

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

COMMERCIAL CASE NO 46 OF 2006

SABUNI DETERGENTS LIMITED.....1ST PLAINTIFF
PERSEROAN TERBATAL (P.T)WINGS SURYA..2ND PLAINTIFF

VERSUS

HAROON DAUD ABDULLA.....1ST DEFENDANT
MURZAH OIL MILLS LTD.....2ND DEFENDANT
TURKY COMPANY LIMITED.....3RD DEFENDANT

R U L I N G

MJASIRI, J.

In this case the Plaintiffs are claiming for infringement of their trade mark and licence by the Defendants by passing off its product and are asking for permanent injunction, general and specific damages, an order compelling the defendants to deliver up for destruction products bearing the offending trade mark and devices, interest and costs.

The defendants denied the infringement. The Defendants have also raised two preliminary points of law which are reproduced as under:

- 1. This court does not have territorial jurisdiction to hear and determine this suit as far as the third Defendant is concerned.*
- 2. That this suit is barred by res-judicata as it is alleged that there was Commercial Case No.100 of 2003 in which an act of court settlement was reached.*

The Plaintiffs are represented by Didas Advocate and the Defendants are represented by Mr. Mchome Advocate. The preliminary points of law were argued by way of written submissions following the order made by Dr. Bwana J.

With regards to the issue of jurisdiction, the Counsel for the Defendants submitted that the court does not have territorial jurisdiction as the third defendant is a limited liability

company incorporated in Zanzibar. According to the provisions of section 18(a) (b) & (c) [Cap 33.R.E2002] as there is no cause of action arising from the mainland.

According the Counsel for the Plaintiffs the cause of action arose in Dar Es Salaam and the court has jurisdiction under section 18 of the Civil Procedure Act.

With regards to the second preliminary objection that the suit is barred by res judicata in view of Commercial Case No.100 of 2003 in which an out of court settlement was reached; the learned Counsel for the Plaintiff submitted that the matter cannot be regarded as res judicata as the parties are different. According to Counsel for the Plaintiff the first plaintiff was not a party to the previous suit and the claim of the first plaintiff arises under a licence agreement between the first plaintiff and the second plaintiff. The 1st plaintiff's claim is for the period between April 1st 2005 and June 30, 2006.

The Counsel for the Plaintiff also argued that this matter presently in issue has never been heard and finally decided by the court. There are issues not considered such as whether or not the third defendant could issue a licence to the second defendant to manufacture, distribute and sell the product "GIV". Another issue mentioned is whether the Plaintiff has priority over the 2nd Defendant as a licensee of the 3rd Defendant. The said issues could not have been covered in the previous suit.

The Counsel for the Defendants submitted that the second plaintiff was a party to the suit. The third defendant and the first plaintiff are new parties. However according to him the case cannot be reopened by adding new parties to a suit. Failure to comply with the settlement order cannot be dealt with by filing a fresh suit. The Counsel for the Defendants further stated in his submission that according to the plaint, the second plaintiff's claim against the 2nd and 3rd Defendants is that from a date unknown to the Plaintiff's, the Respondents have been and are still manufacturing and selling marked

products in Tanzania under the mark 'GIV Beauty Soap' without the licence of the first and /or second Plaintiffs the said soap having no connection with the course of trade of the Plaintiff.

The Plaintiff's Counsel further submitted that the parties are different, matters directly and substantially in issue are different; and the matters presently in issue have never been heard and decided by the court in Commercial Case No.100 of 2003.

With regards to the first preliminary objection I am inclined to agree with Counsel for the Plaintiff. Section 18 of the Civil Procedure Act is quite clear. Suits are to be instituted where the Defendants reside or cause of action arises. The breach/infringement is alleged to have taken place in Dar es Salaam within the jurisdiction of this court. I therefore find the objection devoid of any merit and I therefore reject it.

Before considering the second objection let me look into the background of commercial case No.100 of 2003. The Plaintiff instituted a suit against the Defendant to restrain the Defendant their partners/principal officers, servants, agents and representatives from infringing the Plaintiff's registered trade Mark No.22645. The Defendant in its Written Statement of Defence denied producing and distributing GIV Soaps in Tanzania Mainland, admitted that it was not a registered holder of the GIV trademark but was authorised under a royalty Agreement it had entered into with a registered holder of the Trade Mark GIV, Turkey Company Limited (third defendant in this case) in Zanzibar under the Trade Mark Decree (cap.159) which agreement allowed the Defendant (2nd defendant) in this case to manufacture toilet soaps under the brand name GIV.

On 14th May 2004 the Plaintiff and the Defendant entered into a settlement agreement inter alia, to cease permanently to manufacture, supply, sell, distribute or advertise any soap

bearing the Trade Mark GIV Beauty Soap or similar look a like product.

With regards to the objection that the suit is barred by res judicata, let us first look into section 9 of the Civil Procedure Act which provides as under: This section is in pari materia with section 11 of the “Indian Civil Procedure Act.”

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by the court.

The principle behind the doctrine is that there should be an end to litigation: In **Rajendra Kumar V Kelyan** AIR 2000, it was held as under:

“The doctrine of res judicata or constructive res judicata predominantly is a principle of equity, good conscience and justice. It would neither be equitable nor in accordance with the principle of natural justice that the issue concluded earlier ought to be permitted to be raised later in a different case.”

The conditions where Res Judicata should apply are as under: as outlined in Sarkar on Civil Procedure 10th Edition (2005 reprint) at page 91.

1. Identity of the matter in issue. The matter directly and substantially issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.

2. Identity of parties.

The former suit must be between the same parties or parties under whom all of them claim.

3. Same title

The parties in the subsequent suit must have litigated under the same title in the former suit.

4. Concurrence of Jurisdiction

The court which decided the former suit must have been competent to try the subsequent.

5. Final Decision

The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided in the former suit.

Looking at the present claim it is obvious that the issue is similar to that in Commercial Case No.100 of 2003. The issue to be determined is infringement of the trade mark GIV Beauty Soap by the second Defendant. Though the 3rd Defendant was not a party to the said suit the infringement was alleged to have taken place because the second defendant

was distributing products manufactured by the 3rd Defendant under licence. The second Plaintiff's claim is for infringement by the second Defendant from an unknown period and the remedies sought are the same as those in the previous case. Even looking at the prayers in the plaint, the plaintiff is asking for 'another permanent injunction', obviously making reference to the injunction granted in the previous case. The first plaintiff's claim is under licence from the second defendant. The claim arises from the same issue of infringement from the previous case. The specific dates provided by the first plaintiff do not change the position. The second plaintiff was supposed to execute the decree in Commercial Case No.100 of 2003 and not to file another suit by adding another plaintiff and defendant.

The general rule is that the plaintiff who has prosecuted one action against a defendant and obtained a valid final judgment is barred by res judicata from prosecuting another action against the same defendant where:

(a) the claim in the second action is one which is based on the same factual transaction that was at issue at first;

(b) the plaintiff seeks a remedy additional or alternative to the one sought earlier;

(c) the claim is of such a nature as could have been joined in the first action.

Underlying this standard is the need to strike a delicate balance between the interests of the defendant and of the courts in bringing litigation to a close and the interest of the plaintiff in the vindication of a just claim.

It was argued by the Counsel for the Plaintiff that the matter presently in issue has never been heard and finally decided by the court. It is my finding that though in the previous case a settlement order was recorded and filed by the

parties, a consent decree has to all intents and purposes the same effect on res judicata as a decree passed in invitum;

*“ a consent decree is as binding upon the parties thereto as a decree in invitum if the compromise is not violated by fraud misunderstanding or mistake, the parties thereto are bound by the terms of the compromise and the decree passed thereon has the binding force of res judicata. This was held in the case of **Shankar V Balikrishna** 1954 SC 352.*

*In **Sailendra V SA** 1956 SA 346 it was held as under: A judgment by consent is as effective as estoppel between the parties as a judgment whereby the court exercises its mind on a contested case.”*

In Spencer and Turner in the book on Res Judicata 2nd ed page 37 cited in Sarkar on Civil Procedure 10th Edition (2005 reprint) it was stated as under:

“Any judgment or order which in other respect answers to the description of res judicata is nonetheless so because it was made in pursuance of the consent and agreement of parties. The tribunal gives judicial sanction and coercive authority to what the parties have settled between themselves and converts the agreement in a judicial decision on which a plea of res judicata has been founded.”

Looking at the nature of the claim and the record in respect of commercial Case No.100 of 2003 and the settlement agreement reached, I am of the view that the doctrine of res judicata should not be given a narrow application as claims for infringement of trade mark are different from other claims. In reaching a settlement agreement the position of the 3rd Defendant was considered. Though the 3rd defendant was not a party to the previous suit; the 2nd Defendant in this case claimed to have been using the Trade Mark GIV under a royalty agreement entered with a registered holder of the trade mark that is the third defendant.

In view of what has been stated herein above the preliminary objection raised by the defendant in respect of res judicata is hereby upheld and the suit is hereby dismissed with costs.

Sauda Mjasiri

Judge

January 22, 2007

Delivered in Chambers this 22nd day of January 2007 in the presence of Mrs. Rwebangira, Advocate for the Plaintiffs and Mr. Mchome, Advocate for the Defendants.

Sauda Mjasiri

Judge

January 22, 2007

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I Certify that this is a true and correct
of the original order judgement Rulling
Sign K. Mjasiri
Registrar Commercial Court Dsm.
Date 25/1/2007