

ORIGINAL

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

MISCELLANEOUS CIVIL REFERENCE NO. 160 OF 2013

IN THE MATTER OF THE TRADE SERVICES MARKS ACT  
(CAP. 326 R.E. 2002)

AND

IN THE MATTER OF TRADE MARK APPLICATION  
NO. TZ/T/2012/715/MIMEA (WORD) IN CLASS 3 IN THE NAME  
OF REHEMA MICHAEL SANGA, WILFRED JUMANNE MWANZIN  
AND SAMWEL JUMANNE MWANZINI TRADING AS MWASARE  
INVESTMENT AND OPPOSITION THERETO BY Beiersdorf AG. A  
COMPANY REGISTERED AND EXISTING UNDER THE LAWS OF  
GERMANY.

*Date of hearing: 23/12/2013*

*Date of last order: 23/12/2013*

*Date of Ruling: 19/03/2014*

**RULING**

**MAKARAMBA, J.:**

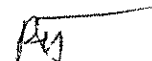
This is a ruling on application for Reference by the Registrar of Trade and Service Marks to this Court in respect of notice of opposition to registration of a Trade Mark. The Reference was brought under section 13 of the *Trade and Service Marks Act, [Cap.326 R.E 2002]* and Regulation 32 of the *Trade and Service Marks Regulations, [G.N. No.40 of 2000]*.

The Reference is in respect of notes of opposition to registration of trade mark application number TZ/T/2012/715 MIMEA (word) in Class 3

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(of the international classification of goods and services) in the name of Rehema Michael Sanga, Wilfred Jumanne Mwanzini Trading as Mwansare Investment.

The nature of the matter is such that a brief background is apposite. The application for registration of the above named and numbered trademark was filed at the Registry of Trade and Service Marks on 3<sup>rd</sup> May 2012. Upon its substantive examination it was accepted. Advertisement was caused as per requirement under section 13 of the *Trade and Service Marks Act, [Cap.326 R.E 2002]* and Regulation 32 of the *Trade and Service Marks Regulations, [G.N. No.40 of 2000]*. Notice of opposition to the registration of the above named and numbered trademark was filed at the Registry in duplicate. A copy of notice was duly served to Applicants, who in return filed a counter-statement in duplicate. Pleadings therefore had been completed and what was pending was the fixing of a date for the hearing of the opposition proceedings to the registration of the trade mark application number TZ/T/2012/715 MIMEA (word) in Class 3 (of the international classification of goods and services) in the name of Rehema Michael Sanga, Wilfred Jumanne Mwanzini Trading as Mwansare Investment. However, one of the Applicants, M/s **Rehema Michael Sanga** (since deceased), by her letter dated 14<sup>th</sup> June, 2013, made representation to the Registrar with regard to the opposition proceedings in that, **she preferred the matter to be adjudicated before another person and not the Registrar of Trade and Service Marks**. The Registrar avers in the reference that the Registrar of Trade and Service Marks is the sole person who under the law has the capacity to preside over the matter. In the circumstances, the Registrar further avers, it appeared to



the Registrar that the adjudication of the opposition proceedings had been rendered to be "**of complexity**" to the extent of loss of confidence by the Applicant in the Registrar and therefore the Registrar relying on section 49 of the Trade and Service Mark Act referred this matter to this Court for a decision.

The learned Counsel for the Respondents to the Reference, namely, the late Rehema Michael Sanga, Wilfred Jumanne Mwanzini and Samwel Jumanne Mwanzini has lodged in this Court a Notice of Preliminary Objection containing the following grounds:-

- 1. That this Civil Reference is defective and misconceived as it was referred to this Court by the Registrar of Trade and Service Marks without any complexity.*
- 2. That the Registrar of Trade and Service Marks acted unlawfully when referred this matter to this Honourable Court while we had already cleared the said complexity through our letter Ref. MITM/BRELA/TZ/T/2012/646/15 dated 15<sup>th</sup> October 2003.*
- 3. That the Registrar of Trade and Service Marks acted unlawfully and unprocedurally when he referred to this Court before appointing the administrator of the estate of the late Rehema Michael Sanga.*

In disposing the matter orally, **Mr. Hakiel Mgonja** and **Mr. Seka Kasela** Deputy Registrar and Registrar respectively appeared for the Applicant/Referee. **Mr. Augustine Mrema**, Advocate appeared for the

*AS*

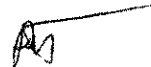
*AS*

1<sup>st</sup> Respondent/Objector and **Mr. Samson Rusumo** represented the 2<sup>nd</sup> Respondent/Objector.

Submitting on the first point of preliminary objection, Mr. Samson Rusom argued that the civil reference by the Registrar has been filed without there being existence of any complexity in terms of section 49 of the ***Trade and Service Marks Act, [Cap.326 R.E 2002]***. According to Mr. Rusumo, for the Registrar to file a reference in Court under section 49 of the Act, the Registrar must establish that the matter involves a point of law or is of an unusual importance or complexity. Furthermore, the Registrar must also give notice to the parties on the complexity, which notice unfortunately the Registrar did not serve to the parties, Mr. Rusomo added.

Mr. Rusumo submitted further that, section 55 of the ***Trade and Service Marks Act, [Cap.326 R.E 2002]*** lists down the procedures to be followed in reference, in terms of which the Registrar is required to file the reference when there was at least a certain stage of proceedings. However, when the Registrar filed the present civil reference in this Court, the parties were at the stage of exchanging information and the stage had not been reached and started in terms of hearing the parties. Therefore the reference has been filed at the very initial stages, and according to Mr. Rusumo, it does not appear that, there is a matter of unusual importance or complexity.

Mr. Rusumo submitted further that, in referring this matter to this Court the Registrar has acted unlawfully as the said complexity had already been cleared through a letter with Ref. MITM/BRELA/TZ/T/2012/646/15 dated 15<sup>th</sup> October 2003 clarifying the

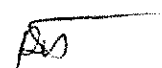


purported complexity, which letter was submitted to the Registrar before the filing of the present application for reference in this Court.

On the third objection, Mr. Rusumo argued that, when a partner dies, the partnership automatically dissolves. And further that if the late Rehema Michael Sanga was a party to the application, automatically probate law requires an administrator be appointed to defend her interests before filing the Reference to this Court, Mr. Rusumo pointed out. The late Rehema Michael Sanga, Mr. Rusumo further submitted, was in a partnership with the Applicants, which was registered under the Business Names Act, R.E 2002 by the name of "Mwasare Investment." Mr. Rusumo prayed that the application for reference be dismissed with costs for having being brought in this Court un-procedurally and that, an order be made that the Registrar should hear the matter as required by law.

In his reply Mr. Mgonja argued that, the Respondents brought the complexity even before the hearing date of the apposition application. Mr. Mgonja expounded that the "complexity" was that, the Registrar received a letter from the late Rehema Michael Sanga that asking the Registrar not to hear the matter on the ground that she had no confidence in the Registrar and that in the alternative the Registrar should reassign the matter to another person to conduct the hearing. Mr. Mgonja submitted further that the Registrar wrote back to the legal representative of the late Rehema Michael Sanga indicating to them that, it seems that they have lost confidence in him and that they would prefer the matter be reassigned to another person.

Mr. Mgonja submitted further that, it is the objector to the application for registration who brought the complexity otherwise the Registrar



would have proceeded to perform his duties under the Act including hearing the parties on the opposition proceedings. Mr. Mgonja added that, the letter by the Objector does not state why the late Rehema Michael Sanga had lost confidence in the Registrar and as such the letter did not clear the complexity as contended. Mr. Mgonja invited this Court to determine whether there is any complexity and if it finds so to order the complexity to be heard by another person, may be a Deputy Registrar.

In his response Mr. Mrema argued that, the preliminary objections raised do not qualify to be a matter of law but a matter of facts, citing the case of **MUKISA BISCUITS MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1966) EA 696**. According to Mr. Mrema the questions whether there is complexity or whether the letter cleared the complexity and whether an administrator has been appointment need facts to prove as these are questions of fact not law.

Mr. Mrema submitted further that, the reference is not proper before the Court because it invites the Court to hear and determine the opposition proceedings, which is not its duty but that of the Registrar under section 27 of the Trade and Service Mark Act and Regulation 42 of the Trade and Service Marks Regulations. Mr. Mrema referred this Court to the decision in **Misc. Civil Reference No. 14 of 2005 between the SCOTCH WHISKY ASSOCIATION AND VITAMIN FOODS (1986) LIMITED** on application for removal of a trademark from the Register. Mr. Mrema also referred this Court to the decision in **Misc. Civil Reference No. 14 of 2002 between KOUK OIL AND GRAINS PTE LTD VERSUS MURZAH OIL MILLS LIMITED** on registration of trademark. Mr. Mrema submitted that in both cases cited

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above, the Court was looking on specific issues to be determined. Likewise in the present suit, the Registrar ought to have referred to specific issues otherwise this Court does not have jurisdiction to hear and determine opposition proceedings.

In his rejoinder Mr. Rusumo argued that, the objection by the late Rehema Michael Sanga was brought under her own personal capacity and she was ready to receive a decision from any other Registrar in the Registrar's office. Finally, Mr. Rusumo stated that, it is not an automatic action that when there is complexity the Registrar should run directly to Court.

I have carefully followed the submissions of learned Counsels in support and rival to the points of preliminary objection raised by the Respondents' Counsel. It seems very clearly that the submissions also traverse the main issues which this Court was to determine in the main application. That being the case therefore, I consider the three points of preliminary objection as being issues for the determination of the matter and I take them as such.

On the first point of preliminary objection, whether there is any complexity to be referred by the Registrar of the Trade and Service Marks in this Court, this requires a revisit to section 49 of the Trade and Service Marks Act, (Act No.12 of 1986) which provides as follows:

*"49. When **any matter to be decided** by the Registrar under this Act appears to him **to involve a point of law** or **to be of unusual importance** or **complexity**, he may, **after giving notice to the parties**, refer such matter to the court for a decision and shall thereafter, in relation to such matter, act in accordance with the decision of the court." (the emphasis is of this Court).*

*Rus*

In terms of section 49 of the Act, the Registrar has discretionary powers to refer a matter to court for determination. The Registrar may exercise such discretion where it appears to the Registrar that the matter which is to be decided by the Registrar involves a point of law or is of unusual importance or complexity. However, before the Registrar may refer such matter to court, the Registrar has to give notice to the parties. The issue therefore is which **matter was to be decided** by the Registrar and whether the matter appeared to the Registrar to involve a point of law or was of unusual importance or complexity.

From the facts on record, M/s **Rehema Michael Sanga** (since deceased), through her letter dated 14<sup>th</sup> June, 2013 had made representation with regard to the opposition proceedings which were before the Registrar. The presentation was a preference that the matter be adjudicated before another person and not the Registrar of Trade and Service Marks. The issue therefore is whether merely by M/s **Rehema Michael Sanga** requesting for the recusal of the Registrar this constituted ***a matter of unusual importance or complexity*** as envisaged under the law for the exercise of the discretion by the Registrar to refer the matter to this Court for a decision. The attendant issue is whether the Registrar gave notice to the parties.

It is worth noting here that the law does not give any directions as to what may amount to "***a matter of unusual importance or complexity.***" In any event could it be said that the law envisaged that where a party to proceedings before the Registrar seeks for recusal of the Registrar from the proceedings this would constitute ***a matter of unusual importance or complexity?***" It would appear that the Registrar is now seeking from this Court a determination whether the

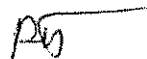




request by Rehema Sanga for the recusal of the Registrar from handling the opposition proceedings to the registration of the trade mark MIMEA amounted to ***a matter of unusual importance or complexity?*** I am of the considered view that this determination was supposed to have been made by the Registrar himself. In the event that the determined that there were valid grounds for his or her recusal, then the Registrar would have caused the matter to be reassigned to a Deputy Registrar to handle it. For the Registrar to have referred this matter to this Court for determination at this stage the Registrar has clearly misconceived the import and reach of section 49 of the Trade and Service Marks Act. As such this Court has not been properly moved to exercise its powers under section 49 of the Act.

The late Rehema Michael Sanga through her a letter dated 14<sup>th</sup> June, 2013 raised alarm to the Registrar (Mama Kishebuka) that she (Rehema Michael Sanga) did not have confidence in the Registrar to continue entertaining the opposition proceedings, and requested another officer to be reassigned the matter and to proceed with it. Rather curiously though, the late Rehema Michael Sanga did not disclose in her letter the reasons for her lack of confidence in the Registrar to handle the opposition proceedings. This is a matter which I strongly believe as indeed I have hinted out above, the Registrar was better placed to determine by simply causing notice to the parties so that they could appear before the Registrar and hear the complainant and make a determination as to whether there were valid grounds for withdrawal from entertaining the opposition.

The issue is whether the law renders any assistance in terms of the request by the late Rehema Michael Sanga for the recusal of the



Registrar and whether the matter could be placed before a Deputy Registrar to proceed with it. In terms of section 4 of the Trade and Service Marks Act, which establishes the Office of Deputy Registrar(s) provides clearly that subject to the directions by the Registrar, a Deputy Registrar "*shall have all the powers and privileges conferred by the Act on the Registrar.*" In the eyes of the law therefore since a Deputy Registrar has "all the powers and privileges" conferred on the Registrar under the law, the Registrar could, in the event of determining the request for recusal, have placed the matter before a Deputy Registrar to proceed with it. The facts in this matter do indicate that the Registrar did not make any determination on the complaint by the late Rehema Michael Sanga requesting for the recusal of the Registrar or whether this matter involved "any complexity." In any event it does not seem that the parties were served with notice by the Registrar of the purported complexity. That being the case therefore, clearly the Registrar did properly exercise her discretion as stipulated in section 49 of the Trade and Services Marks Act. The application for reference to this Court by the Registrar is clearly misconceived and thus incompetent and should be struck out.

It is for the above reasons that the 1<sup>st</sup> point of preliminary objection succeeds, which holding suffices to dispose of the entire application. However, for the sake of interest of justice and in order to put the record straight, I shall also determine and make a finding on the 2<sup>nd</sup> and 3<sup>rd</sup> points of preliminary objection as well.

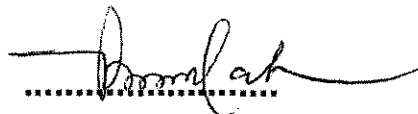
The 2<sup>nd</sup> point of preliminary objection essentially touches on the question whether the letter dated 15<sup>th</sup> October, 2003 cleared the said complexity and the 3<sup>rd</sup> point of preliminary objection is whether the

reference referred to this Court un-procedurally without there being first an appointed administrator of the estate of the late Rehema Michael Sanga.

Mr. Mrema rightly submitted that, the nature of the preliminary objections need a determination on facts, in that, it involves an examination and ascertainment of the contents of the letter dated 15<sup>th</sup> October, 2003, and the purported letter of appointment of the administrator. That being the case therefore, clearly the 2<sup>nd</sup> and 3<sup>rd</sup> preliminary objections do not meet the test of pure point of law as was propounded in the now famous case of **MUKISA BISCUITS MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1966) EA 696**. It is for this reason that the 2<sup>nd</sup> and 3<sup>rd</sup> points of preliminary objection fail and are hereby dismissed.

It is for the above reasons that the application for reference fails and it is hereby struck out. The Registrar of Trade and Service Marks is hereby ordered to continue with the hearing and determination of the opposition proceedings according to the law. The circumstance of the present matter is such that I shall make no order as to costs. Each party shall therefore bear its own costs in this application. It is accordingly so ordered.



  
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**R.V. MAKARAMBA**

**JUDGE**

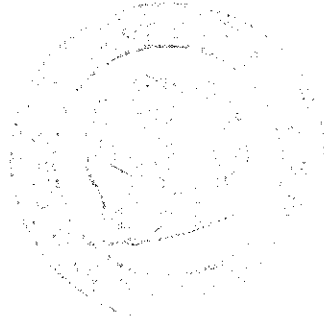
**19/03/2014**

Ruling delivered this 19<sup>th</sup> day of March 2014 in the presence of:

For the Applicant: ..... *Mrs Rehema Halid, Adv* .....

For the Respondent/Objector: ..... <sup>ISA</sup> *Mr Samson Ruzimo* .....

*for the 2nd Rep - Mrs Rehema Halid for*  
~~..... *Samson* .....~~ *Mr Masame*



**R.V. MAKARAMBA**

**JUDGE**

**19/03/2014**