

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

COMMERCIAL CASE NO. 46 OF 2008

BETWEEN

ISAYA MWAKILASA @ WAKUVANGA	}	APPLICANTS
MUJUNI SYLIVERY @ MPOKI		
LUCAS MUHUVILE @ JOTTI		
EMMANUEL MGAYA @ MASANJA		
ALEX CHALAMILA @ MC. REGAN		
JOSEPH SHAMBA @ VENGU		
SEKIONI DAVID @ SEKI		
(ALL t/a ZE COMEDY PRODUCTION)		

VERSUS

EAST AFRICA TELEVISION LTD.	}	RESPONDENTS
REGISTRAR OF TRADE AND SERVICE MARKS		
COPYRIGHT SOCIETY OF TANZANIA		

RULING

ORIYO, J.

Having successfully crossed over the barrage of preliminary points of objection raised by the respondents, the applicants duly filed a Joint affidavit on 30/7/2008 in

place of the defective one. They are now asking the court to issue temporary injunctive orders against the respondents while the pending suit is awaiting determination.

The application is brought under Order XXXVII rules 1 and 2 and Section 95 of the Civil Procedure Act. As usual the application is supported by the joint affidavit of the applicants.

The applicants prayers read as follows:-

1. *This Honourable Court be pleased to grant injunctive order to restrain respondents, their agents, servants, workmen, assignees and/or any other person from interfering, disturbing and/or preventing the applicants from conducting their business in the name and design known as "ZE COMEDY" pending hearing of the main suit.*
2. *Costs.*
3. *Other relief or order.*

The representation of parties remained the same as in the previous ruling on preliminary objections. Mr. Swai, learned counsel, represented the applicants. For the respondents they were advocated for by Ms B. Gogadi learned counsel for the first respondent. Ms Loy Mhando, learned counsel for the second respondent. The third respondent appeared through Mr. J. Kimario, learned counsel. The submissions on the application were made in writing and as with the submissions on the preliminary objections; counsel did a good job.

I have taken time to study the opposing submissions and it is noted with relief that there is no quarrel between the opposing sides on the law applicable to and the purpose of temporary injunctions.

It is trite law that the primary purpose of granting a temporary injunction is to preserve the status quo of the quarreling parties pending the determination of their rights in the main suit. The relevant status quo for consideration at this stage is the one prevailing on the date the suit was filed.

The law applicable to temporary injunctions is as it is well set out in the celebrated decision of this court in the

case of ATILIO versus MBOWE (1969) HCD 284. In that case, GEORGES, C.J.; as he then was, laid down three conditions which must be satisfied before a temporary injunction can be issued, as follows:-

- (a) *There must be a serious question to be tried on the facts alleged and a probability that the Plaintiff will be entitled to the relief prayed.*
- (b) *The Court's interference is necessary to protect the Plaintiff from the kind of injury, which may be irreparable before his legal right is established.*
- (c) *On the balance there will be a greater hardship and mischief suffered by the Plaintiff from withholding of the injunction than will be suffered by the defendant from granting it.*

It is the law that all the 3 conditions above must be satisfied.

The issue here is whether the applicants have made out a case in their favour. Have the applicants satisfied the 3 conditions in the instant case?

Whether the applicants have shown a prima facie case with a probability of success. They submit that there are serious allegations in the supporting affidavit and the plaint; including the allegations of fraud and conspiracy. They state that the first and second respondents are in the process of having the mark ZE COMEDY registered or already registered. They point out to the relevant paragraphs in the plaint which contain the allegations of fraud; in particular paragraph 12(1) to 12(7). Specific emphasis is placed on Annexure MSK - 7 to the Plaint which is a copy of the first respondent's application form for the registration of the disputed mark. The applicants are suspicious of the application form bearing a date of 12/12/2007 but the attached exchequer receipt shows that the payment of fees was made 3months in advance, on 29/8/2007.

The applicants also state that their pleadings and affidavit contain allegations of conspiracy between the 1st and 3rd respondents. They contend that the third respondent; under the influence of the first respondent, on 10/6/2008 wrote to the Tanzania Broadcasting Corporation.

The letter which was copied to the applicants and several others, indicate that the first respondent is the rightful holder of the disputed mark; as per Annexure 3D – A to the counter affidavit of the third respondent.

The applicants express serious concern over the respondents silence to the allegations of fraud, deceit and conspiracy leveled against them. It is in these circumstances that the applicants submit that there exists serious issues for trial between the parties as to who is the lawful owner, author and the actual holder of the trade mark, ZE COMEDY. In addition is the issue of the date when the 1st respondent applied for the registration of the disputed mark; whether it was done on 29/8/2007 or 12/12/2007. In support of their case, the applicants rely on a Court of Appeal decision in the case of TANZANIA UNION OF INDUSTRIAL AND COMMERCIAL WORKERS (TUICO – OTTU UNION) AND ANOTHER

VERSUS

TANZANIA AND ITALIAN PETROLEUM REFINING COMPANY LIMITED.; Civil Appeal No. 34/2000, DSM Registry, (unreported).

Submitting for the respondents, counsel state that they have no quarrel with the applicant's contention that they

have raised serious allegations in the affidavit and plaint. On the other hand they contend that the instant dispute which is over intellectual property has to be distinguished from other ordinary disputes, such as the labour dispute in the TUICO - OTTU UNION case. The respondents oppose any grant of temporary injunction. They contend that the dispute here is on the ownership of a trade mark, ZE COMEDY and the broadcast program. Further, the respondents state that what makes this case even more unique or different is that under normal circumstances, there is a dispute when one of the parties is using the mark. But in the instant dispute, they state that the disputed mark and program are not in use by anyone.

Secondly the respondents state that the serious allegations as contended by the applicants; in particular those of fraud, deceit and conspiracy; cannot be taken lightly by the Court. They submit that the said allegations have to be investigated and established or otherwise; by receiving evidence.

In further reaction, the second respondent did; whether rightly or wrongly; give an explanation on what actually took place to result in an exchequer receipt bearing a different, earlier date than the application itself. The second

respondent's original application form was submitted on 29/8/2007 and the prescribed fee paid on the same date. It is stated that the application was allocated No. QSM 1498 and duly entered in the Applications Index Register. However, the second respondent explained how the original form was misplaced in its registry and the 1st respondent was called upon to resubmit the application. They further state that the resubmission by 1st respondent was done on 12/12/2007; hence the discrepancies in dates on application form as 12/12/2007 and receipt date of 29/8/2007.

I said I am not sure whether the explanation given by the second respondent in the written submission is right or wrong. A number of legal issues arise. One such issue is whether the statement from the bar suffices to answer a legal issue raised by way of an affidavit.

The respondents point out to the dangers of granting an injunction before deciding on the ownership of the mark and copyright. They submit that granting the application at this stage will otherwise amount to determining the suit. Their further submission is that granting a temporary injunction now will be giving recognition to the applicants as the rightful owners of the trade mark and copyright.

To support their submission that an order of temporary injunction should not be issued at this stage, the applicants cited the following authorities:-

- (i) *CPC INTERNATIONAL versus ZAINAB GRAIN MILLERS LTD, Court of Appeal, Civil Appeal No. 49/1995, DSM Registry. (unreported).*
- (ii) *GLAXO GROUP LTD. Versus AGRI - VET LTD.; Commercial Case No. 73/2002. (unreported).*
- (iii) *AGRO - PROCESSING AND ALLIED PRODUCTS LTD. versus SAID SALIM BAKHRESA & COMPANY LIMITED; Commercial Case No. 31/2004. (unreported).*

Whether the applicants stand to suffer irreparable loss if injunction is refused. The applicants list the losses to be suffered to include loss of income, goodwill, image, skills, innovations, creativity and talents. They contend that the cumulative acts of the respondents to process the registration of the disputed mark as property of the 1st

respondent and their interference with the applicants performances and shows has curtailed their income which endanger their lives and those of their families.

It is the applicant's submission that some of the losses like Goodwill cannot be compensated in monetary terms. To support the submission the applicants rely on the court decision in the case of DAMAS ASSEY versus KINONDONI MUNICIPAL COUNCIL, Land Case No. 23/2005. (unreported).

In conclusion, the applicants submit that the total effect of the respondents' acts on them amount to interference with their constitutional right to work, for which no sum of money can repay.

On the opposing side, the respondents are quick to distinguish ASSEY's Case as a land matter and different from the instant case which relates to intellectual property rights. In addition the respondents submit that the injury in the ASSEY case which would have resulted from the demolition of the premises which had an ongoing business concern; was no doubt, irreparable. They submit that the situation in the instant case is different because the applicant's allegations of irreparable losses are allegations of fact which call for testimonies in the main suit to establish.

For the breach of contracts entered into by the applicants with third parties; it is the respondent's submission that in the absence of a valid permit/license; the applicants would have committed illegalities in performing because they have neither a permit nor a license to do so. Otherwise the applicants are advised to plead frustration of contract caused by a court order in the event they are sued for breach of contract.

Independently of the other respondents, the second respondent repeats here its earlier contention that the suit is prematurely in court. The second respondent's gratis advice to the applicants is for the latter to file objection proceedings against the first respondent's application in terms of the provisions of the Trade and Service Marks Act, [Cap 326, R.E 2002].

As in whose favour does the balance of convenience lean? It is the applicant's submission that issuing temporary injunction will not adversely affect the first respondent. Their submission is based on the fact that the 1st respondent was not established exclusively to beam ZE COMEDY episode. They add that the first respondent has a diversity of other income generating activities. They contend that, for them, they are comedian artists who solely depend on it for

their livelihood. The applicants submit that they are the ones who stand to suffer a greater inconvenience and mischief if the temporary injunction is not granted.

The respondents are not in anyway persuaded by the applicant's arguments on this condition. The first respondent contends that the applicants are free to engage in any other group performances that their innovative creativity can come up with for alternative sources of income. However, the contention on other group performances is with caution. The first respondent states that such performances are not to use the disputed mark or any other similar name; or to involve the same artistic (not human) characters as those in ZE COMEDY. It is submitted that mere non use of the mark ZE COMEDY does not make any other group performances by the applicants impossible.

That is the totality of the opposing submissions on the application for a temporary injunction.

Now I turn to consider whether the applicants have satisfied the 3 conditions set out in MBOWE's Case (supra).

The first condition is whether the allegations in the plaint and joint affidavit are sufficient to establish a prima

facie case and a probability of the applicants' success in the main suit. The first condition has two components, as it were. The first one is the establishment of a prima facie case. The second component is the probability of the applicants' success in the main suit.

It is common knowledge that the principal parties in the suit are the applicants and the first respondent. The second and third respondents are brought in by virtue of their roles as regulatory bodies in the areas of Trade and Service Marks and on Copyright, respectively.

On the first component, there is no dispute that the applicants have established that there exists serious questions or issues between the parties to be tried. Such questions are found in the facts alleged in the Joint Affidavit, Plaint and Annexures. The triable issues are set out at page 3 of the applicants submissions in chief, as hereunder:-

"... who is a lawful owner, author and actual holder of the trade mark ZE COMEDY and as to which date did the second defendant apply for the registration of the trade mark ZE COMEDY, between 29th day of August 2007 when payment

was made or on 12th day of December 2007 when the application was lodged."

The decision of the Court of Appeal in the case of TUICO – OTTU UNION (*supra*) which is relied upon by the applicants, states as follows at page 4 of the typed judgment:-

"These questions, serious as they were, could not be answered on the basis of the pleadings at the time of the ruling. Nor could the trial judge have availed himself of any assistance from counsel submissions on them because the questions could not have arisen at the stage of an application for temporary injunction. The trial judge therefore took it upon himself to resolve these questions basing himself on no material adduced before him."

Further at pages 5 – 6 of the judgment, their Lordships held as follows:-

"Thus we hold that the trial judge erred in dealing with the issues in the main suit at the time of hearing the application for temporary injunction,

and for dismissing the application for temporary injunction when there were serious questions between the parties to be tried. The learned judge should have granted temporary injunction as prayed to maintain the status quo pending trial of those questions."(emphasis supplied).

The second component of the first condition is a probability of success. In addition to the extract from pages 5 – 6 of the judgment as authority; the applicants rely on Annexures MSK – 2 and 3 of the Plaint and MSKA – 2 and 3 of the joint affidavit as adequate to satisfy the second component.

Is the first condition satisfied as contended by the applicants?

It has been pointed out above that the purpose of a temporary injunction is to preserve the status quo prevailing on the date the suit is filed. What was the status quo on 4/7/2008 when instant suit filed? According to the pleadings and affidavits on record; it is not in dispute that neither the applicants nor the first respondent was using the mark ZE COMEDY and neither had the exclusive use and/or protection to use it. The status as of 4/7/2008 was that the first

respondent's application to be registered owner of the mark was under process by the second respondent. So as of the filing date the first respondent had no exclusive right to protect over the disputed mark. On the other hand, for the applicants, they had a permit to perform as ZE COMEDY PRODUCTION from the National Arts Council (Baraza la Sanaa la Taifa). Going by the copy of the Permit which is attached to their affidavit; it was for a duration of 12 months; that is from 1/7/2007 to 30/6/2008; which expired over a month ago. However, the Permit has not been renewed to date. Therefore, there is undisputed evidence on record that the status quo as on the date of filing the suit, the disputed mark was at a stalemate; as neither party was using it and none had a legal right to it. In the circumstances, the decision in TUICO - OTTU UNION is distinguishable. In the instant case there was no status quo prevailing on 4/7/2008 worth preservation by injunction.

Another reason to distinguish the TUICO - OTTU UNION decision is on the subject matter. The former suit was on employees' statutory right to be consulted on impending redundancy. The instant suit is on the ownership of intellectual property; a trade mark.

While still on the first condition, it is a trite legal principle that to establish a prima facie case with a probability of success, courts should proceed with care so as not to prejudice the pending suit; it should not amount to pre-judging the parties before their evidence is taken. In the case of ZAINAB GRAIN MILLERS LTD. (supra) the Court of Appeal sounded the warning in the following language:-

"In light of these principles we think that in the instant case what was expected of the learned judge is to consider whether on the facts as disclosed from the affidavits and the pleadings, a prima facie case has been shown. It would, in our view, be premature for the court to require the Appellant/Applicant to prove infringement or passing off at that stage as no evidence had been adduced. This, it would appear is what the learned judge did in this matter where in refusing to grant a temporary injunction it was held that the applicant had failed to prove either infringement or passing off. This, we are satisfied was a misdirection on the part of the learned judge."

Sometime down the road after the decision in ZAINAB's Case, the learned Kalegeya, J. (as he then was) expressed similar views as those of the Court of Appeal and pointed out to the inherent dangers of pre-empting the main suit prematurely. This was in the case of GLAXO GROUP LTD. (supra). At page 10 of the typed Ruling, the learned judge stated as follows:-

"The dangers and the trick lie in the possibility of the court crossing over into the merits of the case as was exposed by the Court of Appeal in the Zainab Case. And, in my considered view these dangers lie very prominently in disputes involving trademarks and business names."

Further, at page 12 of the Ruling the learned judge hammered home the thin dividing line between a prima facie case for temporary injunction and prima facie case for proof in the main case. He stated so in very few, clear words:-

"Where do we put a demarcation?"

Then:-

"How do we make the partition?"

The summary of his views are found at pages 13 -14 in the following language:-

"My views are that in conflicts of trademarks and business names, temporary injunctions should very sparingly be sought by parties and granted by courts because of the intricacy surrounding the first principle of establishment of a prima facie case with probability of success. I am saying so because I fail to see how the Plaintiff/Applicant can established a prima facie case with a probability of success without going into details of what he alleges to be passing offs or infringement and in turn without the court analysing what is submitted and being satisfied of those allegations and at the same time escape from what be fell the High Court in Zainabu's case." (emphasis supplied).

A year later, in 2004 in the case of AGRO PROCESSING AND ALLIED PRODUCTS LTD. (supra), the learned Kimaro, J. (as she then was) echoed the same problem that was faced by the learned judge in the GLAXO case. The issue here was similar in that both cases were on trade marks.

On the first condition of a prima facie case with a probability of success, the learned judge said the following at pages 5 – 6 of the typed Ruling:-

*"I find it extremely difficult to accept Mr.
Submissions as being relevant to support an
application for temporary injunction. They are
more relevant as summing up submission after
the trial."*

After reiterating the purpose of a temporary injunction she stated:-

*"I find it extremely difficult to determine the issue
of whether a prima facie case exists in this case
without going to the merits of the main case."*

I have, at this juncture, to be frank and admit that I find myself in the same intriguing, difficult situation as the learned judges in the GLAXO and AGRO PROCESSING cases. The subject matter of the dispute here is a trademark as in the former cases cited above. And again like in the former cases, the opposing counsel submissions go a longway into the merits of the main suit. The intriguing problem here is where to draw the dividing line.

There is an additional difficulty in the instant case, which again poses an imminent danger of crossing over into the merits of the main suit. This is found in the similarities between the application for injunction and the plaintiffs/Applicants prayers in the Plaint. The prayers are listed on the last but one page of the plaint. The prayers read as follows:-

"WHEREFORE, the Plaintiffs pray for judgment and decree against the Defendants jointly and severally as hereunder:-

- "i) An order for a permanent and perpetual injunction restraining the 1st Defendant from interfering with the business of the Plaintiffs in any manner.*
- ii) A declaratory order that the Plaintiffs' name **"Ze Comedy"** is lawfully owned by them prior to and after comic agreements entered with the 1st Defendant.*
- iii) An order for removal of trade marks **"Ze Comedy"** registered or in process of*

registration by the 1st Defendant from the 2nd Defendants' register.

- iv) An order for payments of TShs. 200,000,000/= as general and punitive damages against the 1st Defendant.
- v) Costs of the suit.
- vi) Any other relief(s) that the Honourable Court show deem fit and just to grant."

The similarities are not limited to the prayers. The allegations made in the Plaint are repeated in the Applicant's Affidavit. In my view, granting the temporary injunction would have a similar effect as granting the prayers in the plaint, save for the prayer for damages. Consequently, it would be tantamount to pre-judging the main suit without affording the parties the opportunity to tender their respective testimonies. For the respondents/defendants; they would be condemned unheard by such a decision.

Let me digress a bit from the main subject matter. What is the status of the 7th applicant, SEKIONI DAVID @ SEKI? In the written submissions, counsel for the first respondent raises doubts on SEKI's legal status as a

member of the "group". Allegations are made from the bar in the written submissions that SEKI was at the material period of time employed by the first respondent, etc. It is submitted that SEKI could not have been a legal member of ZE COMEDY PRODUCTION group because the employment contract with the first respondent prohibited him from any other engagement. The applicants on their part made some responses to the allegations in their rejoinder submissions.

Of concern to the court on the issue is not whether SEKI is legally a member of the "group" or not; but the manner the issue has been raised through written submissions. I must admit that I am at a loss how counsel chipped in on the legal status of SEKI. The issue was not raised as a preliminary objection at the relevant stage. Now the matter is at the substantive stage of the application for injunction.

It is a trite principle of practice that it is unprocedural to raise objections within written submissions because the latter do not stand for pleadings. Further to that, objections are argued upon court's leave. The first respondent was not granted leave of the Court to argue the objection on the legal status of SEKI. Both counsel for the first respondent and for the applicants are senior members of the bar and

alive to the rules of the game. In this connection, I reiterate what was stated by this court on 2/6/2008 (learned Werema, J.) in the case of SAJJADALI LTD. versus KIWI EUROPEAN HOLDINGS B.V., Commercial Case No. 267/2001, (res sub-judice); (unreported). At page 2 of the typed Ruling the learned Judge stated as follows on what is expected of the bar:-

"The Bar, I must say, must continue to safeguard the integrity as well as the perfection of this so called noble profession. Careless or casual pleadings must be avoided at all costs." (emphasis supplied).

While I fully agree with my brother judge and having sought and obtained leave from him; I will make some addition to the categories listed in the last sentence as hereunder:-

"...Careless or casual mistakes in pleadings, affidavits or submissions must be avoided at all costs."

In the event, I reject the objection raised in the first respondent's written submissions on the legal status of SEKI. In the event the first respondent wants a decision of

the court on the issue; then let it be brought up through the normal procedure.

I will now revert to the main application for a temporary injunction. There is already a finding that as on the date of filing the suit there existed no status quo worth preservation by an order of a temporary injunction. That finding would have been sufficient to determine the matter.

But in view of the importance attached to the application by parties, I have decided to go further to consider whether the three conditions for a temporary injunction to issue have been satisfied. I wish to pose a question here. Whether in the face of the difficulties elaborated above and the peculiar circumstances of the instant case; it can safely be said that the applicants have established a prima facie case with a probability of success.

From the foregoing detailed discussions on the dangers and difficulties inherent in disputes on trade marks and on the authorities of decided cases reproduced above; I am satisfied that the first condition laid down in MBOWE's case has not been satisfied.

With this finding, it will remain a mere academic exercise to consider the other two conditions.

In the final analysis I would say that the instant case is not suitable for a temporary injunction.

In the result the application for temporary injunction is dismissed.

Costs shall abide the cause.


K.K. Oriyo

JUDGE

19/8/08

4.457 words

bk