

S.A. MASSATI

JUDGE

31/5/2007

3,099 words

I Certify that this is a true and correct
of the original ~~Order Judgement~~ Ruling
Sign .....
Registrar Commercial Court Dsm.
Date 31/5/07