

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

COMMERCIAL CASE NO 49 OF 2007

TANZANIA BREWERIES LTD..... PLAINTIFF

VERSUS

QINGDAO SINO TANZANIA
BREWERIES CO.LTD.....1ST DEFENDANT
REGISTRAR OF COMPANIES.....2ND DEFENDANT

J U D G M E N T

Hon. Mruma, J.

The Plaintiff, a local limited liability Company incorporated under the Companies Act Cap 212 has instituted a suit against the Defendant a foreign company incorporated and registered in Tanzania under the same Companies Act seeking for the orders that:

- (a) *A declaration that the name Qing DAO SINO Tanzania Brewery Company Limited or QIDAO SINO TANZANIA BREWERIES Company Limited is too much like a name Tanzania Breweries Limited appearing in the Index of Company names.*
- (b) *The 1st Defendant be restrained permanently from using the name QING DAO SINOTANZANIA*

BREWERY COMPANY Limited or QING DAO SINO TANZANIA BREWERIES COMPANY Limited.

- (c) The 2nd Defendant be ordered to strike off the name QING DAO SINO TANZANIA BREWERIES Company Limited fro the index of the Company names.*
- (d) The 1st Defendant be ordered to pull out and discard all advertisements in trade and in its custody printed in the name of QING DAO SINO TANZANIA BREWERY Company Limited or QING DAO SINO TANZANIA BREWERIES Company Limited.*
- (e) Costs of the suit and;*
- (f) Any other relief as this honourable court may deem fit.*

The Plaintiff was incorporated in Tanganyika on 3rd day of March 1960 and was issued with a certificate of incorporation as TANGANYIKA BREWERIES Limited on the same day. On 26th November 1964 it changed its name to Tanzania Breweries Limited and since then the plaintiff has been using that name and trading as Tanzania Breweries Limited in its brewed products.

In October 2005, the 1st Defendant's company was incorporated in Tanzania and was issued with a certificate of incorporation No. 54148. Following its incorporation and upon complying with all required procedures, the 1st Defendant started its business dealing with brewed products in Tanzania.

The Plaintiff's complaint against the Defendants is that the name QING DAO SINO TANZANIA BREWERIES COMPANY Limited that appears on its certificate of incorporation and/or QING DAO SINO TANZANIA BREWERY COMPANY Limited that appears on for 1st defendant's brewed products is too much like a name TANZANIA BREWERIES LIMITED. The 1st Defendant is denying these allegations and contends that its name has a different meaning and there is no similarities whatsoever with that of the Plaintiff's company.

Two witnesses were called to testify for the Plaintiff. The second witness is Albert Martin Kingu the Plaintiff's sales representative for Temeke District. He testified that one day he received a telephone call from one of his customers who asked him as to why they (the plaintiffs) were doing business promotions without inviting him. Because he (PW1) was not doing any promotion he conducted an inquiry and he realized that actually it was the 1st Defendant's Company which were doing promotions of its brewed products. The

witness testified further that in that promotions the 1st Defendant's Company were launching a new brand of beer which they termed as "a draft beer" the same term which is used by the plaintiff's company when launching a new brand of beer. In their posters, there were also a picture of a person kicking the ball. It is the testimony of this witness that these features in the 1st Defendant's promotion brought about confusion to the Plaintiffs customers who are used to their brands. He said that the confusion may cause the plaintiff to loose some of its customers.

Colleta Crispin Tax (PW1) an employee of Tanzania Breweries Company Ltd testified that the 1st Defendant's company name is too similar to the Plaintiff's name to the extent that its customers cannot distinguish between the two, and this has a negative impact to the plaintiff's business.

The 1st Defendant called one witness Mr. Guan Hong Zhang (DW1) its managing director. He testified that his company was registered and incorporated by the 2nd Defendant's authority after the latter was satisfied that all the procedures had been complied with. He said that when he went to the 2nd Defendant's office, the second Defendant's official requested him to submit three names one of which he would

like his company to be registered in. He submitted three names, that is

1. QING DAO SINO TANZANIA BREWRIES COMPANY LIMITED.
2. QING DAO SINO TANZANIA BEER FACTORY and;
3. CHINA - TANZANIA BREWERIES COMPANY LIMITED.

After one week he went to inquire in the second Defendant's office. The second Defendant's officials informed him that he can choose any of the three names he submitted and he chose QING DAO SINO TANZANIA BREWERIES COMPANY Limited. After two weeks he collected his certificate of incorporation (exh.D1). This witness testified further that the 1st Defendant's company is owned by another company called QING DAO SINO TANZANIA TRADING COMPANY Limited, and that its factory is operating and is located at Temeke Kurasini, in Dar-es-Salaam. He said that his company is producing draft beer of between 5 and 10 litres, and that it does not produce any brand of beer similar to the plaintiff's products.

He stated that "QING DAO" is a very famous City in China with a population of about 7 million people and it is a home Town of a famous beer called "QING DAO." He explained that the term "DAO" refers to the long standing friendship

existing between China and Tanzania. He said that the 1st Defendant's name is quite different from that of the Plaintiff and he had never ever received any complaint and/or inquiry about the relationship between the two companies.

The second Defendant which is an agency of the Government of the United Republic of Tanzania called one witness Rehema John Kitambi (DW2) an assistant registrar of Companies. This witness explained the procedures which must be followed before a company is incorporated. She said that before the agency can issue a certificate it looks into the name(s) and the line of business the company or companies do in order to decided whether the two names are similar or not. The witness testified that the 1st Defendant's company was incorporated and issued with a certificate of incorporation on 7th October 2005. After the incorporation, it was discovered that there existed another company Tanzania Breweries Limited which is similar to the 1st Defendant's name. According to this witness, the incorporation of the 1st Defendant's Company in that name was an oversight and the 1st Defendant was duly notified of the said oversight and was instructed to change its name within 30 days of the letter (exh.D2), but it did not change.

Before the hearing of this suit three issues were framed and agreed to by the parties they are;

- (1) *Whether the name QING DAO SINO DTANZANIA BREWERIES COMPANY Limited is similar or too like to the name of TANZANIA BREWERIES LIMITED to create confusion to the general public.*
- (2) *Whether it was proper for the 2nd Defendant to give directives to the 1st Defendant to change the names and*
- (3) *To what reliefs are the parties entitled to.*

Concerning the first issue, according to PW2, the confusing part is "Tanzania Breweries....." He told this court that his customers called him on phone and told him that they were confused. No such customer was called to testify on his or her confusion.

On his part PW1 told the court that the use by the 1st Defendant of its name creates confusion in plaintiff's brands because according to her the Plaintiff customers know that there is only one Tanzania Breweries in the market.

It is not disputed that both Companies ie Tanzania Breweries Limited and Qingdao Sino-Tanzania Breweries Company Limited were registered by the Business Registrations and Licensing Agency (BRELA) and were allowed to use their respective names.

Apparently, following the Plaintiff's company complaints BRELA wrote to the 1st Defendant's company to notify them that it had come to their notice that the company name: Qingdao Sino-Tanzania Breweries Company Limited was oversightly issued as there already existed a company called Tanzania Breweries Limited."

The 1st Defendants were given 30 days within which to change their company name so as to avoid further confusion to the general public (exh.D2).

Admittedly there is a Register of both company and business names and formalities which must be complied with before registration is allowed.

Tanzanian law does provide for the registration of both company and business names. The dispute here is over company name(s). According to Rehema John Kitambi (DW2) an assistant Registrar of Company in the Registrar's of the company (BRELA) office a company name may be refused because of identity or similarity with an existing company name. She said that the 1st Defendant's name was refused and they were dully notified.

Collect Crispin Tax (PW1) an employee of the Plaintiff's company testified that the two names - that is "Tanzania

Breweries Limited and Qingdao Sino Tanzania Breweries Company Limited are too similar that the general public thinks that "Qingdao Sino" is a brand of Tanzania Breweries Limited. On the other hand Mr. Guan Hong Zhang (DW1), the owner of the 1st Defendant's company testified that the name Qingdao Sino Tanzania Breweries Company Limited does not create any confusion when pegged with the name of the Plaintiff's Company - Tanzania Breweries Limited. He said that the word "Qingdao" means friendship while the word "Sino" means China. Thus the name Qingdao Sino - Tanzania.....means friendship between China and Tanzania.

He contended that his factory which is located at Temeke in the city of Dar-es-Salaam does not produce any brand of beer similar to that of Tanzania Breweries therefore the apprehension that the general public will be confused is unfounded. The witness says that in anyway a company name does not create proprietary rights over it.

Admittedly a mere existence of a company and/or business name cannot be a basis for invalidating or prohibiting the use of it by another company because it does not grant any proprietary rights which can be asserted against that company. But use of a company and/or business name by another company can amount to infringement and/or passing off.

The criteria for infringement and/or passing off is the same as that which exists generally and that is identity, similarity and likelihood of confusion. The question which arises is always one of likelihood of confusion and whether the public are likely to believe that under a particular name a business is in some way connected or associated with the earlier company name acquired through reputation.

The situation is different where an earlier company name is in use. Proprietary rights can arise through use leading to reputation. In the case at hand the Plaintiff's company has adduced evidence which is uncontroverted that the name Tanzania Breweries Limited was acquired on 26th November 1964 and it has been in use ever since. Given the nature of the beer Industry and its market in the country (where till mid 1980s the Plaintiff's company had a monopoly over beer production and supply in the country), I find that an incorporation of another company in the name of "Qingdao Sino - Tanzania Breweries Company Limited" can amount to passing off. Because of reputation it acquired for the period of over 40 years and its monopoly character in the beer industry persons are likely to believe that Qingdao Sino - Tanzania Breweries Company Ltd is connected or in some way associated with Tanzania Breweries Limited - the

Plaintiff herein. It is also likely that the general public may think that "Qingdao Sino" is a brand of Tanzania Breweries Ltd products as alleged. It is for all these reasons that I find that the name Qingdao Sino-Tanzania Breweries Company Limited is too much like the name Tanzania Breweries Limited and there is a likelihood of creating confusion and the public are likely to believe that their business are somehow connected. Thus, I answer the 1st issue in the affirmative.

Having resolved the 1st issue in the affirmative, it goes without saying that the 2nd issue should be answered in the affirmative again, and that is to say, yes, it was proper for the second Defendant to give directives to the 1st Defendant to change its name. A company name should be refused registration where its use would amount to an infringement or passing off of an earlier company name registered having regard to identify, similarity and likelihood to create confusion with the earlier company name. That is exactly what the 2nd Defendant did.

However, there should be a time period within which the owner of an earlier company name should be entitled to challenge the adoption of a company name, and if successful, the company should be compelled to change its

corporate name and the business name registration should be cancelled.

That said, judgment is entered for the Plaintiff. It is hereby declared that the name Qingdao Sino- Tanzania Breweries Company Limited is too much like the name Tanzania Breweries Limited appearing in the index of company names. The Defendant is therefore hereby restrained permanently from using the name Qingdao Sino-Tanzania Brewery Company Limited or Qingdao Sino Tanzania Breweries Company Limited. The second Defendant is ordered to strike off the name Qingdao Sino-Tanzania Breweries Company Limited from the index of Company names. Further more, the 1st Defendant is ordered within a period of three (3) months from the date of this judgment to remove all advertisements printed in the name of Qingdao Sino Tanzania Brewery Company Limited or Qingdao Sino – Tanzania Breweries Company limited. The Plaintiffs will have their costs.

Order accordingly.

A.R.Mruma

Judge

28/4/2009


Date 28.4.2009

Coram: Hon. A.R.Mruma, Judge.

For the Plaintiff – Mr. Posi for the Plaintiff.

For the Defendant – Mr. Posi, Advocate holding Mr. Thadei's
brief for the 1st Defendant.

COURT: Judge delivered.


A.R.Mruma
Judge
28/4/2009

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