

**IN THE UNITED REPUBLIC OF TANZANIA**  
**CIVIL CASE No. 150 OF 2018**

**JUDGMENT**

Citation

Rig Co. Limited Water Com Tanzania v Tanzania Limited - Civil case No. 150 of 2018- The high Court of Tanzania Dar es salaam

**J. A. DE - MELLO J;**

The Plaintiff is a Limited Liability Company, registered in Tanzania, doing business of among others, that of, General Merchant with a registered **Trademark Certificate No. TZ/T/2014/1993**, consisting of the recognizable expression of **"RIG Afya NATURAL DRINKING WATER"** registered in **class 32** in respect of pure drinking water. The Defendant is similarly a limited liability company as well, registered in Tanzania, dealing with the business of processing, packing, selling and, distribution of drinking water under the trade mark of word **"Afya"** with a registered **Trademark Certificate No. TZ/T/2017/52** in **class 32**, in respect of , soft drinks and carbonated water.

It is alleged by the Plaintiff that, the use of the word **"Afya"** on the Defendant's trademark amounted to infringement and, unless restrained by this Court, the Plaintiff continues to suffer, as he prays for the following orders;

- 1. An injunction to restrain the defendant, its agents, assigns, successors in title and whosoever will be acting and/or is acting through the defendant in whatever capacity from continuing to infringe the registered trademark No. TZ/T/2014/1993 consisting of the word "Afya" registered in class 32 in respect of pure drinking water.**
- 2. An inquiry as to damages and an order for payment of all sums found to be due at 40% of the profits made by the defendant on the sale of pure drinking water using the trade mark with interest thereon under the equitable jurisdiction of the court.**
- 3. The defendant pays the plaintiff the sum of Tanzania shillings of 3.5 billion as per para 10 Of the plaint.**
- 4. The defendant pays the plaintiff interest on decretal amount at the bank rate from the date of judgment till when the decree is fully satisfied.**
- 5. The defendant pays the plaintiff cost of an incidental to the suit and;**
- 6. Any other order that this court may deem fit to grant.**

Written statement by the Defendant has been lodged, disputing the claims that, the Plaintiff has depicted under **paragraph 10**, basically, for loss suffered to the tune of TShs. 3.5 billion, as a result of the alleged infringing of his registered **Trade Mark No. TZ/T/2014/1993** consisting of the word **AFYA**. In course of hearing the following exhibits were tendered and admitted;

**Exhibit P1 – Certificate of Registration No. 109755 for RIG (T) CO. LIMITED**

**Exhibit P2 – Water Analysis Report by Municipal Water Engineer**

**Exhibit P3 – Trade/Service Mark Certificate RIG Afya Natural Drinking Water**

**Exhibit P4 – Collectively, Fees paid to Brela (Disclaimer, Journal, Advertisement, Registration)**

**Exhibit P5 – Collectively, Receipts for drilling the Well**

**Exhibit P6 – Business Plan RIG (T) CO. LIMITED**

**The defense tendered the following;**

**Exhibit D1 – TFDA & Business, Certificate and Licence respectively, Temporary Industrial License**

**Exhibit D2 – Bill of Lading for Thermoforming Packing Machine**

**Exhibit D3 – Trade/Service Mark Certificate**

The Plaintiff, in care of **Counsel Roman Lamwai**, from **M.R.M Lamwai & Co. Advocates** whereas; the Defendants are fended by **Evans Ignace John of Mark & Associate Attorneys. Six (6) witnesses** were lined up by the Plaintiff, upon which **Chacha Magilo Rukwi**, sixty seven (67) years, a farmer (retired), residing at Mwandenge Chatembo-Mkuranga Pwani, commenced his evidence and, marked as **PW1**. A Christian and sworn, he testified to have commenced water business in **2007** as a Managing Director of Rig Company Limited. The business officially took of in **11<sup>th</sup> July, 2014**, with Certificate of registration from **BRELA No. 109755** of which not objected was admitted and,4 marked as **exhibit P1**. Further that the well for water production was drilled in 2007 in his residence at **Mwandege** following and acquiring all procedures for approval to include scientific analysis report qualifying human consumption which was admitted and, marked as **exhibit P2**. The trademark registered at Brela adopted the name of "**RIG Afya NATURAL**

**DRINKING WATER**", issued with a certificate which was admitted and marked as **exhibit P3**, dated the **22<sup>nd</sup> October, 2014** with exclusive rights in favour of the company. Still pursuing joint venture investors, it came to his knowledge that, "**Afya**" mark is already in use by another company based and, conducting similar water business in **Kisarawe – Kigamboni**, branding itself in the name and, style of "**Afya Pure Drinking Water**". This, he reckons, hindered progress to not only produce but, on a higher note, is securing of investors and finance from the banks. As such, he retorts, he has been left with routine vending and in a smaller way, within and, around the vicinity of his neighborhood. All in fine, it is the Plaintiff prayer that, this Court bar the Defendant from using his brand/trade name "**Afya**" that, attracts compensation of **TShs. 3.5 Billion and 40% profit** as the result of the said infringement, whose breakdown is reflected in the business plan for one year, Registration fees **TShs. 60,000/=**, Advertisement fees **TShs. 50,000/=** plus **TShs. 15,000/=** for Journal and, Disclaimer fees, collectively, admitted as **exhibit P4**, accompanied with receipts were admitted collectively as **exhibit P5**. On cross examination **PW1** claimed no to remember the names of investors neither worked with the Defendant nor advertised the trademark but, notwithstanding he was the first to register the trademark as opposed to **Watercom**. Second in line was **PW2**, one **Gabriel Irangai**, a forty one (41) years, Senior Registration Assistant (BRELA), residence of Tabata, a Christian too, testified to be in charge of trademarks and company registration at BRELA. He corroborated **PW1's** testimony towards **exhibit P1** that his office issued registering **RIG CO. LTD**. It is authentic considering a seal reflecting a certificate of a trademark issued to **RIG CO. LTD** by BRELA with the word "**Afya**" and

**RIG** on top marked as **exhibit P3**. The usage of the word "**Afya**" with the **RIG** on top of water drop is exclusive for **RIG CO. Ltd** as opposed to **WATERCOM**, he pointed out. That is for him alone and restricted to others. Next was **PW3** is **Thomas Pande Rweyemamu**, a seventy seven (77) years, former bank manager at NBC, residence of Boko Ziwani, a Christian, testifying to have retired in 1994, having served the National Bank of Commerce for thirty (30) years. He further contended to personally know the, Plaintiff whom he prepared Business Plan all in view of applying for a bank loan. He claimed to be the one who drafted and completed it with a format of a book, endorsing his signature embedded with his and a company name. It was admitted and marked as **exhibit P6**, having been not objected. Narrating on the details, **PW3**, testified the estimated cost for the plant was **TShs. 1,670,190,000/= billion**, while page 3 displays the financial analysis and projections for profitability. In appendix 1 at page 37, the net profit projected per year is **TShs. 3 billion** in the first year and, in the 5<sup>th</sup> year a net profit is **TShs. 4 billion**. This was all what the Plaintiff brought in support of their case. The defence side summoned and lead only one witness named **Usamah Mohamed Shack**, a thirty four (34) years **Watercom** employee, residing in Upanga, a Muslim, since 2013. Watercom was registered in 2012, for production of water and, soft drinks, scattered countrywide. That apart from registration, they had applied for installing an industry at the Ministry of trade, he tendered **TFDA certification** accompanied with business license from Brela, collectively marked as **exhibit D1**. The industry is located at **Kisarawe 2, in Kigamboni Dar Es Salaam** and, installed a water machinery plant as evidenced by bill of lading which was admitted and, marked as **exhibit D2**. The water produced carries the

name of **AFYA PURE DRINKING WATER**, with a **Camel photo**, water drops above and, with a curve line beneath the camel. This was in line with the trademark certificate from BRELA admitted and, marked as **exhibit D3**. He went to explain the requirement for registering a mark stating that it must be different from any other, in terms of colour, script and appearance. This same BRELA is the one which cleared and approved its registration and gazette in Government Gazette in line with the law, for the public to raise concern if any and within sixty days60 days. Further that to-date and, as we speak neither reservation nor objection has been raised and, hence granted a condition of no exclusive right with the word '**Afya.**' **DW1** further stipulated that, he is not aware if the Plaintiff is a competitor and wondered why the controversy considering different tradenames between the two. He testified to observe **exhibit P3** to reads "**RIG**" while theirs reads "**Afya**", with a glaring difference of the camel, water drops, grasses, curve as opposed to RIG reading '**Natural Drinking Water**' **DW1** dismissed the claims for damages terming them baseless without proof of production and or operational activity as alleged by the Plaintiff. In the absence of tangible proof, the suit has no justification, as he prayed dismissal with costs.

Final written submissions was prayed and, duly granted. On record, Counsels have exhibited effort in research and, I commend them all for this. It is worth to highlight the three issues framed as hereunder;-

- I. Whether the Defendants have infringed trademark No. TZ/T/2014/1993?**
- II. If the above is answered in affirmative, then whether the Plaintiff has suffered loss.**
- III. Reliefs, if any?**

For academic purposes and, considering the specialized field this suit bases its claim, some basic terminologies pertaining to trade and service marks, as governed by The **Trade and Service Marks Act, Cap. 326 R.E. 2002** (the Act), is necessary. According to **World Intellectual Property Organization (WIPO)** on their journal titled **What is Intellectual Property? Page 9** defines a Trademark as;

**"A distinctive sign identifies certain goods or services produced or provided by an individual or a company. Trademark may be one or combination of words. Letters and numerals, they may consist of drawings, symbols or three-dimensional signs, such as the shape and packing of goods".**

The law under **section 2** of the Act means;

**"Any visible sign used or proposed to be used upon, in connection with or in relation to goods or services for the purpose of distinguishing in the course of trade or business the goods or services of a person from those of another"**

What **"visible sign"** has been defined in the Act, imply the following:

**"Any sign which is capable of graphic reproduction, including a word, name, brand, devise, heading, label, ticket, signature letter number, relief, stamp, vignette, emblem or any combination thereof"**

It follows therefore that, once there has been a valid lawful registration, the proprietor is regarded as to have exclusive right over the trade and service mark as per **section 31 of the Act** has expressed that;

**“Subject to the provision of this Act and limitations or conditions entered in the register, the registration of a trade or service mark shall, if valid, give or be deemed to have given to the registered proprietor the exclusive right to the use of a trade or service mark in relation to any goods including sale, importation and offer for sale or importation”**

In anticipation of infringement, the law provides for under **section 32 (1) (a)** of **the Act**, which states as follows:

**(1) “The exclusive right referred to in section 31 shall be deemed to be infringed by any person who, not being the proprietor of the trademark or its registered user using by way of the permitted use, uses as sign either-**

**(a) Identical with or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade or business, in relation to any goods in respect of which it is registered or in relation to any closely related goods and in such manner as to render the use of the sign likely to be either...”**

Having reviewed the law, it is now safe to determine the first issue as whether the Defendant has infringed the Plaintiff’s trademark No. TZ/T/2014/1993, consisting of the recognizable expression of **“RIG Afya NATURAL DRINKING WATER”** hereby marked as **exhibit P3**. It is alleged by the Plaintiff that, the trademark he owned is illegally used by the Defendant by manufacturing, advertising and selling on wholesale basis throughout the United Republic of Tanzania, bottled water under the mark of **“Afya”**. This, he retorts, is intended to infringe the Plaintiffs



marks users, but worse confusing investors including banks which were ready to invest and fund his project. Rebutting the above, the Defendant, finds no infringement whatsoever from trademark certificate **No. TZ/T/2017/52** with the name **"Afya"** marked as **exhibit D3** which is distinctive from the Plaintiff. After all, his further observation is that while the Plaintiff claims to have followed all the procedures and requirements in registration from BRELA, so did they. which is a regulatory institution hence no infringement done on their side.

What is subject of contention here is what, both **exhibit P3** and **D3** reflects of that **"Afya"** word featuring in both. In answering the first issue and drawing the position that the case of **Double Diamond Holdings Limited vs. East African Spirits (T) Limited & Another, Commercial Case No. 8 of 2018, High Court of Tanzania, Commercial Division at Arusha**, guiding Courts when comparing trademarks, to evaluate their elements in its entirety rather than dissecting them, based on the **"Rule of Anti-Dissection"**. Reference to the case of **M/S South India Beverages Pvt Ltd vs. General Mills Marketing Inc. and Another (No.961/2013 in CS (OS) 110/2013) p.5**, was made in which the rule was applied.

The Court held that;

**"This rule mandates that the Courts whilst dealing with cases of trademark infringement involving composite marks, must consider the composite marks in their entirety as an indivisible whole rather than truncating or dissecting them into its component parts and make comparison with the corresponding parts of arrival mark to determine the likelihood of confusion. The raison underscoring the said principle is that the commercial**

**impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole and not by its component parts”.**

In the above regard, and based on **M/S South India Beverages case** (supra) which applied the **“Rule of Anti-Dissection”** this Court can not refrain to follow that entire wording should be used rather than dissecting it. In our case at hand, as per **exhibit P3** the words are **“RIG Afya NATURAL DRINKING WATER”** whereas in accordance with **exhibit D3** the word is **“Afya”** not similar. Looking at their logo, the Plaintiff trade marks comprises on top the word, **RIG** written in white, followed with a drop of water in blue in colour and, below it with the word **Afya** written in blue and a curved shape of words written in capital letters **NATURAL DRINKING WATER** with green grasses at the bottom with blue background. On the other side, the Defendant’s logo contains an image of yellow Camel on the top left side of the mark, sprayed with water in blue and the word **“Afya”** in the middle, centred written in yellow, in a distinctive font from the Plaintiff’s and yellow bow at the bottom of the word **“Afya”**. It is without flicker of doubt that the two trademarks in general, depicts no similarities whatsoever. It is worth pointing out the other rule that what the case of **Double Diamond Holdings Limited case**(supra) laid down **“First Syllable Rule”**. It is apparent that, the Plaintiff’s trademark is preceded by the word **“RIG”** while the Defendant’s is simply **“Afya”** hence another distinction. **Section 32 (1)(a)** of the **Act**, provides for the test of infringement, which wants the marks to be identical or nearly resembling likely to deceive or cause confusion. This Court is of the opinion there is neither such resemblance in the marks, nor confusion caused as the Plaintiff is as

alleged yet to commence production with products in the market to confuse the customers/buyers. In his testimony though he claimed to be serving a small neighbourhood within his vicinity. In the absence of resemblance, I would however advise the Plaintiff to go full blown production. This then answers the first issue in the negative, which then disposed the rest of the remaining issues similarly. Neither damage nor cost has been incurred by the Plaintiff, as I dismiss the suit with cost. In line with the balance of probability that governs Civil suit, the Plaintiff failed to prove as required.

I order.

**J. A. DE- MELLO**

**JUDGE**

**1<sup>st</sup> April, 2021**